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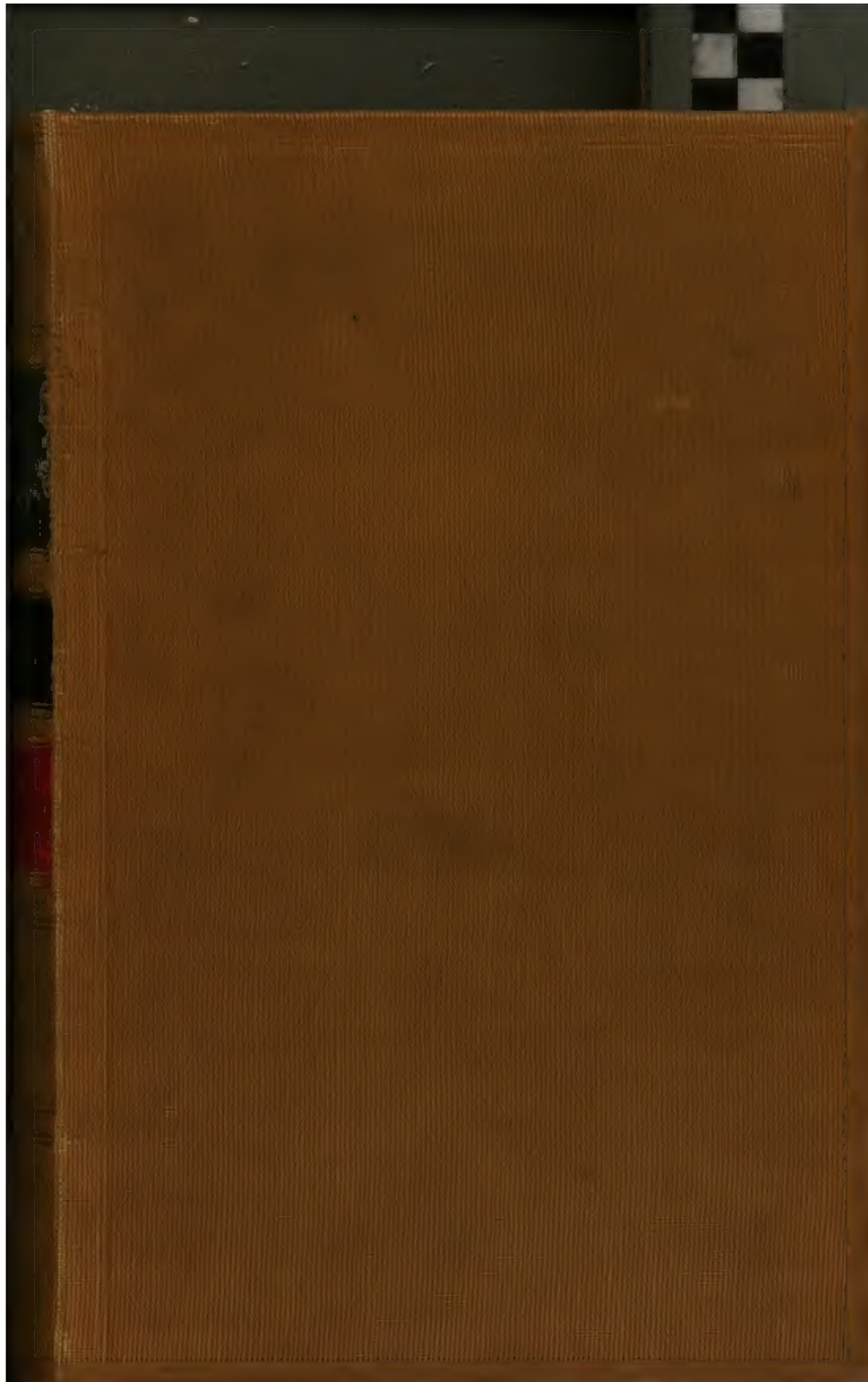
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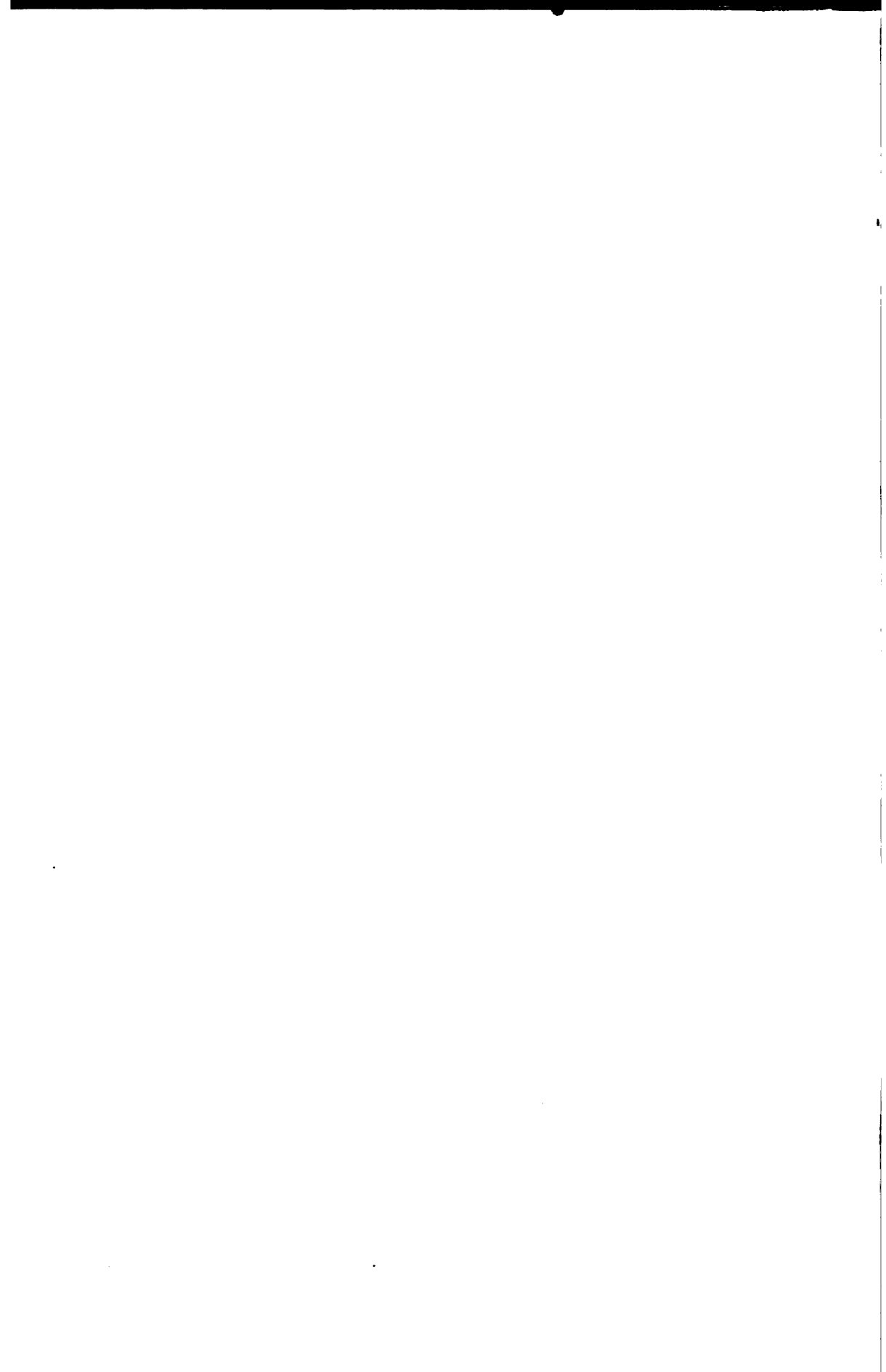
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**Of the Albany Bar, Author of "Annotated (N. Y.) Code of Civil Procedure,"
Author "Commercial Paper," and Joint Editor of "Annotated
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Of the Rochester Bar

REVISED EDITION

IN TWO VOLUMES

VOL. I



ALBANY, N. Y.

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1921

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PREFACE TO TWELFTH EDITION.

Collier on Bankruptcy was the pioneer work on the subject, and quickly attained a high position with the bench and bar, a position which it has maintained for twenty-three years, through eleven different editions. The last edition was published over three years ago, during which time there have been over twelve hundred new decisions construing the Bankruptcy Act. The wisdom of continuing the previous policy of the publishers of keeping the work up to date as the leading exponent of the Law of Bankruptcy has caused the preparation of this new edition.

The method of treating the subject in this edition is the same as that employed in previous editions, as the editors are convinced that the arrangement of the book with the Bankruptcy Act itself as the basis for the discussion, is the most practical and desirable form. Frequent additions have been made to the text where justified by the new decisions. It has been found necessary, however, to make only slight changes in the analysis arrangement of the subject matter, and therefore this edition will continue responsive to references made in decisions of the courts to the eleventh edition.

A new feature of this edition is the addition of the new Canadian Bankruptcy Act and General Rules thereunder, which became operative July 1, 1920. This is included as Appendix C, and is fully indexed. Cross references to the Canadian Act have been made under the heading "Analogous Provisions" at the beginning of each section throughout this work, and frequent references to the act have been made in the text.

The index has been re-written to provide for all text changes, and a new table of cases has been prepared. This edition includes cases down to and including page 389 of volume 45 of the American Bankruptcy Reports. Parallel citations have been made to the National Reporter System, but it should be borne in mind that there are numerous decisions by referees which are not reported elsewhere than in the American Bankruptcy Reports.

The editors offer this new edition in the confident hope that it will, like the previous editions, meet with the approval of the profession.

FRANK B. GILBERT,
FRED E. ROSBROOK.

February 1, 1921.

PREFACE TO ELEVENTH EDITION.

Since the last edition of this work was published in 1914, more than two thousand bankruptcy cases have been decided in the Federal and State courts, and two important amendments have been enacted by Congress, materially affecting bankruptcy practice. Many of the cases are of great importance and have tended to dispose, finally, of controverted questions. These facts are sufficient in themselves to justify the publishers of *Collier on Bankruptcy* in continuing the well-established policy of publishing periodical editions of the work.

The work has been largely rewritten and many parts of it have been rearranged. The general scheme of retaining the sections of the Bankruptcy Act as the basis of the work, placing the discussion or treatise under the several sections, has been so well received by the profession that it has been deemed advisable to retain this method of treatment. The analysis of subject-matter under the section has been made more in detail—many headings having been inserted which were not in former editions. This will obviously make the great mass of the law more available for use.

The notes have been much amplified, by including therein copious extracts from decisions and findings of the courts on important matters. The cases which merely reiterate previous rulings have been cited in their appropriate connection.

The publishers and editor are much gratified at the favorable reception of this book through its numerous editions over a period of nearly twenty years. No other work on the subject has been published so often. Each has met with the approval of bench and bar. It is on this account with pardonable confidence that it is anticipated that this edition will meet the favor of bankruptcy practitioners and others interested in the subject.

The book has been reindexed. The increase in the size is occasioned by the ever-increasing number of bankruptcy cases. This increase may be noted by a comparison of the new table of cases in this edition with those in former editions. This edition includes citations of and quotations from all cases reported in the *American Bankruptcy Reports*, down to and including volume 38.

FRANK B. GILBERT.

October 1, 1917.

PREFACE TO TENTH EDITION.

The tenth edition of this work brings down to date the former edition, including all the recent reported cases on the subject. Many new and important questions have arisen since the last edition which have been considered and determined, and which must necessarily be treated to make the work complete and comprehensive. The changes in the law of bankruptcy are constant and varied. While the tendency has been toward definiteness, and many former inconsistencies and conflicts in the authorities have been eliminated by authoritative decisions of the United States Supreme Court, new difficulties have appeared which have produced a lack of harmony in the authorities. It has therefore been deemed advisable to continue the policy of publishing periodically a new edition of this work so that the thousands of lawyers and judges who are actively engaged in the consideration of questions arising in bankruptcy law may have constantly available the very latest authoritative expressions upon the subject.

This edition contains all the recent cases on bankruptcy decided by State and Federal courts, and includes citations and quotations from all cases reported in the American Bankruptcy Reports, down to and including volume 31.

JUNE 1, 1914.

FRANK B. GILBERT.

PREFACE TO NINTH EDITION.

It will be noticed, upon an examination of this edition of Collier on Bankruptcy, that the work has been greatly enlarged, and that the entire text and notes have been revised, and a large amount of new matter inserted. In preparing the work the method of treatment used in former editions has been followed. The matter in the text has been classified much more minutely than in former editions. The great volume of the law under the important sections of the Bankruptcy Act has necessitated more careful and complete analysis. The text has been amplified by more extensive discussion of many of the troublesome questions which have arisen to disturb the minds of both lawyer and judge. The notes have been increased in volume and number to give room for digests of cases supporting the text, and extracts of opinions of the courts relative to matters of importance discussed in the text.

Mr. Collier, the learned author of the first edition of this work, clearly stated his reasons for treating the law of bankruptcy as a branch of statutory law. He made the sections of the bankruptcy act the basis for his discussion. Each of the subsequent editors has adopted this method, so that Collier on Bankruptcy is now the only important work on bankruptcy which has so correlated the text of the bankruptcy act with the discussion thereon, as to recognize the principle that the act lies at the foundation of the law and practice in bankruptcy. Without the bankruptcy act there would be no bankruptcy law. The subject cannot be logically and effectually treated by relegating the act to an appendix. We have therefore retained the former arrangement of placing the sections of the act in their consecutive order, completing the discussion under each section, and uniting the related subjects by appropriate cross-references.

Many new forms have been added. The annotations of the General Orders are much more complete than in former editions. The entire work has been revised, increasing the size of the former edition more than one-third. It has been somewhat difficult, under our plan, to compass the subject within one volume. It was thought desirable to accomplish this, even at the expense of making the volume somewhat bulky.

The cases reported in the American Bankruptcy Reports to the end of volume 27, and in Federal Reporter, Volume 194, and in United States Supreme Court Reports, Volume 224, have been cited and discussed.

FRANK B. GILBERT.

ALBANY, N. Y., *August* 15, 1912.

PREFACE TO EIGHTH EDITION.

The eighth edition of this work is made necessary by the important amendments to the Bankruptcy Act by the Act of June 25, 1910. Nearly two years have elapsed since the publication of the former edition and in that period, about five hundred bankruptcy cases have been reported, many of them very important. The amendments of 1910 were prepared by acknowledged experts in bankruptcy law, for the purpose of settling many disturbing questions, in respect to which a number of controversies had arisen, and of obviating the confusion which had arisen because of divergent views as to the compensation of receivers and trustees. These amendments are far reaching in their effect. They completely nullify many decisions which were controlling in the several jurisdictions. In view of the many changes thus made in the law, the publishers, in furtherance of their policy of keeping this work abreast of the times, could not do otherwise than cause a new edition thereof to be prepared and published.

The cases included in this edition are those contained in the American Bankruptcy Reports, down to and including page 456 of volume 24, together with other cases of even date, not included in that series because not deemed properly within the scope thereof.

FRANK B. GILBERT.

ALBANY, N. Y., *October 1, 1910.*

PREFACE TO SEVENTH EDITION.

This new edition of Collier on Bankruptcy is published in pursuance of the publishers' policy of keeping the work abreast of the development of the law on the subject. In preparing this edition it has seemed necessary to entirely rewrite a large portion of the text. The method of treatment used in former editions has been followed in this, but the discussion under the several sections of the bankruptcy act has been reclassified and extended. The notes have been made more prominent; many of the new and important cases cited therein being digested and applied to the principles laid down in the text.

In recognition of the fact that the law of bankruptcy is based solely upon the Federal Bankruptcy Act, the several sections of that act have been clearly set forth at the beginning of each chapter. Such sections are cemented together by exhaustive cross references at the end of each section, and in the foot notes. The general orders containing correlative matter are quoted or referred to as the occasion demands. As in former editions, the text of the statute has thus been given its proper place in the work.

It is desirable to call attention to this feature of the work. To the editor's mind it is one of the things which has made this work a success. If it had been thought advisable, the so-called text-book method of treating the subject might have been adopted without additional labor or expense. The experience of lawyers and judges dealing with bankruptcy has shown the importance of keeping the several parts of the statute in their proper relation with the discussion to which they pertain. Every bankruptcy case relates to some particular provision of the Bankruptcy Act. The principle laid down in the case pertains to the application or discussion of such provision. It is not desirable to disassociate the case and the statute. We have therefore continued our former method of treating this important subject, and are firm in the belief that it is what the practitioner wants.

The general orders have been separately treated; all of the cases pertaining thereto having been grouped and considered thereunder. This is a new feature which will prove serviceable. A complete new index has been made covering the entire subject.

The cases included in this edition are those contained in the American Bankruptcy Reports down to and including the first three numbers of volume 21 thereof, together with such English cases and cases arising under the former bankruptcy acts as are applicable.

Much of the valuable matter contained in former editions of this work has been retained. The many important and trustworthy comments upon the law made by Mr. Hotchkiss in the Fourth Edition will still be found in their places, with such elaboration as seems necessary to conform with recent developments in the law.

FRANK B. GILBERT.

ALBANY, *May* 1, 1909.

PREFACE TO SIXTH EDITION.

Two years have elapsed since the former edition of this work was published. During this time nearly 600 cases involving the interpretation and application of the National Bankruptcy Act have been decided, all of which have been reported in volumes 13 to 16, and in the first three numbers of volume 17 of the American Bankruptcy Reports. Many of these cases conclusively settle disputed questions and are authoritative declarations of important doctrines. The character of these cases has required occasional modifications of the text of the former edition. In many instances new paragraphs and subdivisions have been inserted for the purpose of conforming the text to the trend of the judicial decisions.

The law of bankruptcy is based upon the Federal statute. Explanatory and illustrative cases are cited and commented upon in this edition, as in the former editions, for the purpose of clearly showing what the statute means and how it should be applied. It may be safely assumed that this important subject may not be properly treated in any other way. We have endeavored in this edition to bring before the practitioner first the statute and then the decisions in their legitimate relations without magnifying the importance of the one to the detriment of the other. It is suggested that in so doing the valuable results of former editions have been retained.

The constant and continued use of Collier on Bankruptcy by the courts and the profession, as evidenced by the frequent citations therefrom in the reported decisions, has more than justified a retention of the method of treatment adopted in former editions. All the recent cases are cited in their proper connection and are discussed and commented upon when deemed necessary. The commanding position which this work occupies among text-books upon this subject has brought home to the publishers the necessity of keeping it strictly up to date, and hence this new and revised edition. It is hoped that this edition, like its predecessors, will meet with the approval of the bench and the bar.

FRANK B. GILBERT.

ALBANY, N. Y., *April 15, 1907.*

PREFACE TO FIFTH EDITION.

The fourth edition of this work was written and published soon after the enactment of the important amendments of 1903 to the bankruptcy act.

Many important cases have been decided and reported during the two years which have elapsed since the publication of the fourth edition, many of them bearing directly upon the effect of the amendments of 1903. These cases have been referred to in their appropriate connection in this new edition. The text of the former edition has been rewritten wherever necessary to conform it to subsequent authorities, and much new matter has been added supplementing and amplifying its many valuable features.

The progress and ever increasing volume of the law of bankruptcy is evidenced by the number of cases reported during the two years intervening between this and the prior edition of this work. These cases run through volumes 9, 10, 11, and 12, and the first number of volume 13 of the *American Bankruptcy Reports*. All of these cases have been referred to or discussed and considered in this edition of this work. The many valuable notes in these reports are frequently used or referred to.

The number and importance of these cases and their instructive value as interpretations of the amended bankruptcy act of 1903 and the policy adopted by the publishers to keep this work in advance of every other work upon the subject render imperative this new and revised edition.

FRANK B. GILBERT.

ALBANY, N. Y., *February 1, 1905.*

PREFACE TO FOURTH EDITION.

The death of Mr. Eaton, the author of the third edition, made necessary the choice of a successor. Originally, the writer's purpose was merely to bring Mr. Eaton's edition down to date. The increasing importance of the federal bankruptcy system and the probability of important amendments, early caused the abandonment of that purpose, and the writing of the book anew. The result is a new work. The present author has, however, frequently drawn from his predecessors' conclusions, and gladly records his debt to them.

This rewriting has made possible some changes:

The cases referred to are cited in foot-notes, not in the body of the text, with, it is hoped, such completeness as to make the work a table of cases on the law of bankruptcy, as well as a text-book. The citations are largely to precedents under the present law, but those thought valuable under previous laws are also included. Reference is made, where possible, to both the American Bankruptcy Reports and the Federal Reporter, and, in the court of last resort, to the United States Reports.

Quotations from reported cases have been eliminated from the text.

Disputed points are not elaborately discussed, the work being intended for the practitioner who is perhaps unfamiliar with this branch of jurisprudence, rather than the student of or expert in it.

Through the "cross-references" at the head of each Section, all analogous provisions in the present law, as well as those in the former laws and the English Bankruptcy Acts of 1883 and 1890, are compacted into a few paragraphs, and the text and the statute thus webbed together. To a General Index, far more complete than in the earlier editions, has been added a system of short indices, called "Synopsis of Sections," at the head of each Section, by running which the investigator may quickly reach the paragraph pertinent to his quest. The General Orders, Official Forms, and Supplementary Forms have also been carefully indexed.

Much more space has been given to practice than in the previous editions, and, for convenience of reference, all paragraphs bearing on it have been indexed by sections under "Practice" in the General Index. The General Orders have also been annotated and criticised and the Official Forms cross-referenced.

A long list of "Supplementary Forms," based on the experience of a referee in bankruptcy and the daily inquiries of the profession, has been

added. These, while in no sense official, will, it is hoped, supply precedents for many of the papers needed in a bankruptcy proceeding. Where the Official Forms do not fit the law or the General Orders, new forms are offered as substitutes.

The abstracts of the exemption laws of the States, and the lists of the federal judges and clerks, and of the terms of court in the various districts, have been omitted.

The amendments of 1903 are indicated by italics, matter omitted from the original statute being placed in the foot-notes. The discussion of the amendments, themselves, is made as complete as possible — there being as yet no decisions construing them — and is based largely on the writer's knowledge of the purposes of the framers of the amendatory act and the genesis of the successive bills that resulted in that act.

The preparation of the work has stretched over more than a year, and it has been frequently revised to meet later decisions and changes in the then pending amendatory bill. For its errors in conclusion or statement, the writer asks the indulgence of all who recognize that to err is human. Such as it is, the work voices, doubtless imperfectly, the purpose of one who, recognizing that the bankruptcy system has now come to stay, earnestly desires to make its principles and procedure both clearer to the general practitioner and available even to the layman whose daily round is to give credit and collect his due.

The grateful acknowledgment of the writer is due to Washington A. Russell, Esq., of the Buffalo bar, for his preparation of the Table of Cases and his work in connection with the foot-notes; also to many of his brethren of the referees' courts for suggestions and encouragement.

Nor can the writer forbear to mention in this place the work in behalf of the amendatory bill of The National Association of Credit Men, and especially its tireless and resourceful Secretary, William A. Prendergast, of New York. Without the earnest and early advocacy of the Ray bill by that Association, its passage would have been doubtful, if not impossible. Without immediate remedial legislation, the law itself would have been repealed. This record of appreciation by one who believes that a permanent bankruptcy system is necessary to a credit-giving nation is, therefore, gladly made.

WILLIAM H. HOTCHKISS.

BUFFALO, N. Y., *March 16, 1903.*

PREFACE TO THIRD EDITION.

In his modest preface to the first edition of this book the author stated that his work was in the nature of a pioneer undertaking intended to "blaze the way" and aid in answering the questions which might arise before adjudications became plentiful. It is pleasant to know that Mr. Collier's scholarly and exhaustive book has not only assisted the practitioner to understand a complicated statute, the subject matter of which is new to most of the present generation, but has also helped greatly in the judicial construction and interpretation of that statute. It is gratifying, too, that the author's answers to many of the numerous questions which he foresaw would arise under this Act have proved to be correct.

In the two and a half years during which the Act has been in force and since the publication of the first edition of this book, most of the sections of the Act have been judicially construed. This fact alone makes a new edition at this time imperative. The bankruptcy decisions, under the law of 1898, have been collated in the present edition and their results set forth in rules of construction. The editor has quoted largely from the more important opinions because he believes that the bar will find it desirable to have the exact language of the court deciding the questions arising under the Act. It is not claimed that the book dispenses with the use of the reported cases but merely that this method guides the practitioner most surely and quickly to an intelligent knowledge of the effect of such decisions and where they may be found. All of Mr. Collier's work which has a permanent and historical value has been retained, while, at the same time, no effort has been spared to make the revision complete and to make the book a thoroughly up-to-date treatise on the principles of the bankruptcy law and guide to bankruptcy practice.

With the hope that this purpose has been fairly realized, the editor submits his work to the kindly indulgence of his professional co-laborers.

JAMES W. EATON.

ALBANY, N. Y., *November 17, 1900.*

PREFACE TO THE ENLARGED EDITION.

In presenting to the profession and to the public, an enlarged edition of my work on bankruptcy, it is but proper that the character and extent of the additions be explained. In this edition the forms which appeared in the original edition have been superseded by the official forms just promulgated by the Supreme Court; and the rules and orders in bankruptcy prescribed by the same court have been inserted. Not only is the full text of these rules and forms given, but an exhaustive index of them has been made, and they have been annotated and cross-referenced as far as their nature permits. The fact that by rule XXXVII it is provided that in proceedings in equity instituted for the purpose of carrying into effect the provisions of the bankruptcy act, or for enforcing the rights and remedies given by it, the rules of equity practice prescribed by the United States Supreme Court shall be followed, has led me to insert these rules; and a detailed index accompanies them.

A list of the judges of the United States District Courts and of the clerks thereof, and the addresses of the clerks, has been inserted for the convenience of attorneys.

The almost universal tendency on the part of practitioners,—in some cases enforced by local rulings of district courts—to withhold proceedings in bankruptcy until the promulgation of the official rules, has resulted in an almost complete absence of adjudications under the new law. Consequently the enlarged edition contains, besides the additions above mentioned, no changes in the text of the original edition except the correction of a few typographical errors, and the changing of the abstract of the exemption laws of Louisiana to correspond with a new statute of that state recently passed and to go into effect upon January 1, 1899. It is believed, however, that everything affecting the law and practice of bankruptcy is embodied in the book.

The marked favor shown to the work,—the original edition of which was exhausted on the day of issue and of which there have been already four reprints,—is a matter for which the author tenders his sincerest thanks. That the book,—now more full and complete than ever before and embracing, in one volume, the statute itself, the official rules, forms and orders, the exemption laws of all the states, the equity rules, exhaustive comment, and full citation of all authorities now applicable,—may be of further aid to the members of the profession and may assist them in the construction and application of the law and in practice under its provisions, is the wish of

THE AUTHOR.

AUBURN, N. Y., *November 29, 1898.*

PREFACE.

The Law of Bankruptcy is purely statutory both in its origin and in its development. Underneath it lies the one great fundamental principle that when a person's property is insufficient to pay in full all of his creditors, it shall be equitably divided *pro rata* among them; but there is probably no other principle which can be said to be fixed and permanent and fundamental. Even in England, where there has been a continuous system of bankruptcy for over three hundred years, that system has been developed rather by parliamentary legislation than by judicial decision; while in the United States so infrequent and spasmodic has been the exercise by Congress of its constitutional powers upon the subject that we can hardly claim that bankruptcy is a part of our system of jurisprudence. It has been, in the past, rather in the nature of fragmentary statutory legislation, the various enactments on the subject being separated by intervals of decades, and each presenting important features not appearing in those preceding it, and often the later acts containing provisions which evidenced a different purpose and policy than those of the earlier acts. So entirely unstable and unfixed is bankruptcy as a system of law that under the last two statutes, as will be seen by reference to the notes under section 12 of the present work, the courts have very frequently been called upon to determine what is a bankruptcy law, and what the "subject of bankruptcy" includes. The successive statutes have effected different classes of persons, have materially changed the manner of procedure, have differed radically as to the acts to be regarded as acts of bankruptcy and have at times enlarged and at other times restricted the rights of creditors, or the benefits conferred and the duties imposed upon bankrupts. Not only have there been changes, but the changes have not always tended toward any one end or indicated any fixed purpose. Like all laws of statutory creation the development of the American bankruptcy system has not been harmonious and symmetrical.

The study of bankruptcy, then, is a matter of statutory construction. The law must be considered and applied and enforced as it appears enacted, not as general notions of equity may seem to indicate as proper. The aim of the author of this book has been to study the bankruptcy act of 1898, to analyze its provisions and terms; in fine to ascertain the expressed will and intention of Congress. Following the general principle of the law of construction that each part of a statute or document is to be construed with reference to the whole, each section has been considered in connection with all others on the

same or kindred topics, and copious cross-references have been given under the various sections.

But it is not to be denied that the present bankruptcy act, though presenting many points of dissimilarity, is substantially like that passed in 1867, and also bears many resemblances to those passed in 1800 and 1841. The fact has not been overlooked that the adjudicated cases decided under those acts not only shed light on the meaning of terms and provisions of the present act, but that in very many cases they are indisputably clear authorities. In so far as these cases are applicable we have cited them, and for every legal proposition unqualifiedly stated, judicial authority is given. Many of the cases cited are now analogous rather than decisive; but it is believed they sustain the points made. The reader will, of course, bear in mind that when a case is cited upon a given point, it is by us claimed to be applicable or analogous only as to that particular point. Upon other matters, by reason of differences between the present and former acts, it may be entirely inapplicable and incorrect as an exposition of the present law. While an attempt has been made to give all applicable decisions, we have also endeavored to omit all that would mislead and confuse. To show to what extent the cases may still be considered authorities, special pains have been taken to point out the differences between the statutes, and with this aim in view under each section we give the analogous provisions in all the former acts, and as an appendix have inserted, for purposes of comparison, the full text of the act of 1867 with all amendments up to the time of its repeal.

While the authority of decided cases is cited for every legal proposition which is stated without qualification, we have felt that we would fail in properly performing the work undertaken if, because of the lack of adjudicated cases, no study should be given to and no comment made upon the great number of questions which spring up from the new and changed provisions of the act. In considering these we have not, however, always felt called upon to answer them dogmatically; but they have all been discussed and treated, and everything bearing upon them laid fully and fairly before the reader.

We take this opportunity of publicly extending our thanks to H. Noyes Greene, Esq., of the Troy, N. Y., bar, for assistance in preparing the index to this book and the table of cases; also to William H. Hotchkiss, Esq., of Buffalo, N. Y., referee in bankruptcy for Erie county, for his assistance in the preparation of the forms.

In presenting the work to the profession we do so with hesitancy. Of its shortcomings and failings few will be more keenly conscious than ourselves, but we ask that those who use it will bear in mind that the book is in the nature of a pioneer undertaking. It could without question be made more accurate, full and complete if its publication could be delayed until the courts should have construed the provisions of the statute and judicially answered

all the questions that might arise, and if then it were made a mere digest of their decisions. But the demand of the bar is for a work that will to some extent, at least, aid them in the solution of the questions that will arise in the early months of practice under the act, before adjudications are plentiful. This task of "blazing the way" is here undertaken, and in proportion to the difficulty of the task we ask the leniency of the critic.

WM. MILLER COLLIER.

AUBURN, N. Y., *September 10, 1898.*

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The Law And Practice In Bankruptcy

SECTION ONE

MEANING OF WORDS AND PHRASES

§ 1. **Meaning of Words and Phrases.**—a The words and phrases used in this act and proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the supreme court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "courts" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are

provable in bankruptcy, except such as are excepted by this act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States, or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and by any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the

masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

Analogous provisions. In U. S.: Act of 1867, § 48; R. S., § 5013.

In Eng.: Act of 1883, § 168.

In Can.: Act of 1919, § 2.

Cross-references: Persons against whom petition may be filed, Bankt. Act, § 67-c. Adjudication, Id. §§ 18-e-g, 38-a(1). Appellate courts, Id. §§ 24, 25. Bankrupt, Id. all sections. Clerk, Id. §§ 51, 71. Corporations, Id. § 3-a (4). Courts, Id. § 39-a, and generally. Courts of bankruptcy, Id. § 2, and generally. Creditors, Id. §§ 55, 56, 57, 58, 59, 60. Debt, Id. §§ 17, 63, and generally. Discharge, Id. §§ 14, 15, 17, 29. Document, Id. §§ 21, 39, 47. Insolvency, Id. §§ 3, 60, 67. Officer, Id. §§ 2(3), 33, 51. Persons, Id. §§ 2(1), 3-a, 4. Petition, Id. §§ 18-a, 59-a-b. Referee, Id. §§ 33-43, 72, and generally. Secured creditor, Id. §§ 56-b, 57-e-h. States, Id. §§ 6, 23, 70-e. Transfer, Id. §§ 3-a-b, 14-b(4), 57-g, 60-a-b, 67-e, 70-a-e. Trustee, Id. §§ 44-50, 72, and generally. Wage-earner, Id. §§ 4-b, 64-b(4).

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I. CONSTRUCTION AND EFFECT OF BANKRUPTCY ACT.

a. Construction.—The general rules of statutory construction, applicable to all statutes, may be applied to the bankruptcy act. It should at all times be borne in mind that the act is remedial, and must be liberally construed with a view of carrying into effect its obvious purposes and intent.¹ The three fundamental purposes for which the act was enacted are: (1) That a debtor who has been unfortunate, and become unable to pay his debts, might be released therefrom, and be enabled to commence his business life anew, relieved of the burden, provided that he has not been guilty of fraudulent or other improper practices. (2) That, as the condition and price of being so released, he should turn over to his trustee, fully and unqualifiedly, all of his property which was subject to the demands of his creditors. (3) That this property should be applied equitably and ratably to the payment of his various debts.² The courts will at all times adopt the construction which tends to promote equity and equality in the distribution of the bankrupt's estate among his

1. Act is remedial.—The bankruptcy act is remedial and should be construed reasonably and according to the fair import of its terms with a view to effect its objects and to promote justice. *Southern Loan & Trust Co. v. Benbow* (D. C., N. Car.), 3 Am. B. R. 9, 96 Fed. 514.

In the case of *Brown v. Barker*, 8 Am. B. R. 450, 453, 68 N. Y. App. Div. 594, 74 N. Y. Supp. 43, the court says: "We may take judicial notice that the present bankruptcy act is the result of a long-continued agitation and discussion, and that it is our duty if possible, to so construe its provisions, liberally if necessary, as to secure the objects for which it was created, rather than by a narrow or technical construction, to defeat them."

See also *Botts v. Hammond* (C. C. A., 4th Cir.), 3 Am. B. R. 775, 99 Fed. 916 (holding that the act is remedial and should be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice); *Blake v. Francis-Valentine Co.* (D. C., Cal.), 1 Am. B. R. 372, 89 Fed. 691 (citing *In re Muller*, Fed. Cas. 9,912; *Silverman's Case*, Fed. Cas. 12,855); *In re Scott* (D. C., Del.), 11 Am. B. R. 327, 331, 126 Fed. 981; *Matter of Murphy Boot and Shoe Co.* (D. C., Mass.), 39 Am. B. R. 811, 242 Fed. 991.

The bankruptcy act is remedial and should be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice. In working out the objects of the bankruptcy act, the courts have not indulged in technicalities wherever a liberal procedure was consistent with the substantial rights of the parties in interest. *Emerson v. Castor* (C. O. A., 6th Cir.), 37 Am. B. R. 719.

2. *Brown v. Barker*, 8 Am. B. R. 450, 453, 68 N. Y. App. Div. 594, 74 N. Y. Supp. 43.

Objects of act.—There are two principles which lie at the foundation of the bankruptcy act: (1) That the debtor may be discharged from his provable debts; (2) that his collectible assets may be divided equitably and ratably among his creditors. *Continental*

Nat. Bank v. Katz (Super. Ct., Ill.), 1 Am. B. R. 19; *Reid, Murdock & Co. v. Cross*, 1 Am. B. R. 34; *Matter of Munford* (D. C., N. Car.), 43 Am. B. R. 218, 255 Fed. 108.

It is the purpose of the bankruptcy act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes. *Williams v. U. S. Fidelity & Guaranty Co.*, 236 U. S. 549, 34 Am. B. R. 181.

The proper purposes of the bankruptcy act are: First (and this was its original purpose) to enable creditors to protect themselves by summary process against the frauds of their debtors in evading the payment of their debts; second, to distribute the assets of the debtor equally among his creditors; and, third, to relieve debtors from the burden of debts which, through business misfortune and otherwise, they have incurred and are unable to pay. *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 383, 95 Fed. 637.

The object of the bankruptcy act is twofold—the benefit of the creditors and the relief of the bankrupt. It is not necessary that both objects shall be attainable in order to warrant proceedings in bankruptcy. In many, perhaps a majority of the cases, the relief to the bankrupt is the only question, for there are no assets to distribute, and in many other cases the benefit and relief of creditors is the only object. *MacDonald v. Tefft-Weller Co.* (C. C. A., 5th Cir.), 11 Am. B. R. 800, 808, 128 Fed. 381.

The equal and equitable distribution of the estates of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy. Bankruptcy without insolvency, actual or

creditors,³ and will protect the unsecured creditors against those who under state laws are given liens or priorities.⁴ But this construction should not minimize the equally important purpose of releasing an honest, unfortunate, and insolvent debtor from the burden of his debts and of his restoration to business activity, in the interest of his family and the general public.⁵ It is the duty of the court to carry into effect both of these purposes to the extent which the language of the act justifies, and to prevent schemes and artifices to avoid the letter and spirit of the law.⁶ The act must be construed, if the language will permit, so as to secure uniformity in the fullest measure, and to avoid an escape of its beneficial purposes by a dishonest tricky debtor.⁷ Where the language of the act is plain and unambiguous it should be given its ordinary meaning; an attempted judicial construction will only lead to doubt and confusion,⁸ but where a provision is ambiguous the court is justified in resorting, for its interpretation, to the official proceedings of Congress at the time of its passage.^{9a} The ultimate determination of the meaning of the provisions of the act rests with the Federal courts, and they are not bound by the interpretation of a State court.⁹

presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. In re Forbes (D. C. Mass.), 11 Am. B. R. 787, 790, 128 Fed. 187.

The federal system of bankruptcy is designed not only to distribute the property of the debtor not by law exempted fairly and equally among his creditors, but as a main purpose of the act intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts except of a certain character after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. *Stellwagen v. Clum* (U. S. Sup. Ct.), 41 Am. B. R. 1, 245 U. S. 606.

See also *Hicks v. Knost* (D. C., Ohio), 2 Am. B. R. 153, 155, 94 Fed. 625; *Ross v. Saunders* (C. C. A., 2d Cir.), 5 Am. B. R. 348, 105 Fed. 915; *Barton Bros. v. Texas Produce Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 502, 504, 136 Fed. 655; *Matter of Jacobs* (C. C. A., 6th Cir.), 39 Am. B. R. 385, 241 Fed. 620; *West v. Empire Life Ins. Co.* (D. C., Wash.), 40 Am. B. R. 93, 242 Fed. 605; *Matter of McNeil Corporation* (D. C., Mass.), 41 Am. B. R. 162, 249 Fed. 765.

3. Distribution of assets.—The proceedings thereunder are equitable and should be conducted on broad lines to accomplish the ultimate purpose of distributing the assets of the estate pro rata among the bankrupt's creditors. In re *Faulkner* (C. C. A., 8th Cir.), 20 Am. B. R. 542, citing *Atchison, T. & S. F. Ry. Co. v. Hurley* (C. C. A., 8th Cir.), 18 Am. B. R. 896, 82 C. C. A. 453, 153 Fed. 503.

The enforcement of equality among creditors is as well the purpose of the bankruptcy act as the protection of the bankrupt from suits against him for the collection of debts, and in case of doubt as to the proper construction of provisions of the act, it is the duty of the court to adopt that construction which shall seem best adapted to promote that general purpose. In re *Adams* (Ref., N. Y.), 1 Am. B. R. 95; *Utah Assn. v. Boyle Furniture Co.* (Utah Sup. Ct.), 39 Utah 518, 31 Am. B. R. 488.

The bankruptcy act includes a large body of remedial legislation. It was designed to relieve unfortunate but honest debtors, and to secure a proper distribution of their assets among their creditors. The latter object is quite as important as the former. In re *Scott* (D. C. Del.), 11 Am. B. R. 327, 331, 126 Fed. 961.

As to purpose of equal distribution among creditors, see In re *Adams & Hoyt Co.* (D. C.,

Ga.), 21 Am. B. R. 161, 164 Fed. 489; *Coal Land Co. v. Ruffner Bros.* (C. C. A., 5th Cir.), 21 Am. B. R. 474, 165 Fed. 881; In re *Tindal* (D. C., So. Car.), 18 Am. B. R. 773, 783, 155 Fed. 456 (where the court said: "The main object of the bankrupt act and one of its most beneficial results, was an equal distribution among his creditors of the estate of the bankrupt"); *Hurley v. Devlin* (D. C., Kans.), 18 Am. B. R. 627, 629, 151 Fed. 910; In re *Blount* (D. C., Ark.), 16 Am. B. R. 97, 101, 142 Fed. 283; In re *Forbes* (D. C., Mass.), 11 Am. B. R. 787, 790, 128 Fed. 187; In re *Swafford Bros. Dry Goods Co.* (D. C., Mo.), 25 Am. B. R. 282, 180 Fed. 549.

4. In re *Sabine* (Ref., N. Y.), 1 Am. B. R. 315.

5. *Hardie v. Swafford Bros. Dry Goods Co.* (C. C. A., 5th Cir.), 21 Am. B. R. 547, 165 Fed. 588; In re *Cohn* (D. C., N. Dak.), 22 Am. B. R. 761, 171 Fed. 568; *Matter of Waller* (C. C. A., 7th Cir.), 41 Am. B. R. 314, 249 Fed. 187; *McPhee v. United States* (Colo. Sup. Ct.), 42 Am. B. R. 346, 174 Pac. 808; *Matter of Rosenfeld* (C. C. A., 2d Cir.), 44 Am. B. R. 390, 262 Fed. 878.

Discharge of bankrupt.—One of the main objects of the bankruptcy act is to protect unfortunate, but honest debtors. Fraudulent debtors are not intended to be protected, nor to escape payment of their just liabilities. In re *Harr* (D. C., Mo.), 16 Am. B. R. 213, 217, 143 Fed. 421.

The purpose of a voluntary proceeding in bankruptcy is in consideration that the bankrupt promptly surrender all of his nonexempt property to the Bankruptcy Court, to the end that all of his creditors, without preference or priority, may take share and share alike in percentage of the property thus surrendered; then the bankrupt is given an acquittance of such percentages of his debts not thus paid, and may commence his business life anew. *Baylor v. Rawlings* (C. C. A., 8th Cir.), 28 Am. B. R. 773, 200 Fed. 131.

6. In re *Blount* (D. C., Ark.), 16 Am. B. R. 97, 101, 142 Fed. 283; *Leighton v. Kennedy* (C. C. A., 1st Cir.), 12 Am. B. R. 229, 129 Fed. 737.

7. *Hill v. McKiniss Co.* (D. C., Ohio), 26 Am. B. R. 329, 332, 188 Fed. 1012.

8. *Swartz v. Siegel* (C. C. A., 8th Cir.), 8 Am. B. R. 659, 117 Fed. 13; *Matter of Hudson* (D. C., Ala.), 45 Am. B. R. 275, 262 Fed. 778.

9a. *Ould & Co. v. Davis* (C. C. A., 4th Cir.), 40 Am. B. R. 185, 246 Fed. 228.

9. *New Jersey v. Anderson*, 203 U. S. 488, 17 Am. B. R. 63, 68.

b. **Effect on State legislation.**—The uniformity of the act throughout all the States is one of its essential features. The act applies alike in all the States and effectively nullifies all State laws which are in conflict with its terms.¹⁰ It follows that all such laws having for their purpose the disposition of the affairs of an insolvent debtor must yield to the paramount force of the bankruptcy act when the creditors invoke its aid.¹¹

c. **Requirement as to uniformity.**—It is not the purpose to discuss at this point the constitutionality of specific provisions of the bankruptcy act. Numerous cases have arisen where the validity of such provisions has been considered. Such cases will be cited and discussed under appropriate sections.¹² The United States constitution provides that Congress shall have power to establish "uniform laws on the subject of bankruptcies throughout the United States."¹³ The provision confers comprehensive power on Congress to legislate upon this subject, and constitutes a relinquishment of all control thereof on the part of the States. The States, on surrendering such control, did so only if Congress chose to exercise it, and until this was done State laws were effective except so far as they transgressed the constitutional restriction that laws should not be passed "impairing the obligations of contracts."¹⁴ The uniformity required in the enactment of bankruptcy acts is geographical and not personal, that is they must extend throughout all the States, and it has been held that the present system is, in a constitutional sense, uniform since under it the trustee takes in each State for distribution among creditors whatever would have been available to such creditors, if the bankruptcy act had not been passed.¹⁵ The act does not lack uniformity because of its recognition of State laws pertaining to exemptions, dower rights and priorities of payment.¹⁶ Nor because it makes a distinction between bankruptcies of individuals and corporations.¹⁷

d. **Suspension of State insolvency laws.**—(1) **IN GENERAL.**—No bankruptcy law since that of 1800 has contained any provision declaring the effect of such a law on analogous State laws. That law, § 61, provided as follows: "This act shall not repeal or annul, or be construed to repeal or annul, the laws of

10. *In re Littlefield* (C. C. A., 1st Cir.), 19 Am. B. R. 18, 155 Fed. 838; *Matter of Heleker Bros. Mercantile Co.* (D. C., Kan.), 33 Am. B. R. 503, 216 Fed. 963; *Stellwagen v. Clum*, 245 U. S. 605, 41 Am. B. R. 1, 38 Sup. Ct. 215; *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525, holding that since the bankruptcy act confers upon courts of bankruptcy jurisdiction to adjudge private bankers bankrupt and to administer their property, this jurisdiction is not only paramount, but is exclusive, and State laws assuming to confer upon State officers or courts authority to administer the property of such bank are superseded and must give way when the bankruptcy act is properly invoked. *In re Keith-Gara Co.* (D. C., Pa.), 29 Am. B. R. 466, 203 Fed. 585, *aff'd* 213 Fed. 450.

11. *In re Bruss-Ritter Co.* (D. C., Wis.), 1 Am. B. R. 58, 90 Fed. 651; *In re Empire Metallic Bedstead Co.* (D. C., N. Y.), 1 Am. B. R. 137, 95 Fed. 957; *In re Littlefield* (C. C. A., 1st Cir.), 19 Am. B. R. 18, 155 Fed. 838; *Matter of Heleker Bros. Merc. Co.* (D. C., Kans.), 33 Am. B. R. 503, 216 Fed. 963.

12. See as to exemptions, under § 6, post; as to incriminating questions on examination of bankrupt, under §§ 7 and 21, post; as to discharges, under § 14, post. See also Am. Bankr. R. Dig., §§ 2, 58, 942, 997.

13. United States Const., Art 1, § 8, cl. 4.

14. *Brown v. Smart*, 145 U. S. 454, 457; *Denny v. Bennett*, 128 U. S. 498, where Mr. Justice Miller observed: "The objection to the extraterritorial operation of a State insolvent law, is that it cannot, like the bankruptcy act passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the state, so far as it does not impair the obligations of contracts, is conceded."

15. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1; *Leidigh Carriage Co. v. Stengel* (C. C. A., 8th Cir.), 2 Am. B. R. 385, 95 Fed. 637.

16. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1; *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585; *Stellwagen v. Clum*, 245 U. S. 605, 41 Am. B. R. 1, 38 Sup. Ct. 215; *Harlin v. American Trust Co.* (Ind. App. Ct.), 41 Am. B. R. 401, 119 N. E. 20.

17. *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 385, 95 Fed. 637.

any State now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may affect persons who are or may be within the purview of this act." So far as it goes, the clause quoted is doubtless still the law. There was no need to insert it in the subsequent statutes, for ere the act of 1841 was passed, the Supreme Court had delivered two epoch-making decisions, which settled the law on the subject: (1) that, when Congress has exercised its constitutional power to enact a uniform bankruptcy law, all existing State insolvency laws applying to the same persons are suspended,¹⁸ but (2) that, this power not being exclusive, State laws are valid and continue operative so far as they do not conflict with the paramount Federal law.¹⁹ The prevailing rule seems to be that the operation of all laws enacted for the purpose of settling or winding up the estates and affairs of insolvent debtors, is suspended to the extent that the provisions thereof are conflicting.²⁰

(2) WHAT ARE INSOLVENCY LAWS.—It is not always easy to determine what laws are insolvency laws. There is some conflict among the authorities as to the operation of such laws, and as to whether or not proceedings thereunder may be instituted in State courts.²¹

It is obvious, however, that if a State law covers the same field as the bankruptcy act having for its purpose the relief of an insolvent debtor, by the distribution of his estate equally among his creditors, and his subsequent release from his debts, it is suspended, *in toto*, and no relief may be had thereunder.²² Laws regulating general assignments,²³ or invalidating transfers in contemplation of insolvency with intent to hinder, delay or defraud creditors,^{23a} not being

18. *Sturges v. Crowingshield*, 4 Wheat. 122.

19. *Ogden v. Saunders*, 12 Wheat. 213; *Singer v. National Bedstead Mfg. Co.* (N. J. Ch.), 11 Am. B. R. 276; *Stellwagen v. Clum*, 245 U. S. 605, 41 Am. B. R. 1, 38 Supp. Ct. 215.

20. *In re Wright* (D. C., Mass.), 2 Am. B. R. 592, 95 Fed. 807.

Suspension of State insolvency acts, see *Carling v. Seymour Lumber Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; *Smith v. Mottley* (C. C. A., 6th Cir.), 17 Am. B. R. 863, 150 Fed. 268; *In re Pickens Mfg. Co.* (D. C., Ga.), 20 Am. B. R. 202, 158 Fed. 894; *Closser v. Strawn* (D. C., Pa.), 35 Am. B. R. 864, 227 Fed. 139; *Ketcham v. McNamara*, 72 Conn. 709, 6 Am. B. R. 160, 46 Atl. 146; *Matter of Brinn* (D. C., Ga.), 45 Am. B. R. 74, 262 Fed. 527.

21. As to what constitutes an insolvency law, see *In re Weedman Stave Co.* (D. C., Ark.), 29 Am. B. R. 460, 199 Fed. 948; *Continental Bldg. & Loan Assn. v. Superior Court*, 163 Cal. 579, 28 Am. B. R. 873; *Closser v. Strawn* (D. C., Pa.), 35 Am. B. R. 864, 227 Fed. 139.

22. *Pitcher v. Standish* (Conn. Sup. Ct.), 37 Am. B. R. 456, 98 Atl. 93.

An act covering same field.—A State insolvency law which provides for proceedings on the part of the creditors of an alleged insolvent to have such insolvent so adjudged upon grounds specifically set forth in the act, and which provides for delivery by the insolvent of all his assets to the receiver, or

to such assignee or additional assignees as may be selected at a meeting of creditors required to be called for that purpose, and which makes provision for the discharge of the insolvent from liabilities to those creditors making claims to their share in the assets, except in respect to claims arising in certain cases, such as fraud, embezzlement, and for false oaths in reference to the settlement of the estate, is in the nature of a bankruptcy act. *Closser v. Strawn* (D. C., Pa.), 35 Am. B. R. 864, 227 Fed. 139.

State insolvency law defined.—A State statute, authorizing a general assignment, is an insolvent law when it permits a person of any class voluntarily to take advantage of its provisions by transferring his property in trust for the benefit of his creditors, and provides that, upon a due administration of his estate and a compliance with the requirements of the statute regulating the proceedings, he is thereby discharged from all liabilities on account of his debts which had been incurred at the time of making the general assignment. *Pelton v. Sheridan* (Sup. Ct., Ore.), 74 Ore. 176, 33 Am. B. R. 472, 144 Pac. 410.

23. *In re Slevers*, 1 Am. B. R. 117, 91 Fed. 366; *Duryea v. Guthrie*, 11 Am. B. R. 234 (Wis.). Contra: *In re Smith*, 2 Am. B. R. 9, 92 Fed. 135; *Matter of Karp* (D. C. Mass.), 36 Am. B. R. 414, 228 Fed. 798, holding that common law assignments are not outlawed by the bankruptcy act; but see *Mayer v. Hellman*, 91 U. S. 496. And compare *Thrasher v. Bentley*, 1 Abb. N. C. (N. Y.) 39, and *Beck v. Parker*, 65 Pa. St. 262.

The Oregon Act relating to assignments for the benefit of creditors is an insolvency act. *Pelton v. Sheridan*, 74 Ore. 176, 33 Am. B. R. 472, 144 Pac. 410; *Sabin v. Chrisman*, (Sup. Ct. Ore.), 36 Am. B. R. 372, 154 Pac. 908.

23a. *Stellwagen v. Clum*, 245 U. S. 605, 41 Am. B. R. 1, 38 Sup. Ct. 215.

insolvency laws, are not suspended. Likewise as to laws concerning the punishment of fraudulent debtors,²⁴ or for the settlement of the estates of deceased insolvents.²⁵ Nor does the existence of a Federal law preclude the passage of a State insolvency law; the latter merely remains inoperative while the former is in force.²⁶ A State statute relating to insolvency and providing for proceedings having the same object as the bankrupt act is absolutely inoperative as to the persons and property to which the bankrupt act applies.²⁷ The discharge feature seems not necessarily a part of an insolvency law, and State laws lacking it have been held suspended by a national bankruptcy law.²⁸

(3) **PARTIAL SUSPENSION; EXCEPTED CLASSES.**—State laws may be suspended in part only, as where they refer to a class expressly excepted by the bankruptcy law, in which case they continue operative as to that class.²⁹ Thus a State law under which persons engaged chiefly in the tillage of the soil may be proceeded against by their creditors for the purpose of throwing them into bankruptcy has been held not to be superseded by the bankruptcy act.³⁰ But a farmer is not deprived of the privilege of voluntary bankruptcy under the bankruptcy act, hence as to him a State act providing for voluntary bankruptcy is suspended.³¹ The exception relieving farmers, wage earners, and debtors owning less than \$1,000 from involuntary proceedings against them, leaves the way clear to creditors to proceed against them under State laws, if provision is made therefor.³²

24. *Berthelon v. Betts*, 4 Hill (N. Y.) 577; *Scully v. Kirkpatrick*, 79 Pa. St. 324.

25. *Hawkins v. Larned*, 54 N. H. 333.

26. *Palmer v. Hixon*, 74 Me. 447.

27. *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct. 206, 12 Am. B. R. 392, in which case it was also held that since the Constitution has left in the States and in Congress concurrent power over bankruptcy, the exercise of such power by Congress precludes legislation by a State over the subject; *Harris v. Luxury Trust Co.*, 142 Ga. 67, aff'd 142 Ga. 866, 32 Am. B. R. 652, 82 S. E. 447; *Capital Lumber Co. v. Saunders*, 26 Idaho 408, 33 Am. B. R. 330, 143 Pac. 1178; *Pelton v. Sheridan*, 74 Ore. 176, 33 Am. B. R. 472, 144 Pac. 410.

28. *In re Smith*, 2 Am. B. R. 9, 92 Fed. 135; *Boese v. Locke*, 17 Hun (N. Y.), 270. Compare *Greene v. Rice* (Idaho Sup. Ct.), 44 Am. B. R. 582, 186 Pac. 249.

29. *Herron Co. v. Superior Court*, 8 Am. B. R. 492; *Maltbie v. Hotchkiss*, 38 Conn. 80. Compare *Fisk v. Montgomery*, 21 La. Ann. 446. See Am. Bank. Dig. § 8.

30. **Effect of exception as to farmers.**—A State law under which persons engaged chiefly in the tillage of the soil may be proceeded against by their creditors was not superseded by the Act of 1898. *Old Town Bank v. McCormick*, 96 Md. 341, 10 Am. B. R. 767, 53 Atl. 934. Compare *Closser v. Strawn* (D. C., Pa.), 35 Am. B. R. 864, 227 Fed. 139; *Herron Co. v. Superior Court*, 136 Cal. 279, 8 Am. B. R. 492, 68 Pac. 814.

31. *Rockville Nat. Bank v. Latham*, 88 Conn. 70, 32 Am. B. R. 247, 89 Atl. 1117.

32. **Effect of exceptions.**—In the case of *Pitcher v. Standish* (Conn. Sup. Ct.), 37 Am. B. R. 456, 98 Atl. 93, the court disapproved the apparent conclusions of the court in the case of *Closser v. Strawn* (D. C., Pa.), 35

Am. B. R. 864, 227 Fed. 139, and says: "He (the judge) seems to have assumed that what Congress has done as respects the insolvent condition of farmers, wage-earners, and small debtors, amounts to an exercise of control over that whole subject."

Cases either expressly or by plain implication holding a contrary doctrine include *Old Town Bank v. McCormick*, 96 Md. 341, 351, 10 Am. B. R. 767, 53 Atl. 934, 60 L. R. A. 577, 94 Am. St. Rep. 577; *Lace v. Smith*, 34 R. I. 1, 12, 82 Atl. 268, Ann. Cas. 1913E, 945; *Keystone Co. v. Superior Court*, 138 Cal. 738, 742, 72 Pac. 398; *Singer v. National Bedstead Co.*, 65 N. J. Eq. 290, 11 Am. B. R. 276, 55 Atl. 868; *Citizens' Nat. Bank v. Gass*, 29 Pa. Super. Ct. 125; *Rittenhouse's Insolvent Estate*, 30 Pa. Super. Ct. 468. The Maryland case above cited contains the most satisfactory and convincing discussion of the subject which has come under our notice, and with most of its reasoning we heartily concur.

It is undoubted law that the federal act does not suspend the operation of State laws in so far as the latter affect classes of persons who are expressly excepted from the operation of its provisions, or which those provisions do not reach. Such classes include municipal, railroad, insurance, and banking corporations which the act expressly excepts. *Sturges v. Crownshield*, 4 Wheat. 122, 195, 4 L. Ed. 529; *Herron Co. v. Superior Court*, 8 Am. B. R. 492, 136 Cal. 279, 282, 68 Pac. 814, 89 Am. St. Rep. 124; *Old Town Bank v. McCormick*, 10 Am. B. R. 767, 96 Md. 341, 352, 53 Atl. 934, 60 L. R. A. 577, 94 Am. St. Rep. 577; *Simpson v. Savings Bank*, 56 N. H. 466, 22 Am. Rep. 491.

(4) **DISSOLUTION OF INSOLVENT CORPORATIONS.**—As to the effect of the bankruptcy act on a State law regulating the distribution of the assets of insolvent corporations there is much conflict. The weight of authority under the act of 1867 was that they were suspended.³³ It would seem that, if the proceeding be purely one of distribution and the corporation be amenable to bankruptcy under § 4 of the present law, the State law would be suspended; otherwise, not.³⁴ As stated by Chief Justice Fuller: "The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under State statutes. The bankruptcy law is paramount, and the jurisdiction of the Federal courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."³⁵

II. TERMS DEFINED IN GENERAL.

The definitions of the words and phrases contained in this section are to be used in construing the several provisions of the bankruptcy act and are to be applied when such words and phrases are used in proceedings under such act. Such definitions are controlling in the construction of the act unless the same be inconsistent with the context of the provision where the word or phrase is found. Several of these definitions are important. They often determine the scope and effect of the provision of the section in which they are found. In many instances, the definitions indicate wide departures from

Equally and for the same reasons, it must be true that whatever classes of cases are either expressly excepted from the operation of the Bankruptcy Act or lie outside of the reach of its provisions are left subject to State regulation. Such classes of cases and the conditions and situations which produce them are not within the field covered by the federal act, and legislative provisions concerning them by the States cannot be said to be in conflict in any way with the federal legislation. The power and jurisdiction of the States in the field of insolvency regulation is full and complete, except as federal legislation may invade and thereby limit it; and it is limited by such legislation only to the extent of that invasion. Wherever the field is not thus restricted, it must follow as a logical consequence that the power of the States remains. The field of restriction certainly cannot be broader than that of the operation of the federal statute. In other words, the test to be applied in determining whether or not the federal act suspends State laws is not one based upon a classification of persons, but upon a less arbitrary and more logical and just classification of cases, situations, and conditions in so far at least as they fall into clearly defined groups. Otherwise some portion of the proper field of bankruptcy and insolvency legislation is quite likely to remain unoccupied. *Sturges v. Crowninshield*, 4 Wheat. 122, 195, 4 L. Ed. 529; *Ex parte Eames*, 2 Story, 322, 326, Fed. Cas. No. 4237; *Singer v. Nat. Bedstead Co.*, 11 Am. B. R. 276, 65 N. J. Eq. 290, 294, 55 Atl. 868; *Herron v. Superior Court*, 8

Am. B. R. 492, 136 Cal. 279, 282, 68 Pac. 814, 89 Am. St. Rep. 124; *Lace v. Smith*, 34 R. I. 1, 12, 82 Atl. 268, Ann. Cas. 1913E, 945; *In re Macon Sash, etc., Co.* (D. C., Ga.), 7 Am. B. R. 66, 112 Fed. 323, 331. The conclusion of the court was that, "We are of the opinion that Congress did not intend to bring the situation, created by the unwillingness of insolvent farmers, wage-earners, and small debtors to submit themselves of their own volition to the jurisdiction of the federal bankruptcy courts for the equal distribution of their estates among their creditors, within the purview of the Bankruptcy Act, or to cover the field created by that condition not unlikely to arise, and that the provisions of our State legislation regulating such situations and conditions are therefore not suspended and rendered inoperative by reason of the existence of the Bankruptcy Act."

33. *Shylock v. Bashore*, 13 N. B. R. 481; *Thornhill v. Bank*, Fed. Cas. 13,992; *Platt v. Archer*, Fed. Cas. 11,213. Contra: *Chandler v. Siddle*, Fed. Cas. 2,594.

34. See *Platt v. Archer*, Fed. Cas. 11,213; also cases cited ante under this heading.

35. *In re Watts*, 190 U. S. 1, 10 Am. B. R. 113. See also *Matter of Milbury Co.*, 11 Am. B. R. 523; *Merry v. Jones* (Ga. Sup.), 11 Am. B. R. 625; *In re White Mountain Paper Co.*, 11 Am. B. R. 491, 127 Fed. 189; *Matter of International Coal Mining Co.*, 16 Am. B. R. 309, 143 Fed. 665; *In re Salmon*, 16 Am. B. R. 122, 143 Fed. 395; *In re Standard Oak Veneer Co.* (D. C., Tenn.), 22 Am. B. R. 883, 173 Fed. 103.

the ordinary meanings of the words. It will be found essential to refer constantly to the definitions here set forth, and the careful practitioner will familiarize himself at the outset, with the peculiar nomenclature of the law. It will be noted that some of the definitions in this section read "shall mean," while others read "shall include." It was not intended that definitions of words used in the act which read "shall include" should exclude other meanings or definitions of the word or limit the ordinary and well-understood meanings. It was intended to make sure that the words defined would be held to include what is expressed.³⁶ It will not be necessary to consider in this place all of the words and phrases here defined but reference will be made to them from time to time in connection with the discussion of the appropriate subject matter. It may be well, however, to briefly consider a few of the definitions, which, in their nature, are fundamental.³⁷

III. STATUTORY DEFINITIONS.

a. Adjudication.—It will be observed that "adjudication" is defined in subd. (2) of this section for the purpose of determining the time when the adjudication takes effect. It is not in this sense a definition. The definition indicates on its face that the adjudication is to be by decree, which should be executed as prescribed in Forms in Bankruptcy Nos. 11 or 12.³⁸ The effect of adjudication or dismissal is considered under § 18, *post*.³⁹ If there is no appeal from the decree adjudicating the defendant a bankrupt, it dates from the rendition of the decree, and if there is an appeal, and it is finally confirmed, the adjudication dates from the confirmation. If an appeal is taken and it is dismissed, the date of adjudication is not changed from the time it is made to the time of dismissal; such dismissal is not a final confirmation.⁴⁰

b. Courts; courts of bankruptcy.—It is provided by subd. (7) of this section that where the term "courts" is used it shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee. "Courts" and "Courts of bankruptcy" are frequently used with the same meaning. The latter term is evidently defined for the purpose of specifying what courts are courts of bankruptcy. Referees do not possess all the jurisdiction of courts of bankruptcy. Their jurisdiction is limited to the matters specially prescribed⁴¹ and to such matters as may be inferred to fall within the jurisdiction expressly granted by statute. Although "courts" may include the referees under the definition, it is not intended to confer upon them such jurisdiction as is possessed by courts of bankruptcy.⁴²

36. Opinion of Judge Ray in *In re Harper* (D. C., N. Y.), 23 Am. B. R. 918, 931, 175 Fed. 412.

37. The act of 1867 contained no definitions. Section 48 of that act explains that "person" included "corporation" and "oath" included "affirmation" and indicated that the singular included the plural and the like. The English bankruptcy act of 1883, § 168, defines expressly many of the terms used in that act, and our present bankruptcy act follows the English act in this respect.

38. A mere memorandum of the adjudication is not sufficient; an order must be entered and recorded. See *In re Boston*, etc.,

Co., Fed. Cas. 1,678; *In re Hill*, Fed. Cas. 6,484.

39. See Bankr. Act, § 18, *post*.

40. *Moore Bros. v. Cowan*, 173 Ala. 536, 26 Am. B. R. 902, 907, 55 So. 903. As to date of adjudication see *In re Lee* (D. C., Pa.), 22 Am. B. R. 820, 171 Fed. 266.

41. See Bankr. Act, § 38, *post*.

42. *In re Walsh Bros.* (D. C., Iowa), 21 Am. B. R. 14, 16, 163 Fed. 352, where the court said: "The word 'court' may include the referee (§ 1 (7)). But this obviously means the referee when acting upon a matter of which he is given jurisdiction by the act."

c. **Creditor.**—This term includes any person who owns a provable debt, demand, or claim against the bankrupt, and may include his duly authorized agent, attorney, or proxy. The determination of the question as to the provability of debts or claims depends upon the statute and must be made as therein provided. The fact that a creditor has not actually proved his claim does not render him any the less a creditor of the bankrupt.^{42a} It has been contended that an indorser or surety is not a creditor within the meaning of the act; but this contention is untenable.⁴³ A surety, or indorser or other person secondarily liable for the bankrupt has a provable claim against the bankrupt estate, in a case where the principal claim is provable.⁴⁴ The mere fact that plaintiffs have brought suit on a claim, pending at the time of bankruptcy, does not justify a finding that they "owned a demand or claim provable in bankruptcy," and are therefore creditors.⁴⁵ In the usual arrangement made between a broker and his customer for the purchase of stock, the broker never owns the stock purchased; the stock belongs to the customer, and he does not become a creditor of the broker, for the amount which he has paid to the broker for the purchase of the stock.⁴⁶ One who subscribes for stock in a corporation and pays the agreed amount under an agreement that the corporation shall issue fully paid stock for twice the amount of the subscription and in case of a failure on the part of the corporation to issue said stock the amount subscribed shall be a loan, if the corporation fails to issue the stock, the subscriber remains a creditor.⁴⁷

d. **Debt.**—Debt means a provable debt; any debt, demand, or claim provable in bankruptcy. A debt is provable if it is susceptible of proof.⁴⁸ A debt may be provable and within the definition although not proved within the time limit,⁴⁹ that is, if it is one of those debts which may be proved under § 63 of the act.⁵⁰ The intent of the law is to make every demand, which may be enforced against the bankrupt either at law or in equity, provable in bankruptcy,⁵¹ provided, of course, such demand is one which, by the terms of the act, does not fall without the classification of provable debts.⁵² While the unmatured liability of a bankrupt as an indorser, surety, or guarantor may not be a "debt" in a technical sense, it is a "demand" or "claim," and falls within the definition.⁵³ A debt is provable whether due or not at the time of the bankruptcy.⁵⁴ The definition does not include contingent claims under

42a. *Matter of Prusslan* (D. C., Mich.), 43 Am. B. R. 13, 255 Fed. 867.

43. *Bank of Wayne v. Gold*, 146 N. Y. App. Div. 296, 26 Am. B. R. 722, 130 N. Y. Supp. 942; *Huttig Mfg. Co. v. Richards* (C. C. A., 8th Cir.), 20 Am. B. R. 349, 100 Fed. 619, 87 C. C. A. 521; *Kobusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 600, 84 C. C. A. 372, 18 L. R. A. (N. S.) 660; *Swarts v. Siegel* (C. C. A., 8th Cir.), 8 Am. B. R. 689, 117 Fed. 13, 54 C. C. A. 390; *In re McCarthy Elevator Co.* (D. C., N. J.), 30 Am. B. R. 247, 205 Fed. 986; *Amundson v. Folsom* (C. C. A., 8th Cir.), 33 Am. B. R. 318, 219 Fed. 122.

Agent holding legal title.—One who holds the legal title to a note, although merely as agent or trustee for an assignee of the payee is a creditor. *Matter of Viler* (C. C. A., 6th Cir.), 41 Am. B. R. 738, 249 Fed. 633.

44. *Kobusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 600; *Bank of Wayne v. Gold*, 146 N. Y. App. Div. 296, 26 Am. B. R. 722, 130 N. Y. Supp. 942. See discussion under Section Fifty-seven, and cases cited. Creditors only may be preferred, see Bankr. Act, § 60-a.

Guarantors are creditors within the meaning of § 60-a, relating to preferences. *Stern v. Paper*

(D. C., No. Dak.), 25 Am. B. R. 451, 183 Fed. 228.

45. *In re Crafts-Riordan Shoe Co.* (D. C., Mass.), 26 Am. B. R. 449, 185 Fed. 931.

46. *Richardson v. Shaw* (U. S. Sup. Ct.), 19 Am. B. R. 717, 209 U. S. 365, affg. 16 Am. B. R. 842.

47. *Clark v. Hamilton* (C. C. A., 8th Cir.), 23 Am. B. R. 193, 217 Fed. 227.

48. *Crawford v. Burke* (Sup. Ct.), 12 Am. B. R. 659, 666, 195 U. S. 176.

49. *Norfolk & Western R. Co. v. Graham* (C. C. A., 4th Cir.), 16 Am. B. R. 610, 145 Fed. 809.

50. See Bankr. Act, § 63-a, *post*.

51. *In re Mahler* (D. C., Mich.), 5 Am. B. R. 453, 459, 105 Fed. 428.

52. The only obligations, which, strictly speaking, are provable are those specified in § 63-a, *post*. As to debts or demands which are not provable, see under Section Sixty-three, sub-title, "What debts are not provable," *post*.

53. *In re Gerson* (C. C. A., 3d Cir.), 6 Am. B. R. 11, 107 Fed. 897.

54. *Germania Sav. Bank & Trust Co. v. Loeb* (C. C. A., 6th Cir.), 26 Am. B. R. 238, 243, 183 Fed. 287.

executory contracts which have not accrued at the time of the institution of the proceedings.⁵⁵ Taxes due are not, in a strict sense, debts, but being claims against the bankrupt or his estate, they fall within the definition.⁵⁶ They are payable by the trustee although not required to be proved like other debts.⁵⁷ Interest accruing after the institution of the proceedings should not be included as a part of the debt.⁵⁸

e. Insolvency.—(1) **IN GENERAL.**—Insolvency is defined in subdivision 15 of this section. In all foreign bankruptcy laws, cessation of payments is the essential of insolvency.⁵⁹ Until the passage of the present law, it was the test in the United States. Under the bankruptcy act of 1867 a debtor was deemed insolvent when he was unable to pay his debts in the ordinary course of business as they matured.⁶⁰ It was held under that act that "the amount of the trader's property was of no consequence if he was unable to pay his debts in lawful money as they matured."⁶¹ Under the law of 1898, the value of the property is the essential element.⁶² When applied to proceedings for the appointment of a receiver the definition of insolvency should be strictly construed.⁶³ The definition controls as against a finding of insolvency in a State court based upon facts contained in the record of a proceeding for the appointment of a receiver of a corporation.⁶⁴ The definition of insolvency contained in this section has been much criticised. It evidently has rendered

⁵⁵ In re American Vacuum Cleaner Co. (D. C., N. J.), 26 Am. B. R. 621, 192 Fed. 939. In re Inman (D. C., Ga., 22 Am. B. R. 524, 171 Fed. 185; In re Roth & Appel (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed. 667.

⁵⁶ In re Fisher & Co. (D. C., N. J.), 17 Am. B. R. 404, 411, 148 Fed. 907.

⁵⁷ See under Section Sixty-four, sub-title "Payment of Taxes," *post*.

See § 17-a, which provides that "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a tax levied by, etc." thus clearly implying that a tax is a provable debt.

⁵⁸ In re Chandler (C. C. A., 7th Cir.), 25 Am. B. R. 865, 184 Fed. 887.

⁵⁹ For the universality of this test, see "Bankruptcy, A Study of Comparative Legislation," by S. Whitney Dunscomb, pp. 12-14.

⁶⁰ Carson v. Chicago Title & Trust Co., 5 Am. B. R. 814, 824, 182 U. S. 438; Hussey v. Richardson-Roberts Dry Goods Co. (C. C. A., 8th Cir.), 17 Am. B. R. 511, 149 Fed. 598.

⁶¹ Ex parte Hull, Fed. Cas. 6,856; In re Dibble, Fed. Cas. 3,884; In re Wells, Fed. Cas. 17,388; Morgan v. Mastick, Fed. Cas. 9,803. See also, Wager v. Hall, 16 Wall. 599, 21 L. Ed. 504; Wilson v. City Bank, 17 Wall. 473, 21 L. Ed. 723; Toof v. Martin, 13 Wallace 40, 20 L. Ed. 481; Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235; Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130.

⁶² Insolvency defined.—In speaking of this definition the court said, in the case of In re Andrews (C. C. A., 1st Cir.), 16 Am. B. R. 387, 390, 144 Fed. 192: "Atten-

tion is called to the fact that the act of 1898 has given an artificial meaning to the word 'insolvent,' thereby complicating very much the construction of the statute as applied to alleged preferences, and rendering to a large extent inapplicable the decisions of courts of authority on statutes where the word 'insolvency' is to be read in its ordinary business sense." In the case of Marvin v. Anderson, 6 Am. B. R. 520, 111 Wis. 387, 87 N. W. 226, a distinction was made between the meaning of the term "insolvency," as the subject of insolvency is dealt with by insolvent and bankrupt laws, and the general meaning thereof. The former was said to be the inability of a person to pay his debts as they mature in the ordinary course of business; the latter, a substantial excess of a person's liabilities over the fair cash value of his property. 5 Cyc. 237, note 1. See, also, in this connection, Grunsfeld v. Brownell, 11 Am. B. R. 509, 601, 12 New Mex. 192, 76 Pac. 310; Hicks Co., Ltd. v. Moore (C. C. A., 5th Cir.), 44 Am. B. R. 384, 261 Fed. 773.

What constitutes insolvency.—Insolvency means something more than that the debtor was financially embarrassed and hard pressed by his creditors. Matter of Salmon (C. C. A., 2d Cir.), 41 Am. B. R. 45, 249 Fed. 300. A debtor is insolvent where, within four months of the filing of his petition in bankruptcy, the aggregate of his property at a fair valuation is insufficient to pay his debts. Golden & Co. v. Loving (Ct. of App., D. C.), 42 App. D. C. 489, 33 Am. B. R. 469, 42 Wash. L. Rep. 818; Schuette & Co. v. Swark (Pa. Sup. Ct.), 45 Am. B. R. 373, 109 Atl. 531.

⁶³ Maplecroft Mills v. Childs (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415.

⁶⁴ In re Golden Malt Cream Co. (C. C. A., 7th Cir.), 21 Am. B. R. 36, 164 Fed. 326; Karst v. Black Diamond Range Co. (N. J. Ch.), 82 N. J. Eq. 231, 31 Am. B. R. 287, 88 Atl. 692; Butler & Co. v. Palmenberg (C. C. A., 1st Cir.), 30 Am. B. R. 502, 207 Fed. 705, 125 C. C. A. 223.

inapplicable the decisions of courts of authority on statutes where the word "insolvency" is to be read in its ordinary business sense.⁶⁵ It is undoubtedly humane, but is thought to put creditors at their debtor's mercy. On the other hand, it protects the debtor whose property is not quickly convertible. In this aspect, it results in conditions not unlike those of a debtor who has taken advantage of the suspended payment periods sanctioned by some of the continental bankruptcy systems. In actual practice it has done little harm.⁶⁶ In any event the definition of insolvency as prescribed by the statute must be strictly adhered to.⁶⁷

(2) **PROPERTY TO BE INCLUDED.**—The property to be valued may include all assets having a value belonging to the person alleged to be a bankrupt, but under the definition any property which is disposed of with intent to defraud, hinder or delay creditors, is to be excluded. The statute thus contemplates that a bankrupt shall not have the benefit of the valuation of property transferred by him in fraud of creditors, in determining whether he is insolvent.⁶⁸ The property to be excluded is that which is actually disposed of by the transfer in fraud of creditors, so that where a mortgage is given which is tainted with bad faith, the equity of redemption should be counted in.⁶⁹ Property transferred in fraud of creditors, and which can only be reached through litigation cannot be considered property of the bankrupt upon the question of solvency or insolvency.⁷⁰ Where property is transferred in payment of, or as security for a just debt, the mere fact that it may involve a preference in bankruptcy should bankruptcy proceedings be instituted, does not exclude it from consideration in determining the debtor's solvency.⁷¹ Under the definition property which is concealed with intent to defraud is not to be valued in determining the solvency of the debtor. Where a man receives money which should have been applied to the payment of his debts, refuses to state where it was kept, but insists that it has been invested by him without the jurisdiction of the court he may be said to have "concealed" it, within the meaning of this clause, and it is to be excluded.⁷² The definition does not exclude exempt property and such property should therefore be valued in determining the question of the alleged bankrupt's insolvency.⁷³ Only such assets should be

65. In re Andrews (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922, affg. 14 Am. B. R. 247. But see In re Electric Supply Co. (D. C., Ga.), 23 Am. B. R. 647, 175 Fed. 612.

66. See discussion upon what constitutes insolvency by Referee Hotchkiss in Matter of Rung Furniture Co. (Spec. M., N. Y.), 10 Am. B. R. 44. For further discussion as to what constitutes insolvency, see discussion under Section Three of this work.

67. Crancer & Co. v. Wade (Sup. Ct., Okl.), 25 Am. B. R. 880, 110 Pac. 778; Maplecroft Mills v. Childs (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415; Grandison v. National Bank of Commerce (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800. Compare Simpson v. Western H. & M. Co. (Wash. Sup. Ct.), 40 Am. B. R. 213, 167 Pac. 113.

68. In re Baumann (D. C., Tenn.), 3 Am. B. R. 196, 96 Fed. 946; In re Hines (D. C., Or.), 16 Am. B. R. 296, 144 Fed. 142; Acme Food Co. v. Meier (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74; Philipps v. Kleinman (Pa. Com. Pleas), 23 Am. B. R. 266;

Utah Association of Credit Men v. Boyle Furniture Co. (Utah Sup. Ct.), 31 Am. B. R. 488, 136 Pac. 572; In re Wenatchee Heights Orchard Co. (D. C., Wash.), 30 Am. B. R. 401, 204 Fed. 674; Debus v. Yates (D. C. Ky.), 30 Am. B. R. 823, 193 Fed. 427.

69. Lansing Boiler Works v. Ryerson (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701; Acme Food Co. v. Meier (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74.

70. Utah Assn. of Credit Men v. Boyle Furniture Co. (Utah, Sup. Ct.), 26 Am. B. R. 867, 117 Pac. 800; In re Crenshaw (D. C., Ala.), 19 Am. B. R. 502, 156 Fed. 638.

71. In re Doscher (D. C., N. Y.), 9 Am. B. R. 547, 554, 120 Fed. 408, holding, also, that this clause refers to the act of bankruptcy stated in § 3-a (1), and not to the acts of bankruptcy relating to preferences.

72. In re Shoesmith (C. C. A., 7th Cir.), 19 Am. B. R. 645, 135 Fed. 684; Matter of Burg (D. C., Tex.), 40 Am. B. R. 126, 245 Fed. 173.

73. In re Hines (D. C., Or.), 16 Am. B. R. 296, 144 Fed. 142; Patterson v. Baker Grocery Co. (Ore. Sup. Ct.), 33 Am. B. R. 740,

included as may be realized on by a creditor if he obtained judgment against the owner in the ordinary course of judicial procedure.⁷⁴

(3) FAIR VALUATION OF PROPERTY.—Insolvency turns on what is a "fair valuation" of the property.⁷⁵ Under this definition it is not necessary to show solvency that the bankrupt was able to realize from his property at the time of an alleged preference or unlawful transfer, a sufficient sum to pay his debts; but if at the time a fair valuation of his property is sufficient to pay his debts, he is solvent.⁷⁶ Fair valuation has been held to be the present market value, and not the amount which he might realize from a forced sale of his property.⁷⁷ The fair "market value" of assets is that value

144 Pac. 673; *In re Baumann* (D. C., Tenn.), 3 Am. B. R. 196, 96 Fed. 946, in which case the court said: "If Congress had intended to exclude from the terms of this definition property exempted by law either explicitly or by necessary implication, . . . it might have been best for Congress to have made that exception, but it is neither absurd nor in any sense unwise that it should, in furtherance of its determination to give us a fixed rule, have made no exception at all. Again, the statute does in fact contain in its language one particular exception and it contains no more. If another exception had been intended it would have been expressed along with that which was significantly declared."

Exempt as well as non-exempt property must be included. *In re Crenshaw* (D. C., Ala.), 19 Am. B. R. 502, 156 Fed. 638. See, also, *In re Rome Planing Mill Co.* (D. C.), 3 Am. B. R. 766, 99 Fed. 937.

The Ray amendatory bill of 1903 sought to insert words which would have excluded exempt property from the aggregate of a debtor's assets in determining whether he was insolvent, but the Senate, unfortunately, struck out the provision.

The definition of what constitutes "insolvency" contained in section 1, subd. 15, does not control in determining whether a debtor was insolvent so as to make a voluntary conveyance fraudulent under the laws of Minnesota. Hence the exempt property of the debtor is not to be considered in determining the value of the assets retained. Nor is a debt that is amply secured by mortgage on the property conveyed to be included in determining whether the debtor has retained assets amply sufficient to satisfy existing claims. *Underleak v. Scott* (Minn. Sup. Ct.), 28 Am. B. R. 926, 134 N. W. 731.

74. In considering assets in relation to liabilities, in order to determine the solvency of an alleged bankrupt, the assets ought to be such as a creditor could realize on if he obtained a judgment against him in the ordinary course of judicial procedure; and where an alleged bankrupt, who has confessed judgment and mortgaged his property, holds accounts for goods sold on the installment plan to people who have no assets except their salaries and are execution proof, though they are doubtless honest and

may eventually pay their debts in full, such accounts will not be considered in estimating his resources. *Louisiana Nat. Life Assur. Soc. v. Segen* (D. C., La.), 28 Am. B. R. 19, 196 Fed. 903.

Good will of building contractor.—In determining whether a building contractor was insolvent at the time of an alleged preference his good will cannot be taken into consideration where it appears that he was at that time unable to obtain new business and was financially unable to complete his contracts. *Lytle v. Fifth National Bank* (Ref., N. Y.), 39 Am. B. R. 690.

75. *In re Gilbert* (D. C., Oreg.), 8 Am. B. R. 101, 112 Fed. 961. When the aggregate of a person's property at a fair valuation is insufficient to pay his debts he is insolvent within the definition contained in the bankruptcy act. *Carson v. Chicago Title & Trust Co.*, 5 Am. B. R. 814, 824, 182 U. S. 438.

76. *Crancer & Co. v. Wade* (Sup. Ct., Okl.), 25 Am. B. R. 880, 110 Pac. 778; *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839, 45 C. C. A. 666.

77. *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839.

Fair valuation.—In the case of *In re Hines* (D. C., Or.), 16 B. R. 295, 144 Fed. 142, the court said, in considering what constitutes a fair valuation: "As it respects property considered in a commercial sense, I can conceive of no better or surer standard by which to arrive at a fair valuation than the market valuation; that is, what the property will probably bring, or is worth, in the general market to-day, where everybody buys. It could not be what it is worth to one person or to another under special circumstances, or having special use for a particular article, but what it is worth as a marketable commodity at a given time with no special conditions prevailing other than affect the market generally in the locality where the commodity is for sale." As bearing upon the question of insolvency, the value of the property may be shown by evidence of what it sold for at private sale by the receiver of the alleged bankrupt appointed in the State court (*In re Bloch* [C. C. A., 2d Cir.], 6 Am. B. R. 300, 109 Fed. 790), but not what the property brought at an auction sale by the trustee. *Rutland Co. Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 146, 156 Fed. 168.

"Fair valuation," as used in the definition, means the fair cash value or the fair market value of the property as between one who wants to purchase and one who wants to sell the property. If the bankrupt had wanted to sell its property, the price it could have obtained for it upon the market from parties who wanted to buy and would give

which the debtor himself might have realized thereon if permitted to continue in business.⁷⁸ The value of the property as a part of the bankrupt's business as a "going concern" should be considered rather than the value after bankruptcy has intervened, and the property has ceased to be productive.⁷⁹ Mortgages held by an alleged insolvent bank should be taken at the value which can be realized thereon by the bank as a "going" bank and not at that which might be obtained by treating them as quick assets, such as commercial bonds and the like.⁸⁰ The actual value and not the face value of commercial paper, accounts and the like must govern.⁸¹ This value should be determined as of the time the proceedings were commenced.⁸² Where the act of bankruptcy itself depreciates the debtor's property until, under this definition, he is insolvent, the petition against the alleged bankrupt must be dismissed.⁸³ Manifestly, a person may not be able to meet current obligations, and yet his property at a fair valuation may be sufficient to pay his debts.⁸⁴

its fair value, is the "fair valuation" which the statute refers to. The price which the property would bring or does bring when forced off at auction, cannot be regarded as always fixing its fair market value. *Grandison v. National Bank of Commerce*, (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800.

78. *In re Marine Iron Works* (D. C., N. Y.), 20 Am. B. R. 390, 159 Fed. 753; *Arnold v. Knapp* (W. Va. Sup. Ct.), 34 Am. B. R. 432, 84 S. E. 895 (citing text).

Determination of valuation.—In the case of *Steen v. Paper* (D. C., No. Dak.), 25 Am. B. R. 451, 183 Fed. 228, the court said: "'Fair valuation,' within the meaning of subdivision 15 of section 1 of the Bankruptcy Act, means a value that can be made promptly effective by the owner of property 'to pay his debts.' That is the language of this liberal statute. It ought not to be enlarged. Such a value excludes, on the one hand, the sacrifice price that would result from an execution or foreclosure sale, and, on the other hand, the retail price that could be realized in the slow process of trade. This latter value should be excluded because it could only be gained by large expense and the many risks of a mercantile venture. 'Fair valuation' means such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property. Such a value will depend upon many circumstances, such as the age and condition of the stock, the season of the year, and the state of trade."

79. *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 804, 141 Fed. 518; *Butler Paper Co. v. Goemmel* (C. C. A., 7th Cir.), 16 Am. B. R. 26, 143 Fed. 295.

Market value, frequently used as a standard of "fair valuation" must be assumed to depend on whether a market exists or can be created by an attempt to sell the property, and expert opinion of market value must necessarily be intended to fix the value which the property ought to give as a fair return, if sold to some one who is willing to pur-

chase under the ordinary selling conditions. A valuation based only upon what may be obtained at a forced sale or an auction sale, or which may be realized under some accidental or unusual situation cannot be taken as the "fair valuation" of property to a going concern. *Matter of Kobre et al* (D. C., N. Y.), 35 Am. B. R. 389, 224 Fed. 106.

80. *Matter of Kobre* (D. C., N. Y.), 35 Am. B. R. 389, 224 Fed. 106.

81. *Benjamin v. Chandler* (D. C., Pa.), 15 Am. B. R. 439, 440, 142 Fed. 242; *Arnold v. Knapp* (W. Va. Sup. Ct.), 75 W. Va. 804, 34 Am. B. R. 432, 84 S. E. 895; *In re Codrington* (D. C., Pa.), 9 Am. B. R. 243, 118 Fed. 281, in which case it was held that where it appears that accounts due to an alleged bankrupt are not at present collectible their actual value must be taken in determining his solvency.

The actual fair valuation of leases, patents, licenses and other intangible property will be considered. See *Troy Wagon Works v. Vastbinder* (D. C., Pa.), 12 Am. B. R. 357, 130 Fed. 232; *Motor Vehicle Co. v. Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 808, 141 Fed. 518; *In re Foley* (D. C., Pa.), 15 Am. B. R. 832, 140 Fed. 300.

82. *In re Hines* (D. C., Or.), 16 Am. B. R. 295, 144 Fed. 142.

83. *Chicago Title & Trust Co. v. Roebeling's Sons* (Cir. Ct., Ill.), 5 Am. B. R. 368, 107 Fed. 71. See also, *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 766, 99 Fed. 937; *In re Rogers Milling Co.* (D. C., Ark.), 4 Am. B. R. 540, 102 Fed. 687; *Vaccaro v. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; *Lansing Boiler Works v. Ryerson & Son* (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701.

The valuation for the test of solvency or insolvency upon an issue as to whether a chattel mortgage was preferential, must relate to the conditions, as a going concern, when the alleged preference was given, and not to the mere dead matter of the plant after bankruptcy intervened. *Butler Paper Co. v. Goemmel* (C. C. A., 7th Cir.), 16 Am. B. R. 26, 143 Fed. 295.

84. *Hackney v. Raymond Bros. etc., Co.*

(4) **EVIDENCE.**—Insolvency owing to its nature, is not always susceptible of direct proof. It may, and in many cases must, be established by the proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred.^{84a} Evidence must be adduced sufficient to show that the alleged bankrupt's debts were more than the value of his assets at the time the petition is filed.⁸⁵ The books of a bankrupt, his schedules, inventory and appraisal are competent evidence upon the question of insolvency.⁸⁶ The question of insolvency is one of fact and not of law, and is determinable as such.⁸⁷

f. Conceal.—The word "conceal" under the present law, means more than "hide;" it connotes more than "secrete." Thus, with peculiar reference to the second objection to a discharge,⁸⁸ it includes the falsifying or mutilating of books or business records.^{88a} Under the former law, concealment of property included a concealment of title to property.⁸⁹ The new definition strengthens rather than impairs this doctrine. It may be doubted, however, whether the definition adds anything to the ordinary meaning of the word "concealed" in § 29-b; the difficulty of reading in either "falsified" or "mutilated" will be apparent at a glance. Almost as difficult would be the interpolation of these new meanings into the first act of bankruptcy.⁹⁰ This definition has frequently been considered by the courts,⁹¹ in connection especially with the concealment of the bankrupt's property as an indictable offense,⁹² or as a ground for the withholding of a discharge.⁹³

g. Secured creditor.—This term is defined in subdivision 23 of this section. Under this definition a creditor, to be secured, must either (a) hold security against the property of the bankrupt, or (b) be secured by the individual obligation of another who holds such a security. This definition thus restricts the popular meaning.⁹⁴ If the security is the property of another, or if it is exempt property, that is, if it is not assignable under the bankruptcy act, the person holding the same is not a secured creditor within this definition.⁹⁵

(Sup. Ct., Neb.), 68 Neb. 624, 10 Am. B. R. 213, 94 N. W. 805, 99 N. W. 675. See also *In re Doscher* (D. C., N. Y.), 9 Am. B. R. 547, 556, 120 Fed. 408; *In re Coddington* (D. C., Pa.), 9 Am. B. R. 243, 126 Fed. 891.

Overdrafts at a bank do not show insolvency. The arranging to cover overdrafts by bank drafts and checks is not in itself sufficient to create even a suspicion of insolvency as the term is used in the act. *McDonald v. Clearwater Ry. Co.* (D. C., Ida.), 21 Am. B. R. 182, 190, 164 Fed. 1007.

^{84a.} *Rosenberg v. Semple* (C. C. A., 3d Cir.), 43 Am. B. R. 671, 257 Fed. 72.

^{85.} *Knittel v. McGowan* (D. C., Pa.), 14 Am. B. R. 200, 134 Fed. 498.

Liability as surety or indorser, where principal solvent.—The liability of an alleged bankrupt as surety or indorser, if the principal is solvent and abundantly able to pay, should not be counted against him on the question of his solvency or insolvency, because, if called on to pay such debt, he would immediately have an asset which would be equal to the amount he would be required to pay. *Matter of Bowers* (D. C., Ga.), 33 Am. B. R. 51, 215 Fed. 617.

Liability to sub-agents.—In determining whether an alleged bankrupt's liabilities are in excess of his assets it is proper to schedule as liabilities deposits made with him by sub-agents which he, as agent of a petitioning creditor, has not returned to the sub-agents or transferred to his principal. *Matter of Burg* (D. C., Tex.), 40 Am. B. R. 126, 245 Fed. 173.

^{86.} *In re Docker-Foster Co.* (D. C., Pa.), 10

Am. B. R. 584, 123 Fed. 190; *Lyttle v. Fifth National Bank* (Ref., N. Y.), 39 Am. B. R. 690.

^{87.} *Utah Assn. of Credit Men v. Boyle Furniture Co.* (Utah Sup. Ct.), 26 Am. B. R. 867, 117 Pac. 800.

^{88.} See Bankr. Act, § 14-b (2), *post*.

^{88a.} *Matter of Halfgott* (D. C., N. Y.), 40 Am. B. R. 198, 245 Fed. 858.

^{89.} *In re Williams*, Fed. Cas. 17,703.

^{90.} See Bankr. Act, § 3-a (1), *post*.

^{91.} See *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 69; *Matter of Carbone* (Ref., Wash.), 13 Am. B. R. 55; *Matter of Burg* (D. C., Tex.), 40 Am. B. R. 126, 245 Fed. 173, and cases cited under § 14-b (1), *post*, and § 29-b.

Where an indictment under § 29-b uses the words "unlawfully, knowingly and fraudulently" to characterize the word "conceal" it is not necessary to specify whether the concealment consists of secreting, falsifying and mutilating, simply because the word "conceal" as defined in this section, includes "to secrete, falsify and mutilate." *United States v. Comstock* (Cir. Ct., Mass.), 20 Am. B. R. 520, 162 Fed. 416.

"Conceal" includes the withholding of assets, with fraudulent intent. *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513.

^{92.} See discussion under Section Twenty-nine, sub-title "Concealment of property," *post*.

^{93.} See discussion under Section Fourteen, sub-title "Concealment of property," *post*.

^{94.} *In re Coe* (D. C., Ohio), 1 Am. B. R. 275, 49 Fed. 481; *Stauffer, etc., Co. v. Abington Co.*

The English definition, "a person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, for a debt due to him from the debtor,"⁹⁶ is even more restrictive than is ours. Thus, in both systems, creditors may often be secured and yet not be secured creditors.⁹⁷

h. Transfer.—This term is defined in subdivision 25 of this section. The word has most comprehensive meaning in the bankruptcy law. It includes every method of disposing of or parting with property or its possession; thus doubtless comprising within itself even the idea commonly expressed by "conceal." Its enlarged meaning has already been extensively discussed by the courts. A payment of money, even in due course of business, is a transfer.⁹⁸ Transfer includes a chattel mortgage,⁹⁹ as well as any other lien or

(Sup. Ct., La.), 131 La. 715, 32 Am. B. R. 120, 60 So. 202, citing *Collier on Bankruptcy* (6th ed.), 6; *Baker Lumber Co. v. Clark Co.* (Utah Sup. Ct.), 43 Am. B. R. 193, 178 Pac. 764; *Matter of Ferrard* (D. C., La.), 45 Am. B. R. 36, 263 Fed. 908.

Who are secured creditors.—A creditor, which has realized upon its collateral and presented its claim in a court of bankruptcy, is a "secured creditor," although without notice that the security is the property of the bankrupt. *Matter of Bash* (D. C., Pa.), 40 Am. B. R. 341, 245 Fed. 808.

⁹⁶ *Gorman v. Wright* (C. C. A., 4th Cir.), 14 Am. B. R. 135, 136, 136 Fed. 164, revg. 13 Am. B. R. 91; *Matter of Pan American Match Co.* (D. C., Mass.), 39 Am. B. R. 805, 242 Fed. 995; *In re Mertens* (D. C., N. Y.), 14 Am. B. R. 226, 227, 134 Fed. 101, revd. on other grounds, 15 Am. B. R. 332, 144 Fed. 818; *Matter of Thompson* (D. C., N. Y.), 31 Am. B. R. 236, 208 Fed. 207, holding that the words "secured creditor" are limited to creditors secured out of or against the estate.

Exempt property is not of a nature to be assignable under the act, and a creditor holding a mortgage on exempt property is not a "secured creditor." *In re Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 900.

Assignability of homestead.—In the case of *Fenley v. Poor* (C. C. A., 6th Cir.), 10 Am. B. R. 377, 121 Fed. 739, it was held that the real estate in which the bankrupt may have a homestead passes to his trustee, and the holder of a mortgage thereon is a "secured creditor." The court said: "But the definition in the bankruptcy act refers to the nature of the property, and, if it is such as to be assignable under the act, the fact that it includes exemptions under the State laws in force at the time of the filing of the petition could not affect its nature and make it non-assignable. The act provides that the bankrupt shall make claim under oath to his exemptions, and file the same in triplicate, and also makes it the duty of the trustee to set apart the bankrupt's exemptions and report the estimated value to the court, and makes it the duty of the judge to determine all claims of bankrupts to their exemptions. These provisions clearly indicate that the whole estate of the bankrupt is assigned, under the law, to the trustee, and that then the claim of the bankrupt is to be made for his exemptions which are to be set apart by the trustee and determined by the court. The fact that the debtor has a homestead right in a tract of land does not change the nature of the property and make it non-assignable." Citing *In re Sisler* (D. C.), 2 Am. B. R. 700, 96 Fed. 402. See also, *In re Meredith* (D. C., Ga.), 16 Am. B. R. 331, 144 Fed. 230.

⁹⁷ *English Bankruptcy Act*, 1883, § 163.

⁹⁸ *Gorman v. Wright* (C. C. A., 4th Cir.), 14 Am. B. R. 135, 136 Fed. revg. 13 Am. B. R. 19.

Indorsed notes.—Notes of a bankrupt,

secured only by the personal indorsement of another, are not secured within the meaning of the Bankruptcy Act. *Stauffer, etc. Co. v. Abington Co.* (Sup. Ct., La.), 131 La. 715, 32 Am. B. R. 120, 60 So. 602.

⁹⁹ *Carson v. Chicago Title & Trust Co.*, 182 U. S. 438 5 Am. B. R. 814, sustaining many cases in the lower courts to the same effect, in which case the court said: "'Transfer' is defined to be not only the sale of property, but every other and different mode of disposing of or parting with property. All technicality and narrowness of meaning is precluded; the word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor to obtain a greater percentage of his debt than any other creditor of the same class." *Matter of Muir* (D. C., Pa.), 31 Am. B. R. 528, 212 Fed. 495. It has been held to include the delivery and indorsement of firm notes by a member of a partnership. *Matter of Frazier* (D. C., N. Y.), 34 Am. B. R. 467, 221 Fed. 83.

Payment of money.—It was settled in the *Carson* case *supra*, that money is "property" within the meaning of the Bankruptcy Act, and that a payment of money is a "transfer." *West v. Bank of Lahoma*, 16 Am. B. R. 733, 16 Okla. 508, 86 Pac. 59. See also *Jaquith v. Alden*, 9 Am. B. R. 773, 189 U. S. 78, 47 L. Ed. 620, 23 Sup. Ct. 649; *In re Pfaffinger* (D. C., Ky.), 18 Am. B. R. 807, 154 Fed. 528; *Boyd v. Lemon Gale Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 81, 83, 114 Fed. 647; *Landry v. Andrews*, 6 Am. B. R. 281, 21 R. I. 597; *In re Sloan* (D. C., Iowa), 4 Am. B. R. 356, 102 Fed. 116; *In re Ft. Wayne Elec. Corp.* (C. C. A., 7th Cir.), 3 Am. B. R. 634, 99 Fed. 400; *Knost v. Wilhelmy* (Ref., Ohio), 2 Am. B. R. 471; *Johnson v. Wald* (C. C. A., 5th Cir.), 2 Am. B. R. 84, 91, 93 Fed. 640.

⁹⁹ *Matter of Riggs Restaurant Co.* (C. C. A., 2d Cir.), 11 Am. B. R. 508, 130 Fed. 691. This case was decided under the New York statute and the case of *Butler v. Miller*, 1 N. Y. 500, was cited, in which the court said: "A personal mortgage is more

mortgage voluntarily created by the debtor.¹⁰⁰ It includes orders drawn by the bankrupt, which operate as assignments of the funds upon which they are drawn.¹⁰¹ It is not, however, sufficiently broad to include a preferential payment to a creditor within the meaning of the term "transferred" so as to bar a discharge under § 14-b (4), in the absence of a fraudulent intent.¹⁰² The performance of labor by a debtor for a creditor does not constitute a "transfer of property."¹⁰³ Nor does a "transfer" include a bailment; it was only intended to apply to cases where from the nature of the contract, the title to the property has become vested in the bankrupt to such an extent as to render it his property, and as such liable for the payment of his debts.¹⁰⁴ The words "as a payment, pledge, mortgage, gift or security," as used in this definition are illustrative merely, and do not so qualify the meaning of the term as to permit a transfer by any other method.¹⁰⁵ In § 67-e, "transfer" seems to be used as something different from "conveyance," "assignment" and "encumbrance," though the better opinion is that this was an inadvertence in the drafting of the law, and that even here the general word includes those that are specific. This definition becomes important in §§ 3-a (1) (2) and b (1), 57-g, 60-a, 67-e, four of the leading sections of the law. Its significance to a proper understanding of the statute cannot be too much emphasized.

i. **Wage-earner.**—This term is defined in subdivision 27 of this section. Cases interpreting this definition are already numerous. A traveling salesman was held not to be a wage-earner;¹⁰⁶ yet, under the meaning of the word, as used in local statutes, may be.¹⁰⁷ But he is not within the definition if he receives a salary of \$100 per month, and his board and lodging which were worth \$40 per month to him.¹⁰⁸ The doubt as to this question led to the amendment of § 64-b (4) by the act of 1906, giving traveling salesmen the same priority as other wage-earners.¹⁰⁹ A bookkeeper working for a stated

than a mere security. It is a sale of the thing mortgaged and operates as a transfer of the whole legal title to the mortgage, subject only to be defeated by the full performance of the condition."

100. In *re Tindal* (D. C., S. Car.), 18 Am. B. R. 773, 155 Fed. 456; *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 152 Fed. 943; In *re Wright Lumber Co.* (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1011, 1013.

A voluntary confession of a judgment in favor of certain of the creditors of any insolvent is a transfer. In *re Nasbaum* (D. C., N. Y.), 18 Am. B. R. 598, 152 Fed. 835; *Grant v. National Bank of Auburn* (D. C., N. Y.), 28 Am. B. R. 712, 197 Fed. 581. Allowing a judgment to be taken and docketed, thereby creating a lien and a security for the debt, may constitute a transfer, for it would be or might be a disposition of real property by way of security. In *re Tupper* (D. C., N. Y.), 20 Am. B. R. 824, 826, 163 Fed. 766.

Surrender to attaching creditor.—Where a bankrupt parts with the possession of property to the attaching officer, conditionally and as security, it may be admitted that there has been a transfer of the property. In *re Crafts-Riordan Shoe Co.* (D. C., Mass.), 26 Am. B. R. 449, 185 Fed. 931.

101. In *re Hines*, (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 543; *McDonald v. Clearwater Ry. Co.* (Cir. Ct., Idaho), 21 Am. B. R. 182, 164 Fed. 1007.

102. *Matter of Maher* (Ref., Mass.), 15 Am. B. R. 786, aff'd 16 Am. B. R. 340, 144 Fed. 505.

103. In *re Steers Lumber Co.* (C. C. A., 2d Cir.), 7 Am. B. R. 332, 112 Fed. 406, affg. 6 Am. B. R. 315, 110 Fed. 738.

104. *Walter A. Wood Co. v. Vanstory* (C. C. A., 4th Cir.), 22 Am. B. R. 740, 171 Fed. 375; See, also, In *re Columbus Buggy Co.* (C. C. A., 8th Cir.), 16 Am. B. R. 759, 143 Fed. 861.

105. In *re Stege* (C. C. A., 2d Cir.), 8 Am. B. R. 515, 116 Fed. 342, 54 C. C. A. 116.

106. In *re Scanlan* (D. C., Ky.), 3 Am. B. R. 202, 97 Fed. 26; In *re Greenwald* (D. C., Pa.), 3 Am. B. R. 696, 99 Fed. 705.

107. In *re Lawlor* (D. C., Wash.), 6 Am. B. R. 184, 110 Fed. 135.

108. In *re Hurley* (D. C., Minn.), 29 Am. B. R. 567, 204 Fed. 126.

109. See cases cited under section 64, subtitle "Traveling or city salesmen." As to priority where traveling salesman claims for \$175 earned within five weeks prior to adjudication of employer, see *Matter of Brecker & Co.* (D. C., N. Y.), 31 Am. B. R., 596.

Effect on priorities under § 64b(4).—The

salary when the act of bankruptcy was committed is a wage-earner.¹¹⁰ A teamster working with his team for day wages hauling logs and performing other similar services is a wage-earner.¹¹¹ A person who acts as the agent or representative of another in conducting the business of such other, but who has no interest therein, and is paid a salary or wage for his services is a wage-earner.¹¹² But a music teacher giving music lessons at a certain sum an hour is not.¹¹³ Nor is a married woman a wage-earner who lives at home and performs the ordinary domestic duties of a married woman, but at certain times during the year, when not otherwise engaged at home, performs services for others than the members of her own family.¹¹⁴ The definition resolves itself into what constitutes working for salary or hire, and, in the end, to the rulings of the State courts on analogous provisions in State laws.¹¹⁵ The importance of this definition is found in the fact that wage-earners cannot be petitioned against,¹¹⁶ and are entitled to priority of payment for a limited period of labor prior to the bankruptcy.¹¹⁷ All of these matters will be taken up and discussed at length in their proper connection.

IV. JUDICIAL DEFINITIONS.

a. **Preferences.**—Though this word is not defined in this section, the supreme court has held that § 60-a is a definition.¹¹⁷ A preference under this law has then but three elements: (a) insolvency, (b) the procuring or suffering of a judgment or the making of a transfer by the bankrupt, (c) a consequent inequality between creditors of the same class.¹¹⁸ A voidable preference is something very different.¹¹⁹ It follows, also, that only transfers and judgments can be preferences. The English law continues to distinguish between mere preferences and those that are either "fraudulent"¹²⁰ or "undue." The result of our new meaning to an oldtime word has been far-reaching.¹²¹

definition does not refer to or limit section 64b(4) giving priority to wages due to workmen, clerks, traveling or city salesmen, or servants, earned within three months; but was intended only to define the phrase "wage-earner" in any provision of the Bankruptcy Act or proceeding relating thereto in which the word may be found, and especially section 4b, which provides that any person, excepting a wage-earner or a person engaged chiefly in farming or the tillage of the soil, etc., may be adjudged an involuntary bankrupt. *Blessing v. Blanchard* (C. C. A., 9th Cir.), 35 Am. B. R. 125, 213 Fed. 35.

110. In re Pilger (D. C., Wis.), 9 Am. B. R. 244, 118 Fed. 206, where it was also held that the fact that the bookkeeper was a stockholder and officer of the insolvent corporation was immaterial.

111. In re Yoder (D. C., Pa.), 11 Am. B. R. 445, 127 Fed. 894. But see *Matter of Winton Lumber & Mfg. Co.* (Ref., Ky.), 17 Am. B. R. 117.

112. *Hermanos v. Fernandez* (D. C., Porto Rico), 39 Am. B. R. 345, 9 P. R. Fed. 439.

113. *First National Bank of Wilkes Barre v. Barnum* (D. C., Pa.), 20 Am. B. R. 459, 160 Fed. 245, considering a number of cases relative to what constitutes earning wages.

114. *Matter of Remaley* (Ref., Pa.), 23 Am. B. R. 29, in which case it was declared that the test in determining whether a person is a wage-earner is: Does the person claiming to be a wage earner depend, first and foremost, upon the return from his personal service for his maintenance and support?

The definition of "wage-earner," contained in section 1 (27) of the Bankruptcy Act, is not applicable to the claim of the president and general manager, and the treasurer and assistant general manager, of a corporation so as to bring such claims within section 64b (4), giving priority to "wages due workmen," etc., merely because claimants received salaries. In re *Crown Point Brush Co.* (D. C., N. Y.), 29 Am. B. R. 638, 200 Fed. 882.

114. As to what persons are within the purview of statutes affecting the enforcement of claims for services, see article by Mr. C. B. Labatt in 44 Can. Law Journal, 369-427.

115. See Bank. Act, § 4-b, *post*.

116. See Bank. Act, § 64-b (4), *post*.

117. *Carson v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, where it is said: "Subdivisions a and b (of § 60) are concerned with a preference given by a debtor to his creditor. Subdivision a defines what shall constitute it, and subdivision b states a consequence of it" (p. 116).

To same effect, in re *Rosenberg* (Ref., N. Y.), 7 Am. B. R. 316; *Swarts v. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1. Compare, however, *Stern v. Louisville Trust Co.* (C. C. A., 6th Cir.), 7 Am. B. R. 305, 112 Fed. 501.

118. See Bank. Act, § 60, *post*.

119. See Bank. Act, § 60-b, *post*.

120. Eng. Bankruptcy Act of 1883, § 48.

121. Compare *Carson*, *Pirle*, etc. v. *Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R.

b. Dividends.—Prior to the amendments of 1903, the meaning of “dividends” was important as a basis for compensation of trustees and referees under §§ 40-a and 48-a. The term has been defined as “a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors or in a different proportion.”¹²² It may be doubted whether this is correct, since, under § 65-a, dividends can only be paid on claims which are neither secured nor entitled to priority.¹²³ It may also be doubted whether § 65-a amounts to a definition at all.¹²⁴ The meaning of this word is, however, now unimportant.¹²⁵

c. Property.—The English Bankruptcy Act of 1883 defines property as including “money, goods, things in action, land and every description of property, whether real or personal and whether situate in England or elsewhere, also obligations, easements, and every description of estate, interest or profit, present or future, vested or contingent, arising out of or incident to property as defined above.”¹²⁶ This definition is comprehensive. Section 70-a of our law indicates, in words which are at times oddly narrow and again surprisingly broad, what property passes to the trustee. Otherwise, the law contains no definition of “property.”

814, with *In re Hall* (Ref., N. Y.), 4 Am. B. R. 671, 679; and note changes due to amendments of 1903, under § 60, *post*.

122. *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 311, 97 Fed. 547.

123. *In re Utt* (C. C. A., 7th Cir.), 5 Am. B. R. 383, 105 Fed. 754.

124. Thus compare *In re Gerson* (D. C.,

Pa.), 2 Am. B. R. 352, 107 Fed. 897, with *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 322, and *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547.

125. Commissions are now paid on “moneys disbursed.” §§ 40-a and 48-a.

126. English Bankruptcy Act, 1883, § 168.

SECTION TWO

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION

§ 2. That the courts of bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several States, the supreme court of the District of Columbia, the districts courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services *as provided in section forty-eight of this act*;* (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in

* The amendment of 1910 inserted the matter in italics, and omitted the words "but not at a greater rate than in this act allowed trustees for similar services."

controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; (19) transfer cases to other courts of bankruptcy; and (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.* Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

Analogous provisions: In U. S.: Act of 1867, §§ 1, 11, 49, and R. S., §§ 563, 711, 4972, 4973, 4974, 4975, 4977, 4978, 4978-a, 4978-b, 4979, 5014; Act of 1841, §§ 6, 16; Act of 1800, § 2.

In Eng.: Act of 1883, §§ 92, 93, 94, 95, 99, 100, 102.

In Can.: Act of 1919, §§ 5, 15, 27, 63, 64, 67, 71.

Cross-references: To the law: As to exercise of jurisdiction in respect: Adjudication, §§ 1 (18), 18, 38-a (1). Allowance of claims, §§ 57, 63. Appointment of receivers and marshals, §§ 2 (15), 3-e, 69-a. Offenses by bankrupts, officers, etc., § 29. Conduct of business by receivers, marshals or trustees, §§ 2 (3, 15), 48, 72. Additional parties.

* The amendment of 1910 added subdivision 20 to this section.

§§ 23, 58-a (7), 59. Collection and distribution of bankrupt's estate and settlement of controversies, §§ 23-b, 47-a (2, 4, 9), 65. Closing and reopening estates, § 47. Compositions, §§ 12, 13. Confirmation, modification and overruling acts of referee, § 38-a. Exemptions, §§ 6, 7(8), 47-a (11). Discharge, §§ 14, 15. Obedience to lawful orders, §§ 2(15, 16), 41-a. Extradition, § 10. Lawful orders, process, etc., §§ 11, 21-a. Contempts, § 41. Appointment and removal of trustees, §§ 44, 46. Taxation of costs, §§ 3-e, 62, 64-b(3). Transfer of causes, § 32. Ancillary jurisdiction, § 23-b.

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I. JURISDICTION IN GENERAL.

a. What are courts of bankruptcy.—As in England, where in the London district the high court, and elsewhere the county courts, have jurisdiction in bankruptcy, our law avails itself of an existing organization and confers bankruptcy jurisdiction on the district courts in the States and Territories, and the corresponding courts in the District of Columbia and Alaska.¹ The English court of bankruptcy in the London district is in effect a separate court, devoted exclusively to bankruptcy matters, and appeals are uniformly heard by the same judge of the Court of Appeal.² This is not so in this country. It would seem, however, that, under our system, the district courts while sitting in bankruptcy are also separate courts, exercising a distinct jurisdiction, different from that, for instance, of the same courts while sitting in admiralty.³

b. Bankruptcy court as court of equity.—A bankruptcy court is a court of equity, seeking to administer the law according to its spirit, and not merely by its letter.⁴ Proceedings in bankruptcy generally are in the nature of pro-

1. See Bankr. Act, § 1 (8). *ante*.

2. Eng. Bankruptcy Act, 1883, §§ 90-95.

3. In re Norris, Fed. Cas. 10,804.

4. In re Kane (C. C. A., 7th Cir.), 11 Am. B.

R. 533, 127 Fed. 532; Zeltinger v. Hargadine, etc. Co. (C. C. A., 8th Cir.), 40 Am. B. R. 324, 244 Fed. 719. See Am. B. R. Dig., § 15.

ceedings in equity,⁵ and frequently call for the exercise of full equity powers in the ascertainment and proper enforcement of the equities of the parties; where this is so the court may apply equitable rules and will be governed by equitable principles.⁶ But the bankruptcy act does not confer upon the bankruptcy court

The words "at law" as used in the first sentence conferring on courts of bankruptcy "such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings," may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law and not in equity. *Bardes v. Bank*, 4 Am. B. R. 163, 173, 178 U. S. 524.

Equitable jurisdiction.—The bankruptcy court is a court of equity and, controlled by the statute, may do equity guided by the well-defined and established principles of equity jurisprudence. *Matter of Syracuse Gardens Co.* (D. C., N. Y.), 37 Am. B. R. 354, 231 Fed. 284.

5. *Bardes v. Hawarden Bank*, 4 Am. B. R. 163, 173, 178 U. S. 150, 524, 44 L. Ed. 1175; *Mason v. Wolkowich* (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 699; *In re Waugh* (C. C. A., 9th Cir.), 13 Am. B. R. 187, 192, 133 Fed. 281; *Lockman v. Lang* (C. C. A., 8th Cir.), 11 Am. B. R. 597, 132 Fed. 1; *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 182; *Swartz v. Siegel*, 8 Am. B. R. 689, 117 Fed. 13; *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363; *Matter of Brenner* (D. C., Pa.), 26 Am. B. R. 646, 190 Fed. 209; *In re Thompson-Breeze Co.* (D. C., Ohio), 30 Am. B. R. 105; *Ogden & Jamison v. Gilt Edge Mines Co.* (C. C. A., 8th Cir.), 34 Am. B. R. 893, 225 Fed. 723; *Matter of Velez* (D. C., Porto Rico), 39 Am. B. R. 307, 9 Porto Rico Fed. 404; *Clark v. Johnson* (C. C. A., 8th Cir.), 40 Am. B. R. 330, 245 Fed. 442; *Matter of Port Tampa Phosphate Company* (D. C. Mass.), 41 Am. B. R. 154; *Searle v. Mechanics Loan & Trust Co.* (C. C. A. 9th Cir.), 41 Am. B. R. 736, 249 Fed. 942.

Proceedings in equity.—In the case of *Westall v. Avery* (C. C. A., 4th Cir.), 22 Am. B. R. 673, 171 Fed. 626, the court said: "It is well settled that bankruptcy proceedings themselves are purely equitable in their character and within the limits prescribed by the Bankruptcy Acts and the special rules of practice prescribed by the Supreme Court are to be administered in accord with the general principles and practices of equity."

How it happened that jurisdiction in equity became of an equitable nature is explained historically in an interesting way in *Robson's Bankruptcy* (2d Ed.), p. 2.

The administration and distribution of the property of bankrupts is a proceeding in equity. The jurisdiction to inquire and determine who the lawful owners are, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time or to be barred of any right or interest in the property in its custody or in its proceeds, is a power inherent in every court of equity incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds. *Nisbet v. Federal Title & Trust Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 222, 229 Fed. 644.

Equitable relief.—A bankruptcy court as a court of equity may afford relief where one party with a full opportunity to avoid the result has placed it in the power of another to injure a third. *Matter of Virgin* (D. C., Ga.), 35 Am. B. R. 494, 224 Fed. 128.

6. **Application of equitable rules.**—In *re Siegel-Hillman Dry Goods Co.* (D. C., Mo.), 7 Am. B. R. 351, 358, 111 Fed. 983, holding that cases in bankruptcy are peculiarly within the rule that where a court of equity is charged with the distribution of an estate or a fund under its control, and has before it the several parties whose rights and interests are involved in the administration of the estate, it may, disregarding mere matters of form, but having regard to the substantial rights of all the parties, ascertain the ultimate relation and liability of the several parties, and base its decree thereon, thus avoiding the delay and expense which would be caused if the parties were remitted to the pursuit of their legal rights without aid from a court of equity; *In re Chase* (C. C. A., 1st Cir.), 10 Am. B. R. 677, 680, 124 Fed. 753; *Batchelder & Lincoln Co. v. Whitmore* (C. C. A., 1st Cir.), 10 Am. B. R. 641, 646, 122 Fed. 355, where it was held that the law applicable to proofs of debt in bankruptcy is governed by equitable considerations; *In re Broadway Sav. Trust Co.* (C. C. A., 8th Cir.), 18 Am. B. R. 254, 257, 150 Fed. 152, holding that a proceeding in bankruptcy is a proceeding in equity, and the rules and practice in equity prevail as far as they are consonant with the speedy administration of justice which is prescribed; *In re Hersikopf* (C. C. A., 9th Cir.), 9 Am. B. R. 745, 118 Fed. 101; *Matter of Larkey* (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867; *Matter of Association Dairy Co.* (D. C., Conn.), 42 Am. B. R. 321, 251 Fed. 749; *Matter of Roseboom* (D. C., N. Y.), 42 Am. B. R. 437, 253 Fed. 136; *Martin v. Oliver* (C. C. A., 8th Cir.), 43 Am. B. R. 739, 260 Fed. 89.

Right to trial by jury does not exist in bankruptcy proceedings, except as provided in § 19, *post*, since such proceedings are equitable in their nature. *In re Rude* (D. C., Ky.), 4 Am. B. R. 319, 101 Fed. 805; *In re Christensen* (D. C., Iowa), 4 Am. B. R. 99, 101 Fed. 802.

Writ of *ne exeat* does not issue unless a suit in equity is commenced; a bankruptcy proceeding is a suit in equity for such purpose. *In re Lipke* (D. C., N. Y.), 3 Am. B. R. 599, 98 Fed. 970.

Adequate remedy at law.—In the case of *Sessler v. Nemcof* (D. C., Pa.), 26 Am. B. R. 618, 183 Fed. 656, the court said: "If the trustee has an adequate remedy at law, a bill in equity cannot be maintained, in this or in any other court. Whatever equitable jurisdiction may have been conferred upon the District Court by the Bankruptcy Act and the amendments thereto, it is confined to controversies relating to a bankrupt estate. Within this limited area, whether or not a

jurisdiction to entertain a plenary suit in equity,⁷ except where concurrent jurisdiction is conferred upon such court to set aside a preference, a fraudulent transfer made within four months preceding bankruptcy,⁸ and a transfer which any creditor of the bankrupt might have avoided.⁹ If a court of bankruptcy has jurisdiction of the person or subject matter, it may exercise the plenary powers of a court of equity for the ascertainment and enforcement of the rights and equities of the various parties interested in the estate of the bankrupt.¹⁰ If a proceeding to set aside an alleged fraudulent transfer is instituted in a court of bankruptcy it must be governed as to pleading and practice by the laws applicable to that court.¹¹ Being a court of equity it will exercise the equitable power of intervening in cases of mistake.¹² As a court of equity it is empowered to protect a tax payer, whose property was in its custody, from a fraudulent and excessive assessment.^{12a}

c. Jurisdiction is limited by statute.—The origin of courts of bankruptcy is statutory, and they have no powers or jurisdiction other than is conferred on them by, or necessarily implied from, the statute.¹³ Their jurisdiction is limited—that is, limited in respect to the subjects over which they may exercise jurisdiction.¹⁴ They possess only such powers as are conferred upon

bill in equity may be maintained must be tested by the ordinary rules that govern bills before any other tribunal, and perhaps the most familiar test is to inquire whether the plaintiff has an adequate remedy at law."

7. *Bardes v. Hawarden Bank*, 4 Am. B. R. 183, 178 U. S. 524, 44 L. Ed. 1175; *In re Hutchinson & Wilmoth* (C. C. A., 6th Cir.), 19 Am. B. R. 313, 318, 158 Fed. 74; *Brumbey v. Jones* (C. C. A., 5th Cir.), 15 Am. B. R. 578, 141 Fed. 318; *Havens & Geddes Co. v. Pierck* (C. C. A., 7th Cir.), 9 Am. B. R. 569, 120 Fed. 244.

8. See § 23-b, *post*, § 60-b, *post*, § 67-e, *post*.

9. See § 70-e, *post*. *Atherton v. Beaman* (D. C., Mass.), 40 Am. B. R. 273, 243 Fed. 930.

10. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, where it was held that a district court may under § 2 (3), (7) determine, in a plenary suit in equity, the title to property claimed by a trustee in bankruptcy to have been surrendered to third parties by the temporary receiver, after the filing of a voluntary petition in bankruptcy without right and without authority from the court.

Amendment of 1903.—The Supreme Court came to this conclusion without reference to the effect of the amendment of 1903 to § 70-e of this act. The effect of this amendment has been considered in *Hurley v. Devlin* (D. C., Kan.), 17 Am. B. R. 797, 149 Fed. 268, and it was there held that Congress intended to confer upon bankruptcy courts equity jurisdiction in suits arising under § 70-e to set aside transfers which creditors might have avoided. See also *Manning v. Evans* (D. C., N. J.), 19 Am. B. R. 217, 156 Fed. 106; *In re Hutchinson & Wilmoth* (C. C. A., 6th Cir.), 19 Am. B. R. 313, 318, 158 Fed. 74; *Skewis v. Barthell* (D. C., Iowa), 18 Am. B. R. 429, 153 Fed. 534. These cases are now confirmed by the amendment of § 23-b by the act of 1910, which expressly authorizes suits for the recovery of property under § 70-e in district courts. The cases of *Hull v. Burr* (C. C. A., 5th Cir.), 18 Am. B. R. 541, 153 Fed. 945; *Warmath v. O'Daniel* (C. C. A., 6th Cir.), 20 Am. B. R. 101, 159 Fed. 87, are no longer of any force. The effect of this amendment upon the jurisdiction of the court to entertain plenary suits to set aside transfers in fraud of creditors will be further considered under § 70-e, *post*.

10. *In re Swafford Bros. Dry Goods Co.* (D. C., Mo.), 25 Am. B. R. 282, 180 Fed. 549; *Matter of National Boat and Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208; *Matter of Larkey* (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867; *Matter of Ohio Copper Mining Co.* (D. C., N. Y.), 39 Am. B. R. 284, 241 Fed. 711; *Dalton v. Humphreys* (C. C. A., 4th Cir.), 39 Am. B. R. 360, 242 Fed. 777.

Proceeding to determine validity of mortgage.—A United States District Court sitting in bankruptcy has jurisdiction of a suit in equity brought by a trustee in bankruptcy to determine the validity of a mortgage and to restrain the foreclosure thereof where the possession of the property is in the court. *Karasik v. People's Trust Co.* (D. C., N. Y.), 39 Am. B. R. 830, 241 Fed. 939.

Jurisdiction to impress property with trust in favor of third person.—A court of bankruptcy has jurisdiction of an ancillary proceeding instituted by a third person to impress property, in the possession of the court, with a trust in favor of such person, based on the ground that the property was purchased by the bankrupt with funds fraudulently obtained from such person. *Jaffe v. Pyle* (C. C. A., 5th Cir.), 40 Am. B. R. 219, 242 Fed. 67.

11. *Westall v. Avery* (C. C. A., 4th Cir.), 22 Am. B. R. 678, 171 Fed. 626, holding that such a proceeding brought in a Federal court is governed by the Federal equity practice, unaffected by the procedure obtaining in the State courts.

12. *Matter of Brenner* (D. C., Pa.), 26 Am. B. R. 446, 190 Fed. 209.

12a. *Cross v. Georgia Iron & Coal Co.* (C. C. A., 5th Cir.), 41 Am. B. R. 385, 250 Fed. 438.

13. *Bardes v. Hawarden Bank*, 178 U. S. 524, 4 Am. B. R. 183, 44 L. Ed. 1175; *In re Elmira Steel Co.* (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456; *In re Williams* (D. C., Ark.), 9 Am. B. R. 741, 120 Fed. 38; *Brumbey v. Jones* (C. C. A., 5th Cir.), 15 Am. B. R. 578, 141 Fed. 318; *Jobbins v. Montague*, Fed. Cas. 7,329; *In re Morris*, Fed. Cas. 9,825; *Houston v. Shear* (Tex. Ct. of Civ. App.), 43 Am. B. R. 462, 210 S. W. 976.

Rules of procedure.—The United States Conformity Act does not make the State rules of procedure apply to bankruptcy courts. The practice and procedure of those courts is prescribed exclusively by the Bankruptcy Act and the General Orders and regulations pursuant thereto. *Matter of Veler* (C. C. A., 6th Cir.), 41 Am. B. R. 736, 249 Fed. 633.

14. *Edelstein v. United States* (C. C. A., 8th Cir.), 17 Am. B. R. 649, 652, 149 Fed. 636; *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 86, 145 Fed. 395; *Taft v. Century Sav. Bank* (C. C. A., 8th Cir.), 15 Am. B. R. 594, 597, 141 Fed. 369.

The distribution of the judicial power of the United States among the courts of the United States is entirely within the control of Congress. *Johnson Co. v. Wharton*, 153 U. S. 252, 260. All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of actions. *Windsor v. McVeigh*, 93 U. S. 274, 282.

them, either expressly or by necessary implication.¹⁵ But they are not courts of limited jurisdiction in respect to matters which are within their jurisdiction.¹⁶ In respect to the matters coming within their jurisdiction their judgments possess every attribute of finality and estoppel which pertains to those of courts of general jurisdiction.¹⁷ Such courts are not inferior courts in the sense that essential jurisdictional facts must affirmatively appear upon the record.¹⁸ It is not sufficient to allege facts showing jurisdiction; there must be evidence establishing such facts.¹⁹

d. Jurisdiction either exclusive or concurrent.—There are two distinct classes of jurisdiction conferred upon courts of bankruptcy by this section: First, jurisdiction over the proceedings in bankruptcy, initiated by the petition and ending in the distribution of assets among the creditors, and the discharge of, or refusal to discharge, the bankrupt. Second, jurisdiction as an ordinary court, of suits at law or in equity in respect to the estate of the bankrupt.²⁰ The first class of jurisdiction possessed by such courts is exclusive.²¹ It includes the power to adjudicate as to bankruptcy,²² and, after

The cardinal principle of the bankruptcy act is to conserve to creditors only such rights as would have been theirs had not bankruptcy intervened, and to save to the bankrupt such rights as would have been his against creditors seeking to enforce their claims by ordinary judicial process. *In re Cohn* (D. C., No. Dak.), 22 Am. B. R. 761, 171 Fed. 568.

15. *Matter of Hollins* (C. C. A., 2d Cir.), 36 Am. B. R. 168, 229 Fed. 349.

16. *In re Marion Contract & Const. Co.* (D. C., Ky.), 22 Am. B. R. 81, 166 Fed. 618.

A court of bankruptcy is of limited jurisdiction, in the sense that it can take cognizance of particular subjects only, namely, those included within the intendment of the statute; but its jurisdiction is unlimited in respect of its powers over proceedings in bankruptcy specifically made subject to its jurisdiction by § 2. *Sabin v. Larkin-Green Logging Co.* (D. C., Or.), 34 Am. B. R. 210, 218 Fed. 984.

17. *In re First Nat. Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 273, 152 Fed. 64; *Edelstein v. United States* (C. C. A., 8th Cir.), 17 Am. B. R. 649, 652, 149 Fed. 636.

18. *In re First Nat. Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 152 Fed. 64; *In re Columbia Real Estate Co.* (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 935; *Hays v. Ford*, 55 Ind. 52; *Bryant v. Kinyon*, 6 Am. B. R. 237, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 871; *In re Elmira Steel Co.* (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456.

Limited, but not inferior.—The district court of the United States is a court of limited but not inferior jurisdiction. Congress has conferred upon it original and exclusive jurisdiction to adjudge bankruptcies, and its judgments therein are supported by the same presumptions which are indulged in favor of the judgments of all superior courts of general jurisdiction. *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 86, 145 Fed. 395.

19. *Plant v. Gorham Mfg. Co.* (D. C., N. Y.), 23 Am. B. R. 42, 174 Fed. 852.

20. *Lathrop v. Drake*, 91 U. S. 516; *Bardes v. Hawarden Bank*, 178 U. S. 524, 4 Am. B. R. 163.

21. *Bardes v. Hawarden Bank*, 178 U. S. 524, 4 Am. B. R. 163; *In re Watts & Sachs*, 190 U. S. 1, 10 Am. B. R. 113; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623; *In re Marion Contract & Const. Co.* (D. C., Ky.), 22 Am. B. R. 81, 166 Fed. 618; *In re Knight* (D. C., Ky.), 11 Am. B. R. 1, 6, 125 Fed. 35; *Matter of Lengert Wagon Co.* (D. C., N. Y.), 6 Am. B. R. 535, 110 Fed. 927; *In re Schloerb* (D. C., Wis.), 3 Am. B. R. 224, 27 Fed. 326; *Lea Bros. & Co. v. West Co.* (D. C., Va.), 1 Am. B. R. 261, 91 Fed. 237; *In re Huddleston* (Ref., Ala.), 1 Am. B. R. 572; *Matter of Maplecroft Mills* (D. C., S. Car.), 33 Am. B. R. 815, 218 Fed. 659; *Matthew's Sons v. Webre Co.* (D. C., La.), 32 Am. B. R. 180, 213 Fed. 396; *Matter of Yargan Naval Stores Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 269, 214 Fed. 563; *DeMuth v. Faw* (Wash. Sup. Ct.), 42 Am. B. R. 151, 174 Pac. 18; *Matter of Diamond's Estate* (C. C. A., 6th Cir.), 44 Am. B. R. 268, 259 Fed. 70; *Greene v. Moore* (Cal. Dist. Ct. of App.), 44 Am. B. R. 326, 184 Pac. 506.

Exclusive jurisdiction.—The jurisdiction of the bankruptcy court is intended to be exclusive of all other courts, and such proceedings include all matters of administration and the determination of rights between contending parties with relation to the estate upon a fund in the custody of the court. *Gibbs v. Dexter Horton Trust & Savings Bank* (D. C., Wash.), 35 Am. B. R. 632, 225 Fed. 424.

Estate in custodia legis.—The exclusive jurisdiction of the court is so far *in rem* that the estate is regarded as *in custodia legis* from the time of the filing of the petition. *Matter of Schou* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514.

22. *In re Gutwillig* (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475; *In re Slevens* (D. C., Mo.), 1 Am. B. R. 117, 91 Fed. 366.

adjudication, to administer the bankrupt estate.²³ Once acquiring the custody of the bankrupt's property, by adjudication of bankruptcy, the court is vested with exclusive jurisdiction to determine all liens and interests affecting it.²⁴ The possession or custody may be constructive, as well as actual; that is if the property is held by third parties for the benefit of the bankrupt, it will be deemed in the custody of the court.²⁵ Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby, withdrawn from the jurisdiction of all other courts. This rule applies generally to all courts, State or Federal.²⁶ The defense that bankruptcy proceedings are pending, interposed in a suit to foreclose a mortgage against the bankrupt's property will not be valid if the proceedings have not been prosecuted and the property in question was in the possession of a receiver appointed in

23. *Carpenter Bros. v. O'Connor* (D. C., Ohio), 1 Am. B. R. 381, 16 Ohio 526.

24. *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585; *American Graphophone Co. v. Leeds & Catlin Co.* (Cir. Ct., N. Y.), 23 Am. B. R. 337, 174 Fed. 158; *Clemenshaw v. International Shirt & Collar Co.* (D. C., N. Y.), 21 Am. B. R. 616, 165 Fed. 797; *Matter of First* (D. C., Mass.), 37 Am. B. R. 512; *Matter of Goldberg & Sagman* (D. C., N. Y.), 36 Am. B. R. 736, 232 Fed. 194; *Meek v. Eggerman* (Okla. Sup. Ct.), 36 Am. B. R. 458, 155 Pac. 522; *Goldbraith v. Grocery Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 752, 216 Fed. 842; *Matter of Dealgue & Son* (D. C., N. J.), 39 Am. B. R. 70, 241 Fed. 290; *Matter of Patterson Lumber Co.* (D. C., Tenn.), 40 Am. B. R. 545, 247 Fed. 578; *Board of Road Comrs. v. Kell* (C. C. A., 6th Cir.), 44 Am. B. R. 259, 259 Fed. 76. For additional cases on this subject, see Am. B. R. Dig., § 14; see also discussion and cases cited under § 23-a, *Summary jurisdiction, post*.

Exclusive Jurisdiction.—Where a District Court assumes jurisdiction of a bankruptcy proceeding, such jurisdiction is exclusive; and it has power by proper orders to prevent the doing of anything that will at any stage of the proceeding tend to embarrass it in the equitable distribution of the estate of the bankrupt. *Virginia Iron, Coal & Coke Co. v. Olcott* (C. C. A., 4th Cir.), 28 Am. B. R. 321, 197 Fed. 730.

Order of referee as bar to subsequent action in State court.—An order of a referee in bankruptcy, denying the right to recover a check payable to a trustee in bankruptcy, which has been deposited by a person not a creditor, as a part of the deposit required upon a composition, and payment thereon subsequently stopped after some controversy had arisen, is *res adjudicata* and a bar to a subsequent action in the State court by the maker of the check. *Coen v. James* (Sup. Ct., App. Div., N. Y.), 33 Am. B. R. 249, 164 N. Y. App. Div. 419.

Right to replevin property in possession of trustee.—Property in possession of a trustee in bankruptcy is under the control of the Bankruptcy Court and cannot be taken on replevin without the consent of said court. *Matter of Brockton Ideal Shoe Co.* (D. C., Mass.), 32 Am. B. R. 377, 212 Fed. 764.

A creditor may not stand aloof from the bankruptcy proceedings because dissatisfied with the trustee's administration, for there is ample provision in the Bankruptcy Act for his protection by appeal to the referee, and further on to the judge of the court if necessary. *Demuth v. Faw* (Wash. Sup. Ct.), 42 Am. B. R. 151, 174 Pac. 18.

Revocation of leave to prosecute in State court.—Where a bankruptcy court is through its receivers in complete possession of all the property of the bankrupt and has exclusive

jurisdiction of the *res*, it may, if it deems it proper and advisable, authorize the commencement of an action in the State court to establish an alleged vendor's lien, but it may before adjudication in such action revoke the leave granted and enjoin the party from prosecuting the lien elsewhere than in the District Court. *Inv. Reg. Ltd. v. C. & M. Elec. R. R. Co.* (C. C. A., 7th Cir.), 41 Am. B. R. 673, 251 Fed. 510.

25. *Orinoco Iron Co. v. Metzel* (C. C. A., 6th Cir.), 36 Am. B. R. 247, 230 Fed. 40, holding that where, at the time of the bankruptcy of a corporation, a fund arising from a settlement of the corporation's affairs with a foreign country was being held by the United States for the benefit of the bankrupt's estate, in which fund the government recognized the right of the trustee in bankruptcy, a district court of a State sitting in bankruptcy has exclusive jurisdiction to try and determine claims asserted by a creditor of the bankrupt to the fund held by the government, and may enjoin a suit by such creditor in the District of Columbia; *Matter of Wellmade Gas Mantle Co.* (D. C., Mass.), 36 Am. B. R. 354, 230 Fed. 502.

26. *Murphy v. John Hoffman Co.*, 211 U. S. 562, 21 Am. B. R. 487; *Matter of Traumbstein & White* (D. C., Mass.), 34 Am. B. R. 482, 225 Fed. 317; *Martin v. Oliver* (C. C. A., 8th Cir.), 43 Am. B. R. 739, 260 Fed. 89.

Possession of property by officers of court.—Where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or State. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. Jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be recognizable in them. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, the bankruptcy court has exclusive jurisdiction to determine the title as against an adverse claimant, and a State court has no jurisdictional right to take, or interfere with the possession of, said property in an action of replevin, or otherwise. *Darrough v. First National Bank of Claremore* (Okla. Sup. Co.), 37 Am. B. R. 75, 156 Pac. 191. See also *Jaffe v. Pyle* (C. C. A., 5th Cir.), 40 Am. B. R. 219, 242 Fed. 67.

a suit brought against the bankrupt prior to the bankruptcy.²⁷ This jurisdiction cannot be conferred by consent, if of the subject matter,²⁸ but can if of the person only.²⁹ The court having acquired jurisdiction its adjudication is conclusive upon the parties concerned, until set aside by review or appeal, and it cannot be questioned collaterally.³⁰

e. Jurisdiction of suits to recover property.—The animated controversy as to the proper forum for proceedings to recover property brought by the trustee was, in May, 1900, settled by the Supreme Court in *Bardes v. Hawarden Bank*.³¹ The amendment of § 23-b and the corresponding changes made in §§ 60-a, 67-e and 70-e by the act of 1903 are declaratory of the principle underlying this decision. The broad and elastic provisions of subdivisions 7 and 15 of this section, conferring, as they do, jurisdiction upon courts of bankruptcy to entertain suits by the trustee for the recovery of property alleged to have belonged to the bankrupt, are no longer limited by the provisions of § 23-b.³² It may be taken as settled that courts of bankruptcy as such have, within their respective territorial limits, ample, though, of course, as to suits, not exclusive, jurisdiction to do everything "which may be necessary for the enforcement of the provisions of the act." The jurisdiction of courts of bankruptcy to entertain suits brought by the trustee for the recovery of property will be further considered under § 23-b.

f. Courts always open.—Courts of bankruptcy are always open for the transaction of business.³³ It is expressly provided in this section that the jurisdiction conferred upon courts of bankruptcy may be exercised "in vacation, in chambers and during their respective terms." In most of the districts, bankruptcy matters are heard on certain days; this, for the convenience of the courts. Orders made in chambers in vacation are as effective as when made at a term or on a rule day.

g. Territorial extent of jurisdiction.—The act of 1867 limited the jurisdiction of courts of bankruptcy to "their respective districts." This has been held to mean that the exercise of those powers was limited to those districts.³⁴

Concurrent jurisdiction of subject matter.—While possession gives jurisdiction over the *res*, it does not control jurisdiction as to the subject matter. Another court will respect possession but it is at liberty to entertain another cause concerning the same subject matter so long as it does not oust the court first acquiring possession of the *res*. *Brown v. Crawford* (D. C., Ore.), 42 Am. B. R. 677, 254 Fed. 146.

27. *Clark v. Norwalk Steel & Iron Co.* (D. C., Ohio), 34 Am. B. R. 550, 188 Fed. 999.

28. *Matter of Hollins* (C. C. A., 2d Cir.), 36 Am. B. R. 168, 229 Fed. 349; *Jobbins v. Montague*, Fed. Cas. 7,330.

Effect of action of trustee on jurisdiction.—No action of the trustee can impair or affect the jurisdiction of the bankruptcy court over the bankrupt's estate. *Matthews & Sons v. Webre Co.* (D. C., La.), 32 Am. B. R. 180, 213 Fed. 396.

29. *Hall v. Kinell*, 103 Fed. 301. Compare, also, *In re Mason* (D. C., N. Car.), 3 Am. B. R. 599, 99 Fed. 256; *In re Smith* (D. C., Ct.), 9 Am. B. R. 98, 117 Fed. 961.

30. *Sabin v. Larkin-Green Logging Co.* (D. C., Ore.), 34 Am. B. R. 210, 218 Fed. 984.

31. 4 Am. B. R. 163, 178 U. S. 524, 44 L. Ed. 1,175.

32. For the effect of the failure of the act of 1903 to amend § 70-e to correspond

with the amendment of § 23-b, see discussion under § 70-e *post*.

33. *In re Ives* (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. 911, affg. s. c. 6 Am. B. R. 653, 111 Fed. 495; *In re Henschel* (D. C., N. Y.), 8 Am. B. R. 201, 114 Fed. 968.

As there are no terms of courts in bankruptcy an adjudication may be vacated after the expiration of the term wherein it was entered. The district court, for all purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit, are, therefore, at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation. *Matter of Rochester Baths Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 355, 222 Fed. 22, citing *Sandusky v. National Bank*, 23 Wall. 289.

Power to modify orders.—The general rule that the power of a court to modify its orders expires with the term at which they are granted does not apply to a bankruptcy court, as a proceeding in bankruptcy, from the time of its commencement until the final settlement of the estate, is but one suit. *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 708, 217 Fed. 16. See also *Hume v. Myers* (C. C. A., 4th Cir.), 39 Am. B. R. 401, 242 Fed. 827.

34. Consult *Lathrop v. Drake*, 91 U. S. 516, though the same is not exactly in point.

The present act vests jurisdiction in the courts of bankruptcy "within their respective territorial limits as now constituted." A court of bankruptcy may not, therefore, extend its process beyond the territorial limits of the district within which its ordinary jurisdiction may be exercised.³⁵ Thus, a subpoena in bankruptcy is not effective beyond the territorial limits of the court issuing it,³⁶ unless the residence of the person subpoenaed be less than one hundred miles away.³⁷ Likewise a bankruptcy court of one district cannot, by service of process outside of that district, obtain jurisdiction to summarily order a non-resident to deliver moneys collected upon which he claims a lien for

35. *In re Waukesha Water Co.* (D. C., Wis.), 8 Am. B. R. 715, 116 Fed. 1009; *In re Steele* (D. C., Ala.), 20 Am. B. R. 446, 161 Fed. 886; *In re Harris Co.* (D. C., N. Y.), 23 Am. B. R. 237, 173 Fed. 735; *Matter of Geller* (D. C., N. J.), 32 Am. B. R. 629, 216 Fed. 558; *Orinoco Iron Co. v. Metzel* (C. C. A., 6th Cir.), 36 Am. B. R. 247, 230 Fed. 40. See also under former act, *Jobbins v. Montague*, Fed. Cas. 7,329.

Enforcement of order beyond territorial limits.—In the case of *Staunton v. Wooden* (C. C. A., 9th Cir.), 24 Am. B. R. 736, 179 Fed. 61, the court said:

"In the present case the court made a summary order, directed against a resident of another State, ordering him to surrender property in that State to the trustee. It may be conceded that the court in which the petition in bankruptcy is filed has plenary jurisdiction in bankruptcy, co-extensive with the United States, to order and control the disposition of the bankrupt's estate, and is vested with jurisdiction to determine all liens thereon and all interests affecting it. *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585, 97 C. C. A. 535; *In re Dempster* (C. C. A., 8th Cir.), 22 Am. B. R. 751, 172 Fed. 353, 97 C. C. A. 51; *In re Muncie Pulp Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 56, 151 Fed. 732, 81 C. C. A. 116; *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285; *In re Granite City Bank* (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818, 70 C. C. A. 316. But this is not to say that the court of bankruptcy may issue its process to run into another district. It is one thing to issue citation to persons in another jurisdiction to appear before the court of bankruptcy in a proceeding which, in its exclusive jurisdiction, it is authorized to institute with a view to determining liens or rights of property wherever situate; but it is quite another thing to issue process to be enforced in another jurisdiction.

"By whom is the summary order in this case to be executed, and in what manner is obedience to it to be enforced? There is no express provision in the bankruptcy act, or in any statute, indicating the intention of Congress to confer such power. In *Toland v. Sprague*, 12 Pet. 328, 9 L. Ed. 1093, it was said:

"Whatever may be the extent of their jurisdiction over the subject-matter of suits,

in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any Circuit Court to have run into any State of the Union. It has not done so."

"The Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) limited the jurisdiction of courts of bankruptcy to 'their respective districts.' The present act invests them with jurisdiction 'within their respective territorial limits as now established, or as they may be hereafter changed;' and it has been held that a court of bankruptcy may not extend its process beyond the territorial limits of the district within which its ordinary jurisdiction may be exercised. In *re Waukesha Water Co.* (D. C., Wis.), 8 Am. B. R. 715, 116 Fed. 1009; *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 12 Am. B. R. 653, 131 Fed. 824; *In re Steele* (D. C., Ala.), 20 Am. B. R. 446, 161 Fed. 886. In view of these considerations, and the authorities, we are of the opinion that the District Court was not possessed of jurisdiction to make and enforce the summary order."

Injunction against third person in another district.—A District Court, sitting as a court of bankruptcy, has no jurisdiction to enjoin a person, who resides in another district and is not a party to the bankruptcy proceedings, from proceeding to enforce an assignment of wages made by a bankrupt, but the proper remedy is by ancillary proceedings instituted in the bankruptcy court in the district wherein such party resides. *Progressive Bldg. & Loan Co. v. Hall* (C. C. A., 4th Cir.), 33 Am. B. R. 313, 220 Fed. 45.

36. *Paine v. Caldwell*, Fed. Cas. 10,674. Compare, also, *In re Hamstreet* (D. C., Iowa), 8 Am. B. R. 760, 117 Fed. 568.

37. See Bank Act, § 41, *post*.

U. S. Rev. Stats. § 876 provides that: "Subpenas for witnesses, who are required to attend a court of the United States, in any district, may run into any other district. *Provided*, That in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same." See, also, *In re Hamstreet* (D. C., Iowa), 8 Am. B. R. 760, 117 Fed. 568; *In re Appel* (D. C., Neb.), 4 Am. B. R. 722, 103 Fed. 931, holding that, though served outside the district, it operates *in rem* within it.

services.³⁸ In States having several districts, this rule, in spite of the proviso clause of § 41-a, shortens the reach of the district courts and may make their process less effective than that of the State courts. A voluntary appearance of the party living without the district may constitute a waiver of the want of jurisdiction and confer jurisdiction over him,³⁹ although this would not be the case where the court has no jurisdiction of the subject matter.⁴⁰ The territorial limitation of jurisdiction as contained in the preliminary clause of this section is, of course, subject to the qualification made by subd. 20 of the section as added by the amendment of 1910, relative to the exercise of ancillary jurisdiction over persons or property in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy.⁴¹

h. Ancillary proceedings.—(1) **AMENDMENT OF 1910.** The amendment of 1910 added subd. 20 to subsection *a* of this section, expressly authorizing a court of bankruptcy to exercise ancillary jurisdiction within its territorial limits "in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy."

(2) **RULE PRIOR TO AMENDMENT.** Prior to the amendment of 1910 it was held that where process to seize the bankrupt's property was necessary, ancillary jurisdiction might be exercised,⁴² although this doctrine had been refuted in a number of well considered cases.⁴³ Under the act of 1867 there was no express provision conferring upon courts of bankruptcy ancillary jurisdiction, but it was held thereunder that such jurisdiction necessarily resulted from the general jurisdiction imposed in them and was in harmony with the scope and

38. *Matter of Geller* (D. C., N. J.), 32 Am. B. R. 629, 216 Fed. 558.

39. *In re Smith* (D. C., Cit.), 9 Am. B. R. 98, 117 Fed. 961; *Matter of Geller* (D. C., N. J.), 32 Am. B. R. 629, 216 Fed. 558.

Appearing as witness as conferring jurisdiction. The appearance of a non-resident as a witness at an examination under section 21a of the bankruptcy act and representation thereof by an attorney does not constitute such a general appearance as to give the court jurisdiction; *Matter of Geller* (D. C., N. J.), 32 Am. B. R. 629, 216 Fed. 558.

40. *Jobbins v. Montague*, Fed. Cas. 7,329.

41. See discussion under next paragraph.

42. *In re Benedict* (D. C., Wis.), 15 Am. B. R. 232, 140 Fed. 55; *In re John L. Nelson & Bro. Co.* (D. C., N. Y.), 18 Am. B. R. 66, 149 Fed. 590; *Matter of Sutter Bros.* (D. C., N. Y.), 11 Am. B. R. 632, 131 Fed. 654; *In re Peiser* (D. C., Pa.), 7 Am. B. R. 690, 115 Fed. 199; *In re Westfall Bros.* (D. C., Cal.), 8 Am. B. R. 431; *In re Schrom* (D. C., Iowa), 3 Am. B. R. 352, 97 Fed. 160; *Matter of Dunseath* (D. C., Pa.), 21 Am. B. R. 742, 168 Fed. 973; s. c., 22 Am. B. R. 75, 168 Fed. 973.

43. **Ancillary jurisdiction, prior to amendment of 1910**—*In re Williams* (D. C., Ark.), 9 Am. B. R. 741, 120 Fed. 38, the court was of the opinion that the bankruptcy act makes no provisions for ancillary or auxiliary proceedings in district courts other than that in which the proceedings are pending, and a petition for

an injunction to protect the assets of a bankrupt, where the proceedings were pending in another district, was denied. This opinion met the approval of the court in the case of *In re Williams* (D. C., Tenn.), 10 Am. B. R. 538, 120 Fed. 321, and in the case of *In re Von Hartz* (C. C. A., 2d Cir.), 15 Am. B. R. 747, 142 Fed. 726, where it was held that if a debtor is adjudicated a bankrupt in one district a bankruptcy court in another district cannot make a summary order directing one to whom the bankrupt had assigned his life insurance policy, to turn it over to his trustee. This question was fully discussed by Judge Hammon in *Ross-Meehan Foundry Co. v. Car & Foundry Co.* (D. C., Tenn.), 10 Am. B. R. 624, 124 Fed. 403, where the conclusion was reached that the "necessity for separate administrations and ancillary proceedings should not exist under any well-regulated system of bankruptcy. The design of the statute is to avoid all ancillary proceedings and secure one uniform possession of the estate by a single court of bankruptcy, having the jurisdiction to administer the assets everywhere under that statute." In the case of *Tybo Mining and Reduction Co.* (D. C., Nev.), 13 Am. B. R. 62, 132 Fed. 697, Judge Hawley refused to appoint an ancillary trustee to aid in the administration of a bankrupt estate, the proceedings in which were instituted in another district, on the ground that courts of bankruptcy are of limited jurisdiction—such

design of the act.⁴⁴ The better reasoning favored the exercise of such ancillary or auxiliary jurisdiction whenever necessary to preserve the bankrupt estate or recover property belonging to it, situated without the territorial limits of the district within which the estate was to be administered.⁴⁵ Congress has settled this disturbing controversy by expressly conferring upon bankruptcy courts ancillary jurisdiction over persons and property in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy.⁴⁶

(8) **EFFECT OF AMENDMENT.** The amendment of 1910 substantiates clearly those cases upholding the exercise of ancillary powers by courts of bankruptcy. However doubtful may have been the authority under the law prior to this amendment, there can be no doubt now that a court of bankruptcy in one district may aid a trustee or receiver, appointed by another in recovering funds belonging to the estate.⁴⁷ The ancillary tribunal may, upon petition, appoint an ancillary receiver to take charge of the property of the alleged bankrupt,⁴⁸ and may make an order and issue subpoenas for the examination of persons concerning the acts, conduct and property of the bankrupt.⁴⁹ Where testimony

as the statute gives, and no other—and that the statute confers no such jurisdiction. In the case of *In re Dempster* (C. C. A., 8th Cir.), 22 Am. B. R. 751, 172 Fed. 353, the court held that any proceeding necessary for the protection of the estate had in any other district must take the form of a plenary action at law or suit in equity; the appointment of a receiver can only be made in some cause properly before the court.

44. *Lathrop v. Drake*, 91 U. S. 516; *Ex parte Martin*, Fed. Cas. 9,149; *Sherman v. Bingham*, Fed. Cas. 12,762; *Markson v. Heaney*, 1 Dill, 497, Fed. Cas. 9,098; *In re Tift*, Fed. Cas. 14,034; *Shainwald v. Lewis*, 5 Fed. 510.

45. See convincing opinion of Judge Young in *Matter of Dunseath* (D. C., Pa.), 21 Am. B. R. 742, 168 Fed. 973; *Babbitt v. Dutcher* (Sup. Ct.), 216 U. S. 102, 23 Am. B. R. 519, in which case it was held that where a Missouri corporation was adjudicated a bankrupt and a trustee appointed in proceedings instituted in the district court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, the district court of the United States in and for the Southern District of New York has jurisdiction of an application upon the trustee's petition for an order directing officers of the corporation within the jurisdiction of the latter court to deliver to the trustee books and documents of the corporation there in their custody. See *Lazarus v. Prentice*, 234 U. S. 263, 32 Am. B. R. 559.

46. See Bankr. Act, § 2 (20) as amended by act of 1910.

47. *Collett v. Adams* (U. S. Sup. Ct.), 43 Am. B. R. 496, 39 Sup. Ct. 372; *Lazarus v. Prentice*, 234 U. S. 263, 32 Am. B. R. 559, 562, holding that a bankruptcy court of a district in which property of a bankrupt is situated is specifically given ancillary jurisdiction over such property, and may appoint a receiver and take summary proceedings for the restoration of such

property so that it may be turned over to the bankruptcy court in which the proceedings are pending, for administration.

Obtaining possession of property.—A court of bankruptcy can exercise ancillary jurisdiction for the purpose of enabling a trustee in bankruptcy, who has been appointed and qualified in another jurisdiction, to reduce to his possession property of the bankrupt which is within the territorial jurisdiction of the court whose ancillary jurisdiction is invoked, and where the court of primary jurisdiction can act summarily, the court exercising ancillary jurisdiction may also proceed by summary order; *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 625.

Restraint suit in State court.—A bankruptcy court does not have ancillary jurisdiction to entertain a bill to restrain the prosecution by the defendants of an action in a State court against the complainant, a partner in the bankrupt concern, based on fraudulent transactions, by virtue of a decree in the bankruptcy court, which does not pass upon the rights of the defendants. *Pell v. McCabe* (U. S. Sup. Ct.), 44 Am. B. R. 362, 40 Sup. Ct. 43.

48. *Matter of Sutter Bros.* (D. C., N. Y.), 11 Am. B. R. 632, 131 Fed. 654.

Ancillary receiver.—A court exercising ancillary jurisdiction acts independently of the court of primary jurisdiction, or of its officers, and for itself. It appoints its own receiver, generally the same person being appointed receiver by the court of primary jurisdiction; but in the seizure, management, sale and distribution of the property seized within the territorial limits of its districts, of which it takes legal custody, this receiver is and must be governed by its orders exclusively. *Fidelity Trust Co. v. Gaskell* (C. C. A., 8th Cir.), 28 Am. B. R. 4, 198 Fed. 865.

May make proper allowances to the receiver for the care and preservation of the property. *Matter of Earnstein* (D. C., N. Y.), 40 Am. B. R. 507, 245 Fed. 189.

49. As to examination of witnesses residing without the district before referees, see Bankr. Act, § 41-a, *post*.

Examination of non-resident witnesses.—In the case of *In re Robinson* (D. C., Minn.), 24 Am. B. R. 617, 179 Fed. 724, it was held that where, upon discharge proceedings, the objecting creditors desire to take the evidence of a witness residing in another Federal

only is wanted, it may be obtained by the customary method of deposition.⁵⁰ Where the ancillary tribunal takes possession of the property of the bankrupt within its territorial jurisdiction, such possession clothes such tribunal with the power to determine all questions of priorities and liens affecting such property,⁵¹ and may deal summarily or otherwise with such property, to the same extent and in the same manner as though the original bankruptcy proceedings were pending in such tribunal.⁵² The ancillary jurisdiction conferred by the amendment includes the power to hear and adjudge the adverse claims of parties to the specific property seized as the property of the bankrupt, and in the exercise of such jurisdiction district courts may, according to their adjudications, send the property or its proceeds to the court of primary jurisdiction, or apply them to the satisfaction of such claims.⁵³ There is no doubt that title passes to the trustee as of the date of the adjudication, no matter where the property may be situated;⁵⁴ it is equally certain that the district courts of other districts have jurisdiction to consider suits to recover possession of the bankrupt's property situated therein and by him fraudulently or preferentially transferred.⁵⁵ The ancillary jurisdiction extends to the release of a bankrupt from imprisonment in a State court of an adjoining district pending his application for a discharge.^{55a}

district, application for an order requiring such witness to appear before a referee in bankruptcy and give his testimony should be made to the Federal district court of the district where the witness resides. In the case of *Matter of Elkus* (Sup. Ct.), 23 Am. B. R. 614, 216 U. S. 115, 30 Sup. Ct. 377, the court said: "The questions submitted are: (1) Did the United States District Court for the Southern District of New York have jurisdiction to grant an order for the examination of witnesses, who were residents of that district, when the bankrupt proceedings in which the examination was desired were being administered in the Northern District of Illinois? (2) Have the respective district courts of the United States sitting in bankruptcy ancillary jurisdiction to make orders and issue process in said proceedings pending and being administered in the district court of another district? On the authority of *Babbitt, Trustee, etc. v. Dutcher et al.* (23 Am. B. R. 519, decided in Feb., 1910), just decided, we answer both questions in the affirmative."

50. See Bankr. Act, § 21-b-c. See also *In re Hemstreet* (D. C., Iowa), 8 Am. B. R. 700, 117 Fed. 568, and *In re Westfall Bros.* (D. C., Cal.), 8 Am. B. R. 431.

51. *Emerson v. Castor* (C. C. A., 6th Cir.), 37 Am. B. R. 719, 236 Fed. 29; *Matter of Einstein* (D. C., N. Y.), 40 Am. B. R. 507, 245 Fed. 189; *Contra, Matter of Patterson Lumber Co.* (D. C., Tenn.), 40 Am. B. R. 545, 247 Fed. 578.

52. *West v. Empire Life Ins. Co.* (D. C., Wash.), 40 Am. B. R. 93, 242 Fed. 605.

Exercise of ancillary jurisdiction.—The ancillary jurisdiction conferred by subdivision 20 of section 2 is such as the court of original jurisdiction would have had if it had territorial jurisdiction, or such as the court appealed to would have had if the bankruptcy proceeding were pending therein. The ancillary jurisdiction so conferred of proceedings of a summary character is limited to cases in which the court in which the bankruptcy proceeding is pending could act summarily, if it had territorial jurisdiction and of plenary or independent suits to such as come within section 23-b of the Bankruptcy Act. *De Frieze v. Bryant* (D. C., Ky.), 37 Am. B. R. 275.

53. *Fidelity Trust Co. v. Gaskell* (C. C. A., 8th Cir.), 28 Am. B. R. 4, 195 Fed. 865; *Matter of Einstein* (D. C., N. Y.), 40 Am. B. R. 507, 245 Fed. 189; *Contra, Matter of Patterson* (D. C., Tenn.), 40 Am. B. R. 545; 247 Fed. 578.

The filing of a petition in the bankruptcy court constructively vests it with jurisdiction of

all the property of the bankrupt wherever situated, the reduction of such property to actual possession being a mere detail in which a bankruptcy court of ancillary jurisdiction may aid, regardless of diversity of citizenship or amount, provided the property be found within the jurisdiction of such court. *In re Musica & Son* (D. C., La.), 30 Am. B. R. 555, 205 Fed. 413.

54. *Lazarus v. Prentice* (Sup. Ct., U. S.), 234 U. S. 263, 32 Am. B. R. 559; *West v. Empire Life Ins. Co.* (D. C., Wash.), 40 Am. B. R. 93, 242 Fed. 605. See discussion under § 70, post.

Liens subsequent to adjudication.—The filing of the petition and the adjudication brings the property of the bankrupt, wherever situated, into *custodia legis*, and it is thus held from the date of the filing of the petition, so that subsequent liens cannot be given or obtained thereon, nor proceedings had in other courts to reach the property the court of original jurisdiction acquires the full right to administer the estate under the bankruptcy law; *Lazarus v. Prentice* (Sup. Ct., U. S.), 234 U. S. 263, 32 Am. B. R. 559.

Exercise of ancillary jurisdiction.—A bill in equity in which one of the plaintiffs was a citizen of the same State of which the defendants are citizens, which sought to enable one of the plaintiffs to obtain a discharge of liability for a fund in its possession, upon the payment of it into court, one of the defendants being a trustee in bankruptcy, and which also sought an injunction restraining the further prosecution of a proceeding commenced by the trustee in bankruptcy, did not confer jurisdiction upon the District Court upon the ground that the suit was ancillary or auxiliary to the bankruptcy proceeding. *Rogers v. Chickamauga Trust Co.* (C. C. A., 6th Cir.), 42 Am. B. R. 577, 253 Fed. 541.

55. That is, since the amendatory act of 1903. See also *Goodall v. Tuttle*, Fed. Cas. 5533, and *Lathrop v. Drake*, 91 U. S. 516; *Lawrence v. Lowrie* (D. C., Pa.), 13 Am. B. R. 298, 133 Fed. 995.

Ancillary jurisdiction; claims to assets in possession of court.—Ancillary jurisdiction is exercised for the purpose of aiding the court of primary jurisdiction to collect the estates of bankrupts and distribute them among those entitled thereto, and when property which has been transferred within the four months' period, in such circumstances as to suggest fraud, comes into the possession of the court exercising ancillary jurisdiction.

i. Court first acquiring jurisdiction.—It is a familiar rule of law, of universal application, essential to the orderly administration of justice, that in order to avoid a conflict between tribunals of co-equal authority, the court first acquiring jurisdiction must be allowed to pursue it to the end to the exclusion of others, and that it will not permit its jurisdiction to be impaired or subverted by a resort to some other tribunal.⁵⁶ This is especially true where there is conflict of jurisdiction between a bankruptcy court and a State court; in such cases if the bankruptcy court has assumed the custody and control of the bankrupt estate before proceedings are instituted in a State court, the jurisdiction of the former in respect to such estate is absolute and will not be disturbed.⁵⁷

that court, by its very possession, draws to itself the power to determine the interests therein of all parties making claim thereto, and it becomes its duty to so determine and grant complete relief that further litigation in respect thereto may be avoided. *In re Lipman*, (D. C., N. J.), 29 Am. B. R. 139, 201 Fed. 169; *Hartman v. Ackoury* (D. C., La.), 31 Am. B. R. 614, 210 Fed. 188.

Summary proceedings to recover assets.—Under clause 20 of this section a District Court of ancillary jurisdiction has authority to appoint a receiver and to take summary proceedings for the restoration of a bankrupt's estate, in the custody of people having no right to it, in order that same may be turned over to the bankruptcy having jurisdiction for administration. *Lazarus v. Prentice* (Sup. Ct., U. S.), 234 U. S. 263, 32 Am. B. R. 559.

Portion of expense.—Where in a bankruptcy proceeding instituted in New York, ancillary proceedings are had in New Jersey where property of the bankrupt is located, a claim by a landlord under the New Jersey statutes for rent as a prior claim although he has not perfected his lien, is subject to that portion of the total expenses of the estate of the bankrupt, wherever situated, which the value of the chattels lying upon the demise premises when the petition in bankruptcy was filed bore to the value of the gross estate. *Matter of Braus* (D. C., N. Y.), 37 Am. B. R. 594, 233 Fed. 835.

Intervention.—A party may not intervene in an ancillary suit brought by the trustee or receiver, the sole purpose of which is to collect assets of the bankrupt for transmission to the bankruptcy court for administration. *West v. Empire Life Ins. Co.* (D. C., Wash.), 40 Am. B. R. 93, 242 Fed. 605.

55a. *Matter of Madigan* (D. C., N. Y.), 41 Am. B. R. 770, 254 Fed. 221.

56. *In re Southwestern Bridge & Iron Co.* (D. C., Kan.), 13 Am. B. R. 304, 133 Fed. 568; *Matter of Vadner* (D. C., Nev.), 42 Am. B. R. 465, 259 Fed. 614; *Martin v. Oliver* (C. C. A., 8th Cir.), 43 Am. B. R. 739, 260 Fed. 89.

Court first acquiring jurisdiction.—The United States Supreme Court in the case of *Pickens v. Dent*, 9 Am. B. R. 47, 187 U. S. 177, sustained the jurisdiction of a State court where it appeared that such court had had for years complete jurisdiction and control over the bankrupt and his property, and said: "The jurisdiction was not divested by the proceedings in bankruptcy, and it was the right and duty of that court to proceed to final decree notwithstanding adjudication, the rule being applicable that the court which first obtains rightful jurisdiction over the subject-matter should not be interfered with." The court cited the case of *Frazier v. Southern Loan & Trust Co.*, 3 Am. B. R. 710, 99 Fed. 707, in which Goff, J., said: "The Bankruptcy Act of 1898 does not in the least modify this rule, but with unusual careful-

ness guards it in all of its details, provided the suit pending in the State court was instituted more than four months before the District Court had adjudicated the bankruptcy of the party entitled to an interest in the subject-matter of such controversy."

Other cases declaring this same principle are *In re Price & Co.* (D. C., N. Y.), 1 Am. B. R. 606, 92 Fed. 987; *In re Gerdes* (D. C., Ohio), 4 Am. B. R. 346, 102 Fed. 318; *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906, in which case the court held that in cases of concurrent jurisdiction the court first obtaining possession of the property administers it, but where that court loses jurisdiction, and it is transferred by operation of valid laws to a court of the United States, which has exclusive jurisdiction of the subject-matter, the question becomes one of paramount authority of the constitution, and comity can have no influence in determining the right. *In re Wells* (D. C., Mo.), 8 Am. B. R. 75, 114 Fed. 222; *Metcalf v. Barker* (Sup. Ct.), 187 U. S. 175, 9 Am. B. R. 36; *In re English* (C. C. A., 2d Cir.), 11 Am. B. R. 674, 127 Fed. 940, revg. 10 Am. B. R. 133.

Rate proceeding against public service company.—A voluntary proceeding in bankruptcy by a public service corporation supplying gas to a city, cannot in judicial contemplation be regarded as undue interference with a suit in the State court by the city and another against said corporation and a holding company to enjoin an increase in the charge for gas. *City of Holland v. Holland City Gas Co.* (C. C. A., 6th Cir.), 44 Am. B. R. 66, 257 Fed. 679.

57. *In re Chambers* (D. C., R. I.), 3 Am. B. R. 537, 98 Fed. 865; *Keegan v. King* (D. C., Ind.), 3 Am. B. R. 79, 96 Fed. 758; *Leidigh Carriage Co. v. Stengel* (C. C. A., 8th Cir.), 2 Am. B. R. 385, 95 Fed. 637; *In re Glove Cycle Works* (Ref., N. Y.), 2 Am. B. R. 447; *In re Houston* (D. C., Ky.), 2 Am. B. R. 107, 94 Fed. 119; *Pietri v. Wells* (La. Sup. Ct.), 137 La. 1087, 36 Am. B. R. 105, 69 So. 847; *Union Banking Co. v. Truscott Boat Mfg. Co.* (Mich. Sup. Ct.), 36 Am. B. R. 175, 155 N. W. 717.

Possession of property as controlling jurisdiction.—Justice Moody, speaking for the Supreme Court of the United States, in *Murphy v. John Hoffman Co.*, 211 U. S. 562, 568, 21 Am. B. R. 487, 29 Sup. Ct. 154, 156, 53 L. ed. 327-330, says: "Where the property in dispute is in the actual possession of the court of bankruptcy there comes into play another principle, not peculiar to courts of bankruptcy but applicable to all courts, Federal or State. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction

There are essential exceptions to the rule as to the jurisdiction of State courts based upon prior acquisition, as where a lien would be acquired by proceedings therein within four months of the bankruptcy, or where such proceedings were instituted under State insolvency laws, a receiver or assignees being appointed therein during the four months' period.⁵⁸ As between two bankruptcy courts, the one in which the petition is first filed ought to be accorded exclusive jurisdiction over the case.⁵⁹ This question of priority of jurisdiction will be more fully considered under other sections of the act.⁶⁰

j. Expedition in exercise of jurisdiction.—The bankruptcy act contemplates that the bankrupt's estate shall be administered with all convenient dispatch, so that the property may be distributed and the bankrupt be discharged.⁶¹

to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. Jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379, 386. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, 25 Sup. Ct. 778, 49 L. Ed. 1157."

Conflict with State court.—When property is taken and held under process, *in rem* or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ, and the possession of the officer cannot be disturbed by process from any State court. *Darrough v. First National Bank of Claremore* (Okla. Sup. Ct.), 37 Am. B. R. 75, 156 Pac. 191; *Meek v. Egge-man* (Okla. Sup. Ct.), 36 Am. B. R. 488, 155 Pac. 522.

Possession of property in controversy.—The jurisdiction of the bankruptcy court appears to turn upon the question whether or not it has the possession of the fund or property over which the controversy arises. If it has such possession, jurisdiction follows. If it does not have possession, it is without jurisdiction. In cases of this character where the bankruptcy court has no jurisdiction, the State court has jurisdiction. In cases where the bankruptcy court has jurisdiction, the State court has concurrent jurisdiction with it. *Union Banking Co. v. Truscott Boat Mfg. Co.* (Mich. Sup. Ct.), 36 Am. B. R. 176, 155 N. W. 717.

Maritime liens; admiralty jurisdiction.—Where an admiralty court, by libel proceedings, acquires complete jurisdiction of a vessel before bankruptcy proceedings are in-

augurated its jurisdiction is exclusive and will be retained to allow that court to determine all the lien claims which may be asserted against the vessel, whether presented before or after the filing of the bankruptcy petition or the adjudication in bankruptcy; and the proceeds of the sale will not be paid over to the trustee in bankruptcy but will be paid into the registry of the court. (See Am. B. R. Dig., §§ 14, 451, 469); *The Philomena* (D. C., Mass.), 37 Am. B. R. 220, 200 Fed. 859.

Where a bankruptcy court, through its receiver duly appointed, has taken possession of vessels belonging to the bankrupt, its jurisdiction is exclusive and will not be ousted to allow the enforcement of a libel in admiralty against the vessels, especially where the libellant's rights can be as well protected in the bankruptcy proceedings, even though the libels are founded on services rendered before the institution of bankruptcy proceedings. *The Casco* (D. C., Mass.), 37 Am. B. R. 215, 230 Fed. 929.

58. *Hooks v. Aldridge* (C. C. A., 5th Cir.), 16 Am. B. R. 658, 664, 145 Fed. 865, citing *In re Watts & Sachs*, 190 U. S. 1, 27, 10 Am. B. R. 113, 23 Sup. Ct. 718, 47 L. Ed. 933; *Matter of Maplecroft Mills* (D. C., S. Car.), 33 Am. B. R. 815, 218 Fed. 659.

59. *In re Tybo Mining & Reduction Co.* (D. C., Nev.), 13 Am. B. R. 62, 132 Fed. 697. Compare *In re Isaacson* (D. C., N. Y.), 20 Am. B. R. 430, 166 Fed. 777, 779.

60. See Bankr. Act, § 23-b, *post*, sub-title "Jurisdiction of State Courts."

61. *Blanchard v. Ammon* (C. C. A., 9th Cir.), 25 Am. B. R. 590, 183 Fed. 556; *In re Swofford Bros. Dry Goods Co.* (D. C., Mo.), 25 Am. B. R. 282, 180 Fed. 549; *In re Syracuse Paper & Pulp Co.* (D. C., N. Y.), 21 Am. B. R. 174, 164 Fed. 275; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131.

Such disposition should be made of bankruptcy cases that creditors may expeditiously realize what they may; but the substance of things and not the forms merely should be observed. *In re Faulkner* (C. C. A., 8th Cir.), 20 Am. B. R. 542, 161 Fed. 900; *Matter of Soloway & Katz* (C. C. A., 2nd Cir.), 37 Am. B. R. 257, 234 Fed. 67.

With this end in view the court will see to it that the proceedings are conducted without unnecessary delay.⁶³ Proper regard must of course be had for the fundamental rights of the interested parties.⁶⁵

II. AS TO ADJUDICATION OF BANKRUPTCY.

a. In general.—Subdivision 1 of this section limits the power of the bankruptcy court to adjudicate the bankruptcy of persons to such as "have had their principal place of business, resided, or had their domicile" within the territorial jurisdiction of the court for the preceding six months or the greater portion thereof. Under the former law domicile and residence were often held equivalent terms. By that act when residence within the district was required, the word "domicile" was not used.⁶⁴ The confusion resulting from the conflicting decisions as to whether residence included domicile has been obviated by inserting in this subdivision the language "resided, or had their domicile" within the jurisdiction of the court.⁶⁵ To determine whether a court of bankruptcy may entertain a petition to adjudicate the bankruptcy of a debtor it must appear that he either, (1) had his principal place of business within the district; (2) or resided therein; (3) or had his domicile therein; and it must also appear that such place of business had been maintained, or such residence or domicile had been had, within such jurisdiction for the greater portion of the six months prior to the time when the petition for an adjudication of bankruptcy has been presented to the court. The existence of these requirements is jurisdictional and the effect of failure to show the same may not be waived by the voluntary appearance of the debtor.⁶⁶ The court may of its own volition

63. Unnecessary delay to be avoided.—The purpose of the act requires the court to cause the property and assets of the bankrupt to be collected, marshaled and distributed without unnecessary delay. In *re Lisk Mfg. Co.* (D. C., N. Y.), 21 Am. B. R. 674, 167 Fed. 411.

As stated by Mr. Justice Miller in *Bailey v. Glover*, 21 Wall. 346: "It is obviously one of the purposes of the bankruptcy law that there should be a speedy distribution of the bankrupt's assets. This is only secondary in importance to securing equality of distribution. The act is filled with provisions for the quick and summary disposal of questions arising in the progress of the case, without regard to the usual modes of trial attended with some delay." See also *Wiswall v. Campbell*, 93 U. S. 347. These cases arose under the former bankruptcy act, but are equally applicable to the present act.

63. Boyd v. Glucklich (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131, in which the court said: "Dispatch in judicial proceedings is commendable, but in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case."

64. Bankruptcy Act of 1867, § 11.

65. Matter of Lemen (D. C., Ohio), 30 Am. B. R. 638, 208 Fed. 80.

65. In re Plotke (C. C. A., 7th Cir.), 5 Am. B. R. 171, 175, 104 Fed. 964; In *re Clisdell* (Ref., N. Y.), 2 Am. B. R. 424; *Matter of Mitchell* (C. C. A., 2d Cir.), 33 Am. B. R. 463, 219 Fed. 690 (citing text).

Effect of section 740 of the Revised Statutes (Jud. Code, § 52).—In the case of *Hills v. McKinniss Co.* (D. C., Ohio), 26 Am. B. R. 329, 188 Fed. 1012, the court said:

"We are referred by defendant to section 740 of the Revised Statutes (Judiciary Code, § 52), providing that suits not of a local nature against a single defendant must be brought in the district in which such defendant resides, and it is urged that section 2 of the Bankruptcy Act does not in any way change or modify this general provision.

"We are not willing to agree with defendant that the Bankruptcy Act is in entire harmony with this general provision, for, as we have seen, the former omits the question of the present residence of the bankrupt altogether from the consideration of jurisdiction.

"A system of bankruptcy national in its character to be uniform in its operation must of necessity be unique in its method of administration, and when one of its provisions involving the very policy of the law is deemed inconsistent with the general law, the special provision must control."

Residence or domicile; waiver.—The question of jurisdiction, depending upon residence or place of business of the bankrupt, cannot be waived by the bankrupt at his election.

inquire into the facts as to these jurisdictional requirements so as to protect itself against fraud or imposition.⁶⁷ Subdivision 1 further provides that the power to adjudicate will exist in the court where the debtor has not had his principal place of business, does not reside, nor have his domicile within the United States but has property within the jurisdiction of the court, and also where a debtor, who has been adjudged a bankrupt by a court of competent jurisdiction without the United States, has property within the court's jurisdiction. In both of such cases, the location of the property of the debtor will determine the jurisdiction of the court. The jurisdiction of the court is further limited by the provisions of section 4 of the act which specifies the persons who may become bankrupts.

b. *Domicile of debtor.*—It will be noticed from the language of subdivision 1 that either domicile or residence within the territorial limits of the court will be sufficient to confer jurisdiction. It is not essential that both should exist.⁶⁸ Domicile means more than residence. To constitute domicile there must exist in combination the fact of residence and also the intent to remain,—the *animus manendi*.⁶⁹ The district in which an alleged bankrupt has resided during the greater portion of the six months next preceding the filing of a petition against him is the “district of his domicile” within the meaning of Gen-

Finn v. Carolina Portland Cement Co. (C. C. A., 5th Cir.), 37 Am. B. R. 449, 232 Fed. 815. See Am. B. R. Digest, § 18.

Jurisdiction dependent on residence or place of business.—Where in an involuntary proceeding an objection to the jurisdiction of the court upon the ground of lack of residence or place of business is raised by the alleged bankrupt within a month after adjudication and before any further proceedings are had, and the same objection is raised by two creditors before adjudication, the court must hear the objection, although the bankrupt first appeared by filing demurrers to the petition, going to the merits of the controversy, without objecting to the jurisdiction. *Finn v. Carolina Portland Cement Co.* (C. C. A., 5th Cir.), 37 Am. B. R. 449, 232 Fed. 815.

Jurisdiction of partnership; section 5c, construed.—Under section 5c of the Bankruptcy Act a court which has jurisdiction over one partner can take to itself jurisdiction over the firm of which he is a member without reference to whether the firm is six months old or three months old, and without there being any specific allegation as to the firm's principal place of business. *Matter of Mitchell* (C. C. A., 2d Cir.), 33 Am. B. R. 463, 219 Fed. 690.

67. In *re Garneau* (C. C. A., 7th Cir.), 11 Am. B. R. 679, 127 Fed. 677; *Matter of Mitchell* (C. C. A., 2d Cir.), 33 Am. B. R. 463, 219 Fed. 690, quoting text with approval.

68. *Matter of Harris* (Ref., N. J.), 11 Am. B. R. 649, in which the referee says: “If a person has had any one of the three (place of business, residence or domicile) in the district for the greater part of six months immediately preceding the date of bankruptcy there is jurisdiction in the bankruptcy court of that district to proceed with the case.” See also *In re Clisdell* (Ref., N. Y.), 2 Am.

B. R. 424; *In re Berner* (Ref., Ohio), 2 Am. B. R. 197, 93 Fed. 943.

69. *Distinction between residence and domicile.*—In the case of *In re Garneau* (C. C. A., 7th Cir.), 11 Am. B. R. 679, 127 Fed. 677, the court says: “There is, of course, a legal distinction between ‘domicile’ and ‘residence’; although the terms are generally used as synonymous, the distinction depends upon the connection in which and the purpose for which the terms are used. ‘Domicile’ is the place where one has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent he has the intention of returning, and where he exercises his political rights. There must exist in combination the fact of residence and the *animus manendi*.” See, also, *In re Dinglehoeft Bros.* (D. C., N. Car.), 6 Am. B. R. 242, 109 Fed. 866; *In re Owings* (D. C., N. Car.), 15 Am. B. R. 472, 140 Fed. 30; *In re Scott* (Ref., Mass.), 7 Am. B. R. 35; *In re Williams* (D. C., Wash.), 3 Am. B. R. 677, 99 Fed. 544; *In re Berner* (Ref., Ohio), 3 Am. B. R. 325; *In re Grimes* (D. C., N. Car.), 2 Am. B. R. 160, 96 Fed. 529; *Matter of Davis* (D. C., N. J.), 33 Am. B. R. 16, 217 Fed. 113, holding that domicile is of more extensive signification than residence and includes, beyond mere physical presence at a particular locality, an intention to constitute it a permanent abiding place.

The distinction between residence and domicile, that a man may reside in one State and be domiciled in another, noted in applying laws relating to the electoral franchise, may be applied in construing the Bankruptcy Act, and it is not impossible that the courts of two districts may have jurisdiction to entertain a petition against the same debtor, that one acting which is first invoked. *Matter of Lemen* (D. C., Ohio), 30 Am. B. R. 638, 208 Fed. 80.

eral Order VI.⁷⁰ Under this order if two or more petitions shall be filed against the same person in different districts the first hearing must be had in the district in which the debtor has his domicile.^{70a} Domicile as here used means the place where the debtor permanently had his home for the greater portion of the six months preceding his bankruptcy, as distinguished from a residence temporarily acquired in some other place.⁷¹ Residence may involve the intent to leave when the purpose for which it has been acquired has ceased;⁷² domicile implies no such intent.⁷³ A debtor who absconds does not lose his domicile within the meaning of the act.⁷⁴ The fact that the alleged bankrupt is a roving character, and never residing at any place for the required period of time, does not affect the necessity of proving that such bankrupt had resided for a greater portion of the previous six months within the territorial limits of the court.⁷⁵ A domicile once acquired is presumed to continue until it is shown to have been changed.⁷⁶ Where it is alleged that there has been an abandonment of the old domicile and an establishment of a new one the burden of proof lies upon the person who asserts the change.⁷⁷ The domicile of any one of two or more partners would be sufficient to support the jurisdiction of the court.⁷⁸ It being established by both the petition and answer in an involuntary proceeding that the requisite jurisdictional fact as to domicile exists, the jurisdiction of the court may not be collaterally attacked after adjudication.⁷⁹

c. Residence of debtor.—The word “resided” as used in subdivision 1 is of

70. In re Isaacson (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 777, 779.

70a. Matter of New Era Novelty Co. (D. C., N. J.), 39 Am. B. R. 80, 241 Fed. 298.

71. In re Isaacson (D. C., N. Y.), 20 Am. B. R. 437, 161 Fed. 777; s. c. (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 779.

Intention of debtor.—In determining the residence of a debtor his intention as expressed by him is always a fact to be considered, but should be measured in the light of the facts in the case and especially in the light of his own conduct. Matter of Lemen (D. C., Ohio), 30 Am. B. R. 638, 206 Fed. 80.

72. Removal for particular purpose.—A removal from one's place of residence does not *prime facie* prove a change in his domicile, when it appears that the removal was, for some particular purpose, expected to be only of a temporary nature, and which is not inconsistent with an intention to return to the original domicile. Matter of Davis (D. C., N. J.), 33 Am. B. R. 16, 217 Fed. 113.

73. In re Berner (Ref., Ohio), 3 Am. B. R. 325.

Intention of remaining.—Two things must concur to establish a domicile—the fact of residence and the intention of remaining. In re Owings (D. C., N. Car.), 15 Am. B. R. 472, 140 Fed. 739; In re Dinglehoef Bros. (D. C., N. Car.), 6 Am. B. R. 242, 109 Fed. 866.

74. In re Filer (D. C., N. Y.), 5 Am. B. R. 332, 108 Fed. 209; In re Oldstein, (D. C., Ore.), 25 Am. B. R. 138, 182 Fed. 409. The fact that the act so plainly makes residence, domicile or conduct of business for something less than the whole time immediately before the filing of the petition the sole criterion of jurisdiction suggests that the personal movements of the bankrupt are immaterial. Hills v. McKinness Co. (D. C., Ohio), 26 Am. B. R. 329, 188 Fed. 1012.

75. In re Williams (D. C., Ark.), 9 Am. B. R. 736, 120 Fed. 34, in which case it was held that a court of bankruptcy did not have jurisdiction to adjudge bankrupt a traveling gambler who had resided within the district and carried on his business there for only two months prior to the filing of the petition in bankruptcy against him.

76. In re Oldstein (D. C., Ore.), 25 Am. B. R. 138, 409 Fed. 182; In re Filer (D. C., N. Y.), 5 Am. B. R. 332, 108 Fed. 209; Matter of Davis (D. C., N. J.), 33 Am. B. R. 16, 217 Fed. 113.

77. In re Berner (Ref., Ohio), 3 Am. B. R. 325; In re Scott (D. C., Mass.), 7 Am. B. R. 39, 111 Fed. 144; In re Waxelbaum (D. C., N. Y.), 3 Am. B. R. 267, 97 Fed. 562; In re Clisdell (Ref., N. Y.), 2 Am. B. R. 424.

The burden of establishing a change of domicile is not discharged by showing that the bankrupt had decided to remain permanently away from his old domicile, without showing an intention to remain permanently in the new place. Matter of Davis (D. C., N. J.), 33 Am. B. R. 16, 217 Fed. 113.

Relinquishment of domicile.—Where the bankrupt had formerly relinquished both his residence and domicile in the State of New York in order to acquire a residence in New Jersey, which would justify him in bringing an action for divorce, he should not be permitted to seek the jurisdiction of a district court in New York to be relieved of his debts. Matter of Lipphart (D. C., N. Y.), 28 Am. B. R. 705, 201 Fed. 103.

78. In re Blair (D. C., N. Y.), 3 Am. B. R. 588, 99 Fed. 76.

79. Matter of Sage (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

slight importance. Cases may arise where it may be useful, as when a debtor attempts to escape bankruptcy by denying domicile. Residence may mean no more than sojourning. It is a personal presence in a fixed and permanent abode as distinguished from a temporary occupation, but it does not include as much as domicile, which requires an intention combined with residence.⁸⁰ If the residence, not amounting to a domicile, continues for the required portion of the three months preceding the filing of the petition in bankruptcy, it will be sufficient to clothe the court with jurisdiction.⁸¹ If change of residence is asserted the burden of proof is upon him who asserts it.⁸²

d. Principal place of business.—(1) IN GENERAL.—A court of bankruptcy may, under subdivision 1 of this section, adjudge a person bankrupt who has had his principal place of business within the territorial jurisdiction of the court for the preceding six months or the greater portion thereof although he may not have resided or had his domicile therein during such period. The former Bankruptcy Act used the words "carried on business" instead of "had their principal place of business" as in the present section.⁸³ Principal place of business means the place where the principal affairs and business of the debtor are transacted,⁸⁴ as a principal and not as an agent or employee; generally speaking a person who is employed by another on a salary, having no business of his own, may not have a "place of business," within the meaning of the Bankruptcy Act.⁸⁵ The residence of the debtor will not control as to his principal place of business; he may reside in one district and be adjudged a bankrupt in another district in which he has his principal place of business.⁸⁶

(2) OF CORPORATIONS.—The question as to what constitutes a principal place of business arises more frequently in respect to a corporation. It is not necessarily where the manager happens to be located or the stock book and record book to be kept, although those are significant facts. The determination of the principal place of business of a corporation is to be gathered from a general survey of the corporation's activities and depends upon a comparison of the activities at each place in respect to their character, importance and amount.^{86a} The principal office of a corporation as specified in its articles of incorporation will not control. The principal place of business may not be conclusively determined by the designation thereof in a certificate of incorporation or of authority to transact business, unless it actually appears that business is done there.⁸⁷ The district

80. In re Dinglehoef Bros. (D. C., N. Car.), 6 Am. B. R. 242, 109 Fed. 866; In re Garneau (C. C. A., 7th Cir.), 11 Am. B. R. 679, 127 Fed. 677, citing Tracey v. Tracey, 62 N. J. Equity 807, 48 Atl. 533; Shaeffer v. Gilbert, 73 Md. 66, 20 Atl. 434; Matter of Lemen (D. C., Ohio), 30 Am. B. R. 638, 208 Fed. 50; Matter of Davis (D. C., N. J.), 33 Am. B. R. 16, 217 Fed. 113.

81. Matter of Lemen (D. C., Ohio), 30 Am. B. R. 638, 208 Fed. 50.

82. In re Waxelbaum (D. C., N. Y.), 3 Am. B. R. 267, 97 Fed. 562; In re Bassett (D. C., Wash.), 26 Am. B. R. 800, 189 Fed. 410.

83. Act of 1867, § 11. The language of the present section is more exact than that used in the former act.

84. Milwaukee Steamship Co. v. City of Milwaukee, 83 Wis. 590, 53 N. W. 839, 18 L. R. A. 353.

85. Matter of Lipphart (D. C., N. Y.), 28 Am. B. R. 705, 201 Fed. 103.

86. In re Brice (D. C., Iowa), 2 Am. B. R. 197, 93 Fed. 942; In re Magle, Fed. Cts. 8,951. See also Guinn v. Iowa Cent. Ry. Co., 14 Fed. 323, 324, which is to the effect that the principal place of business of a corporation is no test of residence. A natural person might reside in one State and have his principal, or for that matter his sole place of business in another State. See Am. B. R. Dig. § 19.

A farmer who lived in one district and whose

business consisted of raising, buying and selling farm products, buying and slaughtering live stock and selling the meat from a stall in a market place in a city in another district where he exhibited and sold all but a comparatively small portion of the produce handled by him, was held to have a principal place of business in the city. In re Mackey (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355.

Partners residing in other districts.—Evidence examined and held sufficient to show that the principal place of business of a partnership was within the jurisdiction of the court at the time of the commencement of involuntary proceedings against it and during six months prior thereto, although the members of the firm resided in another district and there conducted a smaller business. Matter of Gurler & Co. (D. C., Iowa), 37 Am. B. R. 418, 232 Fed. 1016.

86a. Matter of Worcester Footwear Co. (D. C., Mass.), 41 Am. B. R. 695, 251 Fed. 760.

87. Matter of Thomas McNally Co. (D. C., N. Y.), 31 Am. B. R. 382, 208 Fed. 291; In re Wenatchee-Stratford Orchard Co. (D. C., Wash.), 30 Am. B. R. 540, 295 Fed. 964;

court of the district in which the assets, manufacturing plant and business office of a corporation are located will have jurisdiction as against the court of the district in which the articles of incorporation specify that the principal place of business is located.⁸⁸ Corporations are frequently organized under the statutes of one State for the purpose of transacting business in another State. The requirement that a corporation so organized shall have an office within the State where incorporated will not preclude the exercise of jurisdiction by a court of bankruptcy in a district other than that in which such office is located.⁸⁹ If the office be the place where the business affairs of the corporation are managed it may determine the jurisdiction of the court, although

In re United States Lumber Co. (D. C., Wash.), 30 Am. B. R. 682, 685, 206 Fed. 236, citing text; Matter of Federal Contracting Co. (C. C. A., 7th Cir.), 32 Am. B. R. 381, 212 Fed. 688.

Articles of incorporation as determining.—Where there is any doubt on the question as to the principal place of business of a bankrupt corporation the proper course would be to yield to the provisions of the articles of incorporation in determining where the corporation's principal place of business is, although the fact that such articles fixed a named city as the principal place of business is not always conclusive of the question. Matter of Pennington & Co. (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

88. Place where business is transacted.—In the case of Dressel v. North State Lumber Co. (D. C., N. Car.), 5 Am. B. R. 744, 107 Fed. 255, it appeared that the certificate of incorporation specified the home office of the corporation to be in Detroit, Mich., while all its assets, its plant and business were located in Durham, N. C. The court said: "It would be an anomalous construction of the law, and defeat one of the purposes of the bankruptcy act, to hold that by the mere assertion in the articles of association a corporation can fix its principal office in one State or district when in fact all its property is located and its business transacted in a distant district, and thus escape the jurisdiction of the courts in both districts."

See also Tiffany v. La Plume Condensed Milk Co. (D. C., Pa.), 15 Am. B. R. 413, 141 Fed. 444; Milwaukee Steamship Co. v. City of Milwaukee, 83 Wis. 590, 53 N. W. 839, 18 L. R. A. 353; Matter of Perry Aldrich Co. (D. C., Mass.), 21 Am. B. R. 244, 165 Fed. 249; In re Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 485, 109 Fed. 456; Matter of Beirmeister Bros. Co. (D. C., N. Y.), 31 Am. B. R. 474, 208 Fed. 945, holding that the bankruptcy court in the district where a corporation for the last six months has had its factory, and executive office, where its books have been kept and principal banking done and payments made, has jurisdiction of a voluntary proceeding notwithstanding the creditors have the day before filed a petition in another district in which the principal place of business named in the articles of incorporation is located.

Location of property.—The fact that the greater portion of the property of a bankrupt corporation is at a given place is some evidence, though not controlling, that its principal place of business was located there. Matter of Pennington & Co. (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

The place where a mining corporation carries on extensive operations, where its maps and original deeds of property are kept, where a large number of company houses and important commissary stores are maintained, where the bulk of its property is situated, where suits and liens would naturally be enforced, where it complied with the statute, and where its superintendent and manager actually reside, should be considered its "principal place of business," rather than an office in another State, in which the books were kept, the general guidance of the business effected, and from which the selling was conducted. Continental Coal Cor. v. Roszelle Bros. (C. C. A., 6th Cir.), 39 Am. B. R. 563, 242 Fed. 243.

89. In re Magid-Hope Silk Manufacturing Co. (D. C., Mass.), 6 Am. B. R. 610, 110 Fed. 352; Matter of Tennessee Construction Co. (C. C. A., 2d Cir.), 32 Am. B. R. 405, 213 Fed. 33.

Where a West Virginia coal company, though its charter stated that its principal place of business was in that State, as were its mines and real estate, had from the time of its incorporation and for six months prior to the commencement of bankruptcy proceedings maintained its executive office and principal place of business in Philadelphia, the bankruptcy court of the Eastern District of Pennsylvania having first acquired jurisdiction should retain the same as against the bankruptcy court in West Virginia, it not appearing that the greater convenience of parties would be promoted by a transfer. In re Pennsylvania Cons. Coal Co. (D. C., Pa.), 20 Am. B. R. 872, 163 Fed. 579.

Mining corporation not yet engaged in business.—The charter of a corporation organized for the purpose of mining provided that its principal place of business should be at Phoenix, Arizona. The corporation had never done any mining, but its activities were principally connected with the sale of its stock and the payment of its running expenses, and the only place in which business had been conducted was an office in New York City, the rent of which was being paid by its president at the time the board of directors met there and authorized him to file a voluntary petition. The books were all kept there, all meetings of the board were held there and all moneys of the company were disbursed from there, no meetings having ever been held at Phoenix, except the technical ones required by the law of Arizona. Held, that the principal place of business, if any, was in New York City, so that the District Court for the Southern District of New York had jurisdiction to adjudicate it a bankrupt in voluntary proceedings. In re Guanaceli Tunnel Co. (C. C. A., 2d Cir.), 29 Am. B. R. 290, 201 Fed. 316.

factories, mills or mines in another district are operated therefrom.⁹⁰ The question is one of fact to be determined in each particular case by the character of the corporation, its purposes, and the kind of business it is engaged in;⁹¹ and the burden of proof that the principal place of business was in a certain district, other than that specified in the articles of incorporation, is on the petitioning creditors.⁹² Business transacted in a district by a receiver of a corporation appointed to collect assets and turn them into money, is not "business" as meant by the phrase "principal place of business."⁹³ The failure of a foreign corporation to secure a certificate permitting it to do business in a State does not affect the jurisdiction of a court of bankruptcy, nor alter the fact that the principal place of business of the corporation is where its principal business is done.⁹⁴ And the fact that a foreign corporation has filed a certificate in a public office designating its "place of business" within the state does not establish such "place of business" within the meaning of this section, unless business is actually carried on at such place.⁹⁵ Where there is doubt as to which of two States is the location of the principal place of business of a corporation, it should be decided in favor of the State in which it was incorporated.⁹⁶ Where there are two alleged bankrupt corporations, whose business transactions are so intermingled as to be impossible of separation, requiring administration under one jurisdiction, the proceedings may be con-

A corporation organized in Rhode Island maintained a nominal office but never owned any substantial property there. It acquired a lease of a theatre in Massachusetts, made a substantial deposit with the lessor, installed certain chattels used in its business, and never had any office from which its business was conducted, except that connected with the theatre. The lessor brought an action in the State court of Massachusetts in which a receiver was appointed, and a judgment rendered relieving the corporation from forfeiture upon its making certain payments, which it failed to do, and thereafter a petition in bankruptcy was filed against it in Massachusetts. Held, that the corporation had its principal place of business in the district of Massachusetts. *Matter of E. & G. Theatre Co.* (D. C., Mass.), 35 Am. B. R. 255, 223 Fed. 657.

90. *In re Matthews Consolidated Slate Co.* (C. C. A., 1st Cir.), 16 Am. B. R. 407, 144 Fed. 737, affg. 16 Am. B. R. 350, 144 Fed. 724, in which case it was held that where a corporation owning a quarry in one State but whose business was transacted and controlled from an office in another State, the principal place of business was in the latter State. See also *In re Marine Machine and Conveyor Co.* (D. C., N. Y.), 1 Am. B. R. 421, 91 Fed. 630.

91. *In re Tygarts River Coal Co.* (D. C., W. Va.), 30 Am. B. R. 183, 208 Fed. 178; *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388; *Continental Coal Corp. v. Roszelle* (C. C. A., 6th Cir.), 39 Am. B. R. 563, 242 Fed. 243.

Question of fact.—The principal place of business of a corporation during the six months prior to the filing of a petition in bankruptcy is to be determined purely by the facts, and not by intentions of the cor-

porate authorities or recitals in the charter. *Matter of San Antonio Land & Irrigation Co.* (D. C., N. Y.), 36 Am. B. R. 512, 228 Fed. 984.

92. *Matter of Tennessee Construction Co.*, (C. C. A., 2d Cir.), 32 Am. B. R. 405, 213 Fed. 33.

Burden of proof.—Where, in involuntary bankruptcy proceedings, there is a contest as to the principal place of business of the bankrupt corporation, the burden of proof is on the petitioning creditors to establish that fact where it is shown by the articles of incorporation that the domicile and place of residence of the bankrupt is in another district. *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

93. *Matter of Perry Aldrich Co.* (D. C., Mass.), 21 Am. B. R. 244, 165 Fed. 249.

94. *In re Duplex Radiator Co.* (D. C., N. Y.), 15 Am. B. R. 324, 142 Fed. 906; *Matter of Perry Aldrich Co.* (D. C., Mass.), 21 Am. B. R. 244, 165 Fed. 249.

95. *Matter of McNally Co.* (D. C., N. Y.), 31 Am. B. R. 382, 208 Fed. 291.

96. *In re Tennessee Construction Co.* (D. C., N. Y.), 31 Am. B. R. 67, 207 Fed. 203, in which case it was held that where a corporation, incorporated in Missouri and required by statute to keep a general office in that State, has not been in active business during the past six months, and its principal business in this State during such period has been to try to work out a reorganization so that its assets in the hands of a receiver in Missouri may be made valuable, a bankruptcy court in New York will not assume jurisdiction; *affd.* 32 Am. B. R. 405, 213 Fed. 33.

ducted in the court first acquiring jurisdiction regardless of the location of the principal place of business of one of such corporations.⁹⁷

e. Preceding six months.—The alleged bankrupt must have resided, had his domicile, or transacted business within the district for six months or the greater portion thereof preceding the application. This does not mean the full period of six months prior to the filing of the petition;⁹⁸ a residence, domicile or transaction of business for more than three months, whether at the beginning or end of the period of six months, will be sufficient.⁹⁹ The apparent intent of the section is that no adjudication may be had where three months have not elapsed since the alleged bankrupt acquired a domicile, residence or place of business within the district.¹⁰⁰ It has been held that where a voluntary petition was filed prior to the expiration of such period, the adjudication should be set aside, but that upon proper application being made after the expiration of such period a new order of adjudication would be entered.¹⁰¹

f. Alien bankrupts.—An alien may be adjudged bankrupt, provided he has property within the United States, or, if he has been adjudged bankrupt in the bankruptcy courts of another country and does not reside but has property within the United States.¹⁰²

g. Property within district.—The jurisdiction extends also to persons and corporations who reside, have a domicile or place of business in another district provided they have property within the district in which the jurisdiction is exercised. The actual situs of the property of a person or corporation will control, and the general doctrine *mobilia sequuntur personam* will not apply.¹⁰³

⁹⁷ In re Southwestern Bridge & Iron Co., (D. C., Kan.), 13 Am. B. R. 304, 133 Fed. 568; In re Alaska-American Fish Co. (D. C., Wash.), 20 Am. B. R. 712, 162 Fed. 498, citing Collier on Bankruptcy (6th Ed.), p. 17.

⁹⁸ In re Ray (Ref., Wash.), 2 Am. B. R. 158. Contra, In re Stokes (Ref., Wash.), 1 Am. B. R. 35.

⁹⁹ In re Plotke (C. C. A., 7th Cir.), 5 Am. B. R. 171, 104 Fed. 964, 44 C. C. A., 282; In re R. H. Williams (D. C., Ark.), 9 Am. B. R. 736, 128 Fed. 38; Matter of Harris (Ref., N. J.), 11 Am. B. R. 649; In re Berner (Ref., Ohio), 3 Am. B. R. 325.

The act of 1867 contained the words "for the six months next preceding or for the longest period during such six months," which were construed as giving the court jurisdiction to adjudge one a bankrupt if he had resided only one day in the district, provided he had not resided a longer period in any other district. See In re Foster, 3 N. Bank. Rep. 236; In re Goodfellow, 3 N. Bank. Rep. 452.

Greater portion of six months.—If it be made to appear to the satisfaction of the court that an alleged bankrupt has not had his residence, domicile or place of business within the jurisdiction of the court for the period of six months or the greater portion thereof, the proceeding should be dismissed. Finn v. Carolina Portland Cement Co. (C. C. A., 5th Cir.), 37 Am. B. R. 449, 232 Fed. 815.

¹⁰⁰ In re Tully (D. C., N. Y.), 19 Am. B. R. 604, 156 Fed. 634.

A debtor who has departed from the State and established his residence in another jurisdiction more than three months prior to the commencement of bankruptcy proceedings against him, is not subject to the jurisdiction of the court in the district of his former residence. Matter of Fackelman (D. C., Cal.), 41 Am. B. R. 14, 248 Fed. 565.

¹⁰¹ **Objection as to residence by creditors.**

—In re Tully (D. C., N. Y.), 19 Am. B. R. 604, 156 Fed. 634, in which the court said: "But it would be a hardship which certainly no court would allow, unless it is without jurisdiction to prevent, for a creditor, as in the case at bar, to conceal from the court the defect in the allegation as to residence, to stand by and allow proceedings to go on before the referee, and then when the estate has been administered, and the matter progressed to the point where the bankrupt applied for a discharge, successfully nullify the proceedings to which he has been a party, and cause the bankrupt the expense of an additional proceeding, where no end would apparently be accomplished except harassing the bankrupt."

¹⁰² See discussion under section 4 of this work. Matter of Berthond (D. C., N. Y.), 36 Am. B. R. 555, 231 Fed. 529, holding that where an alien residing abroad and having a deposit with a bank in New York City made a general assignment in England, and a petition in bankruptcy was filed against him in the district, including New York City, within four months after the assignment, the bankruptcy court has jurisdiction.

¹⁰³ **The meaning of the word "property"** under section 2 of the Bankruptcy Act, giving jurisdiction of a corporation having property within a district but its principal place of business, residence, or domicile without the United States, should be much the same as that under judicial decisions relating to matters of taxation and attachment, and the situs of property is not to be

h. Removal from one district to another.—The removal of a person from one district to another for the purpose of pretending to acquire a residence so that a petition in bankruptcy might be filed by him in a district in which he did not reside, with the intention of leaving the place as soon as his discharge was granted, does not make him a resident of the district, and such facts being disclosed upon his examination, his creditors may have the proceedings dismissed for want of jurisdiction, the adjudication in bankruptcy not being conclusive upon them.¹⁰⁴

i. Effect of adjudication, in rem.—An adjudication acts both *in personam* and *in rem*. The property of the bankrupt at once vests in the trustees subsequently to be appointed, remaining meanwhile *in custodia legis*. In this the law is defective, and the resultant difficulties and dangers are not fully met by § 2 (3) authorizing the appointment of receivers. In the absence of an official with powers and functions similar to those of the official receiver in England,¹⁰⁵ the custody of the court in the *interregnum* between the filing of the petition and the appointment and qualification of the trustee is often more theoretical than actual. The practice has grown up in some districts of appointing receivers in all cases; this rests on doubtful authority, because not always "absolutely necessary for the preservation of estates," is expensive and sometimes proves an interference with the right given the creditors to choose their trustee. In other districts, the attorney in charge is held responsible for the property. In still others, the property is in effect put under the seal of the court by being locked up and the keys delivered to the referee. While the rules of the western district of Michigan establish the practice of making the referee to whom the case has been referred and who is, therefore, "the court" as well, *eo nomine* the receiver in every voluntary case.¹⁰⁶

III. CLAIMS.

Subdivision 2 of the section authorizes a court of bankruptcy to allow, disallow, and reconsider the allowance or disallowance of claims. This jurisdiction will be fully discussed hereafter.¹⁰⁷

IV. RECEIVERS, APPOINTMENT AND POWERS.

a. In general.—A court of bankruptcy may, under subdivision 3 of this section, appoint receivers of the property of the alleged bankrupt when absolutely necessary for the preservation of the bankrupt estate, "after the filing of the petition and until it is dismissed or the trustee is qualified." The court may also, under subdivision 15, make such orders and interlocutory judgments and issue such process as may be necessary for the enforcement of the provisions of the act. This is in recognition of the equity powers of the court and authorizes intervention by the court, through a receivership or otherwise, to

determined by general doctrines, such as "*mobilia sequuntur personam*." Corporate stock and bond certificates pledged with a trust company and money in an account with the trust company is property within the district so as to confer jurisdiction. But a deposit to meet unpaid coupons is a trust deposit belonging to the holders of the coupons, and is not property within the district belonging to the bankrupt. *Matter of San Antonio Land & Irrigation Co.* (D. C., N. Y.),

36 Am. B. R. 572, 228 Fed. 984.

¹⁰⁴ *In re Garneau* (C. C. A., 7th Cir.), 11 Am. B. R. 679, 127 Fed. 677. See also *In re Oldstein* (D. C., Or.), 25 Am. B. R. 138, 182 Fed. 409.

¹⁰⁵ Eng. Bankruptcy Act of 1883, §§ 66-71.

¹⁰⁶ As to appointment of receiver when necessary for preservation of estate, see next paragraph but one, *et seq.*

¹⁰⁷ Bankr. Act, § 57, *post*.

preserve the property of the alleged bankrupt. If appointed under the former provision he is the custodian of the estate, but may be clothed with such powers as to the court may seem necessary, subject, however, to the title to be acquired by the trustee upon his appointment and qualification.¹⁰⁸ The necessity of providing for the appointment of a receiver is obvious. A considerable time must necessarily elapse between the filing of a petition and the adjudication of bankruptcy and selection and qualification of a trustee. During this period opportunity may be afforded for the dissipation or depreciation of the assets either by the alleged bankrupt, or by third persons, with or without his connivance.¹⁰⁹

b. When receiver should be appointed.—(1) **WHEN ABSOLUTELY NECESSARY.**—The power to appoint may be exercised in either voluntary or involuntary proceedings. The power to appoint is statutory and may only be exercised when “absolutely necessary for the preservation of estates.”¹¹⁰ The necessity

^{108.} Compare *In re Fixen* (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748, and *In re Florcken* (D. C., Cal.), 5 Am. B. R. 802, 107 Fed. 241, with *Boonville Nat. Bank v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891; *Whittlesey v. Becker & Co.* (N. Y. App. Div.), 25 Am. B. R. 672, 142 N. Y. App. Div. 313; *Matter of Larkey* (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867.

^{109.} *In re Benedict* (D. C., Wis.), 15 Am. B. R. 232, 140 Fed. 55.

Object of receivership.—The duty required and the power conferred clearly are that the receiver or the marshal should take possession of property that would otherwise go to waste, and hold it and preserve it, so that it might come to the trustee, when selected, without needless injury. *Boonville Nat. Bank v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891.

Preservation of assets and appointment of receiver.—Courts of bankruptcy are invested with such jurisdiction at law and equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their respective terms, to appoint receivers or marshals, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition, and until it is dismissed or the trustee is qualified. *Darrough v. First National Bank of Claremore* (Okla. Sup. Ct.), 37 Am. B. R. 75, 156 Pac. 101. See Am. B. R. Dig. § 207.

Quasi-receivership.—Where unusual efforts are required to preserve an estate pending bankruptcy proceedings, receivership is usually called for; but even where full receivership is not demanded, a court of bankruptcy may and should exercise a quasi-receivership, to the extent at least of making provisions in advance for necessary services intended, in case of bankruptcy adjudication, to be made a charge against the estate. *Matter of Estate of Kinnane Co.* (C. C. A., 6th Cir.), 39 Am. B. R. 593, 242 Fed. 769.

^{110.} *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623; *In re Florcken* (D. C., Cal.), 5 Am. B. R. 802, 107 Fed. 241; *In re Rosenthal* (D. C., N. J.), 16 Am. B. R. 443, 144 Fed. 548, holding that an order appointing a receiver in a voluntary bankruptcy will be set aside where the petition merely states that the bankrupt verily believes that such an appointment will be to the benefit of all persons in interest. See also *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 144 Fed. 245; *In re Moody* (D. C., Iowa), 12 Am. B. R. 718, 131 Fed. 525; *Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861; *Sprague v. Margolis Co.* (D. C., Mass.), 32 Am. B. R. 692, 211 Fed. 171; *Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 115, 228 Fed. 470; *Matter of Hargadine-Mc-*

Kettrick, etc. Co. (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155; *Matter of Rodriguez* (D. C., Porto Rico), 40 Am. B. R. 685, 10 Porto Rico Fed. 162, 200; *Matter of Independent Mach., etc., Corp.* (C. C. A., 2d Cir.), 41 Am. B. R. 517, 251 Fed. 484; *Walker Grain Co. v. Gregg Grain Co.* (C. C. A., 5th Cir.), 44 Am. B. R. 230, 260 Fed. 1022.

Insolvency an essential prerequisite.—*Matter of Hargadine-McKittrick, etc. Co.* (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155.

Absolute necessity of appointment.—In the case of *Matter of Oakland Lumber Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634, the court said: “Congress recognized the necessity for caution by limiting the appointment of receivers to cases where it is ‘absolutely necessary’ for the preservation of the estate. In other words, the reason for such interference with such rights of property must be clear, positive and certain. Of course cases frequently arise where this remedy may be necessary,—cases where there is a reason to believe that the property may be stolen or secreted, or turned over to favored creditors. But fraud cannot be presumed, neither can danger to property be predicated of acts which are honest and lawful. It cannot be presumed that an assignee under a State law intends to plunder the fund he is appointed to administer. Unless something be shown to the contrary the presumption is persuasive that during the interval between the filing of the petition and the appointment of a trustee, the property will be entirely safe in the hands of the assignee.” And see *Ingram v. Ingram Dart Lighterage Co.* (D. C., Ga.), 34 Am. B. R. 622, 226 Fed. 53.

The court, upon an application for the appointment of a receiver, is entitled to know the truth as to the condition of the estate. *Matter of Veler* (C. C. A., 6th Cir.), 41 Am. B. R. 736, 249 Fed. 633.

Preservation of estate.—In no case should a receiver in bankruptcy be appointed except where, upon clear and convincing proof, the court finds it absolutely necessary for the preservation of the estate. *Matter of Oakland Lumber Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634. An alleged bankrupt cannot, by his consent, waive the limitation as to the necessity of the appointment of a receiver for the preservation of the estate. *Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861. See also *In re Desrochers* (D. C., N. Y.), 25 Am. B. R. 708, 183 Fed. 901.

Property in hands of State court receiver.—Where the property of a bankrupt is lawfully in the hands of a receiver appointed by a State court, a bankruptcy court will not appoint a receiver, as to do so would be entirely useless and futile. *Matter of Hargadine-McKittrick, etc. Co.* (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155.

of showing that the receivership is necessary for the preservation of the estate will not be obviated by the consent of the bankrupt.¹¹¹ And it must affirmatively appear that the assets of the alleged bankrupt are likely to be dissipated or wasted pending the adjudication.¹¹²

(2) CAUTION TO BE USED.— Unless the creditors as a whole are to be benefited by the receivership, a receiver should not be appointed. It must appear that the appointment will protect their interests by the preservation of the estate. A creditors' petition for a receivership will usually be granted where it appears that otherwise the bankrupt's estate will be left wholly unprotected, and be subject to dissipation, especially where there is no fraud or collusion and the other interested parties do not object.¹¹³ The court will carefully scrutinize arrangements made whereby attorneys for the parties are to profit by the receivership; if it appears that the appointment was secured by connivance of the interested parties and their attorneys and that some motive existed, as an agreed division of the fees or the like, for securing such appointment, the court should vacate the order.¹¹⁴

(3) EFFECT OF ASSIGNMENT FOR BENEFIT OF CREDITORS.— Where an assignment for the benefit of creditors has been made within the four months period, constituting an act of bankruptcy, and an assignee or receiver of the property of the debtor has been appointed by a State court, the power of a bankruptcy court to appoint a receiver is not restricted.¹¹⁵ This is apparent when it is considered that an assignment for creditors within the four months period is an act of bankruptcy and when made the basis of involuntary proceedings, the property assigned immediately becomes subject to administration in bankruptcy.¹¹⁶ The court may, in its discretion, recognize the assignee for the purpose of preserving the alleged bankrupt's estate, or appoint a receiver, if the circumstances warrant it, and may restrain the assignee from administering the estate.¹¹⁷

(4) EFFECT OF APPOINTMENT.— Coincident with the filing of a petition the court acquires control of the property of the alleged bankrupt, and to properly exercise this control, it is thereupon vested, under the subdivisions

111. *Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 105 Fed. 861. In which the court said: "It was not intended, we think, that the bankrupt, by his consent, could remove the limitation of the statute, and authorize the appointment of a receiver, where it was not necessary for the preservation of the estate. Provisions of the act for the protection of the bankrupt cannot be waived by him if such provisions also serve to protect the bankrupt's creditors."

112. *In re Standard Cordage Co.* (D. C., N. Y.), 30 Am. B. R. 448, 184 Fed. 156.

113. *In re Huddleston* (D. C., Ga.), 21 Am. B. R. 669, 167 Fed. 428.

114. *Matter of Oshwitz* (D. C., N. Y.), 25 Am. B. R. 504, 183 Fed. 590; *In re Desrochers* (D. C., N. Y.), 25 Am. B. R. 703, 183 Fed. 991.

115. Appointment of receiver after qualification of assignee for benefit of creditors.— The power of the bankruptcy court to appoint a receiver is not affected by the fact that an assignment for the benefit of creditors has been executed and that the assignee named therein has qualified. Whether to appoint a receiver in a given case is a matter for the exercise of a proper discretion, and depending upon the question whether the assignee is a proper custodian of the property during the period between the filing of the petition and the election of a trustee. *Matter of Federal Mail & Express*

Co. (D. C., N. Y.), 37 Am. B. R. 240, 233 Fed. 691. And see *in re Oakland Lumber Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634; *Matter of D. & E. Dress Co. Inc.* (D. C., N. Y.), 40 Am. B. R. 360, 244 Fed. 885.

116. *In re Gutmeilig* (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475; *s. c.* on appeal, 1 Am. B. R. 338, 92 Fed. 337; *Matter of Federal Mail & Express Co.* (D. C., N. Y.), 37 Am. B. R. 240, 233 Fed. 691.

117. *Matter of D. & E. Dress Co. Inc.* (D. C., N. Y.), 40 Am. B. R. 360, 244 Fed. 885; *Matter of Federal Mail & Express Co.* (D. C., N. Y.), 37 Am. B. R. 240, 233 Fed. 691, holding that in all cases where a petition in bankruptcy has been filed within four months of making a general assignment, the bankruptcy court has both the power and the absolute discretion to restrain the assignee from administering the estate. See Am. B. R. Digest, § 935.

Intervention by creditors.— If creditors have accepted a deed of trust or general assignment for the benefit of creditors and the trustee or assignee therein is a party to or bound by the proceedings wherein such assignment is declared to be void, the creditors are without sufficient equity to justify their subsequent intervention to have the order made in such proceeding set aside. *Matter of Dashiell* (C. C. A., 6th Cir.), 40 Am. B. R. 649, 246 Fed. 366.

above referred to, with full power to designate officers of the court, either a receiver or marshal, to preserve such property, to the end that the interests of the creditors may be protected.¹¹⁸ The power to appoint a receiver, where the court has acquired jurisdiction of the parties, is not affected by the fact that the respondent, a corporation, was not subject to adjudication as a bankrupt.¹¹⁹ It seems that if a receiver is appointed in an involuntary case, before adjudication, he must give a bond.¹²⁰ The official status or regularity of appointment of a receiver is not subject to collateral attack.¹²¹

c. Practice on appointment.—(1) **APPLICATION.**—Before reference of the bankruptcy proceeding, the application for a receiver should be made to the judge; after that time to the referee.¹²² The application should state facts showing that a receiver is absolutely necessary for the preservation of the estate,¹²³ and should be accompanied by a bond as required by § 3-e of the bankruptcy act.¹²⁴ The application may be on affidavits of parties in interest, showing the requisite facts. A petition which fails to allege or is not accompanied by affidavits showing that the appointment is absolutely necessary for the preservation of the estate is insufficient.¹²⁵ The proceedings for the

¹¹⁸ *In re Kleinhaus* (D. C., N. Y.), 7 Am. B. R. 604, 113 Fed. 107.

The title to the property of the alleged bankrupt remains in him until adjudication, subject to the control of the court to be exercised either by a receiver or the marshal, if otherwise the interests of the creditors are not sufficiently protected. *In re La Plume Milk Co.* (D. C., Pa.), 16 Am. B. R. 729, 145 Fed. 1013.

Pending and prior to the adjudication in bankruptcy title to the bankrupt's property still remains in them. But the court may take into its custody and control this property pending an adjudication. *Whittlesey v. Becker & Co.*, 25 Am. B. R. 672, 677, 142 N. Y. App. Div. 313.

Effect of appointment on right to acquire lien.—An order of the bankruptcy court appointing a general receiver of the bankrupt's entire estate, directing the delivery of such estate to him as far as possible by the bankrupt, and enjoining all other persons from transferring or otherwise interfering with the property, assets and effects of the bankrupt, effects a sequestration of the bankrupt's estate to such an extent as to prevent the acquisition of any new lien thereon. *Agnew v. Board of Education* (Ct. of Chan., N. J.), 83 N. J. Equity 49, 33 Am. B. R. 132, 89 Atl. 1046.

¹¹⁹ *In re Hill Co.* (C. C. A., 7th Cir.), 20 Am. B. R. 73, 159 Fed. 73.

¹²⁰ Bankr. Act, § 3-e, *post*.

¹²¹ *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

¹²² Gen. Ord. XII. As to the effect that after the order referring a case to a referee, the proceedings, except such as are required by the act or by the general orders to be had before the judge, shall be had before the referee, see *In re Florcken* (D. C., Cal.), 5 Am. B. R. 802, 107 Fed. 241.

Form of application for receiver before adjudication, see Form No. 64, *post*; Form

No. 52, *Hagar & Alexander's Bankr. Forms*, 2d Ed.

¹²³ *In re Oakland Lumber Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634; *In re Rosenthal*, (D. C., N. J.), 16 Am. B. R. 448, 144 Fed. 548.

¹²⁴ *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 354, 135 Fed. 472.

Bond required upon appointment.—It is the evident purpose of section 3-e of the Bankruptcy Act, requiring a bond by an applicant for the appointment of a receiver, to protect the alleged bankrupt from all costs, expenses, and damages incident to the seizure of his property, not only up to the time of appeal, if there be an appeal, but until final adjudication or an order of the court turning back the property. If no bond should be given under said section, or if a bond be given and it proves to be inadequate the applicant for the appointment of the receiver would still be liable, and, independent of the bond, he could be compelled to pay the costs and expenses of the receivership. Upon the appointment of a receiver on the application of a creditor the alleged bankrupt can be identified only by a bond executed pursuant to section 3-e of the Bankruptcy Act and he must resort to this to recover his damages and expenses upon the discharge of the receiver. But, if it appears to the alleged bankrupt that the bond is inadequate, he may apply to the court to require the creditor to give an additional and sufficient bond. *Hill Co. v. U. S. Fidelity Co.* (Sup. Ct., Ill.), 265 Ill. 534, 33 Am. B. R. 781, 107 N. E. 194.

¹²⁵ *Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861; *Matter of Oakland Lumber Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634; *In re New Chattanooga Hardware Co.* (D. C., Tenn.), 27 Am. B. R. 77, 190 Fed. 241.

Sufficiency of petition.—It is not enough to allege the necessity for the appointment of a receiver in the language of the statute, but the moving papers must set forth the specific facts which reasonably establish such necessity. *Matter of Hargadine-McKittick, etc., Co.* (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155.

appointment of a receiver are not a part of the proceedings for adjudication but are ancillary thereto; the application for a receiver should therefore be separate.¹²⁹ The law does not authorize an application by the attorney of the creditors. The analogy of the statute suggests that it be accompanied with a consent, signed by a goodly number of creditors, and a request that a named person be appointed; or, if not so accompanied, the appointment may be withheld until the wishes of creditors can be ascertained. The Bankruptcy Act does not limit the right to apply for the appointment of a receiver to any one or more of the petitioning creditors, but provides that any party in interest may make application for such appointment. This necessarily includes any creditor who has a provable debt against the bankrupt that would be affected by his discharge, whether he be one of the petitioning creditors or not.¹²⁷

(2) NOTICE OF APPLICATION.—Notice of the application for the appointment of a receiver is proper; the statute does not expressly require it, but it should be given except in rare cases, where it is apparent that irreparable loss or injury is threatened or that notice might defeat the very purpose of the receivership.¹²⁸ An appointment without notice is not in a constitutional sense a deprivation of property without due process of law.¹²⁹

(3) ORDER OF APPOINTMENT.—Whether a receiver should be appointed is a judicial question to be determined by the court; its determination may not be compelled by mandamus.¹³⁰ The order of appointment should fix the amount of the receiver's bond, and distinctly specify his powers and duties. Should he find the order insufficient, he may, of course, apply for modifications, fixing or increasing his powers. He should be ready at the first meeting of creditors with a report and account, which should then be audited and his allowance fixed; whereupon he should turn over the property to the trustee. This pro-

126. Receivership proceedings ancillary to bankruptcy proceedings.—It is apparent from a consideration of the provisions of the bankruptcy act that a petition for adjudication and an application for the appointment of a receiver are separate and distinct, and that the receivership proceedings are but ancillary to the proceedings in bankruptcy. *Hill Co. v. U. S. Fidelity Co.* (Sup. Ct., Ill.), 265 Ill. 534, 33 Am. B. R. 781, 107 N. E. 194.

127. *Hill Co. v. U. S. Fidelity Co.* (Sup. Ct., Ill.), 265 Ill. 534, 33 Am. B. R. 781, 107 N. E. 194.

128. *Latimer v. McNeal* (C. C. A., 3d Cir.), 16 Am. B. R. 43, 142 Fed. 451, affg. *In re Francis* (D. C., Pa.), 14 Am. B. R. 676, 136 Fed. 912; *In re Abrahamson & Bretstein* (Ref., N. Y.), 1 Am. B. R. 44; *Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861.

129. Due process of law.—In the case of *Latimer v. McNeal* (C. C. A., 3d Cir.), 16 Am. B. R. 43, 142 Fed. 451, the court said: "Now, as respects the matter of notice, it will be observed that the Bankrupt Act does not expressly require notice to be given the bankrupt before the appointment of a receiver, under the provision quoted. Such appointment, more-

over, does not deprive the bankrupt of his property without due process of law, for the appointment is essentially for the temporary custody of his property with a view to its preservation. Furthermore there occur well-recognized instances of such urgency as to dispense with notice; as where irreparable loss or injury is impending, or where notice might defeat the very purpose of the receivership. We are, indeed, of the opinion that except in rare cases a receiver ought never to be appointed without notice to the alleged bankrupt."

Ancillary appointment.—A bankruptcy court in the district other than that in which the bankruptcy proceedings are pending has no jurisdiction to appoint a receiver of the property of the alleged bankrupt, except upon motion in open court upon such notice to the persons in the actual possession of property so located and to those otherwise interested, as will in the circumstances constitute due process of law, as required by the constitution of the United States. *Ross-Meehan Foundry Co. v. Southern Car & Foundry Co.* (D. C., Tenn.), 10 Am. B. R. 624, 124 Fed. 403.

130. *Edinburg Coal Co. v. Humphreys* (C. C. A., 7th Cir.), 13 Am. B. R. 593, 134 Fed. 839.

cedure rests on custom and the analogy of the administrative features of the statute, rather than on the law or the rules of the courts.¹³¹

d. Powers of receiver.—(1) IN GENERAL.—The powers of the receiver will depend on the purpose for which he is appointed. They are limited by the powers specified in the order of appointment,¹³² or by the jurisdiction, directly or otherwise, of the court which appoints him.¹³³ If appointed for the preservation of the bankrupt estate under authority of § 2 (3), he becomes a mere custodian. He may take custody of whatever is plainly the property of the bankrupt, and against which no third party makes any claim with color of title.¹³⁴ He is a statutory receiver and possesses the powers conferred upon him by the statute, or such as may necessarily be implied from the powers so conferred.¹³⁵

(2) SALE OF PROPERTY BY RECEIVER.—When appointed for the preservation of the estate the court may, for cause, order a sale of the property in his possession,¹³⁶ if it appear that the property be of a perishable nature and sale

131. Where a marshal is required to seize and take possession of the property of the alleged bankrupt the special warrant to him should be in the form prescribed in official forms in bankruptcy number 8; the bond of the marshal is prescribed by form number 10. These forms do not apply to receivers. In supplementary forms numbers 101-104 are found petition and orders for the appointment of receivers before and after adjudication. These will be found useful in practice in receiverships. See also Hagar & Alexanders' Forms on Bankruptcy (2nd Ed.), Nos. 52, 53, 58, 59.

Vacating receivership.—While the questions presented by the creditors' petition and the alleged bankrupt corporation's answer remain undetermined, and there is nothing to indicate that its assignee for creditors was not an honest, capable and responsible man, in whose hands the property of the estate was entirely safe, an *ex parte* order appointing a receiver granted upon the filing of the petition in bankruptcy will be reversed with costs and the receivership vacated. *Matter of Oakland Lumber Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634. To the same effect is the case of *In re Desroschers* (D. C., N. Y.), 25 Am. B. R. 703, 183 Fed. 991.

132. *Matter of Metropolitan Motor Car Co.* (D. C., Wash.), 35 Am. B. R. 539, 225 Fed. 274.

133. *In re Benedict* (D. C., Wis.), 15 Am. B. R. 232, 140 Fed. 55. It seems well established that a receiver appointed in any proceeding, who relies upon his authority as an officer of the court, has no authority to do any official act outside of the jurisdiction of the court appointing him. *Great Western Mining & Mfg. Co. v. Harris*, 198 U. S. 561; *Hale v. Allinson*, 188 U. S. 56; *Booth v. Clark*, 17 How. (U. S.) 327. A receiver of a corporation appointed in a court other than a court of bankruptcy, may contest the adjudication of the corporation

as a bankrupt. *Matter of Hudson River Electric Power Co.* (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934, *affd.* 25 Am. B. R. 504, 183 Fed. 701.

134. *In re Michaelis & Lindeman* (D. C., N. Y.), 27 Am. B. R. 299, 196 Fed. 718.

135. "A statutory receiver is one appointed in pursuance of special statutory provisions. He derives his power from the statute, and to it must look for the duty imposed on him. He possesses such power only as the statute confers, or such as may be fairly inferred from the general scope of the law of his appointment. We are therefore referred to the Bankruptcy Act to ascertain the powers of the bankruptcy court to appoint a receiver and the extent of the power which the act confers upon him.

"* * * It plainly was not contemplated that the receiver or the marshal so designated should supersede the trustee, or exercise the general powers conferred upon a trustee. There is no such power specially conferred or any provisions of the act from which such power can reasonably be implied. Such temporary receiver, whether he be a marshal or another, is not a trustee for the creditors, but is a caretaker and custodian of the visible property pending adjudication and until a selection of a trustee. If in any sense a trustee, he is trustee for the bankrupt, in whom is the title to the property until it passes by operation of law as of the date of adjudication to the trustee selected by the creditors. The duty required and the power conferred clearly are that the receiver or marshal shall take possession of property that would otherwise go to waste, and hold it and preserve it so that it might come to the trustee, when selected, without needless injury." *Boonville Nat. Bank v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891.

After an adjudication in bankruptcy a receiver is no longer merely a custodian of property which may be ordered returned to the alleged bankrupt, but of property which is then in the course of administration. In addition to the duties devolving upon him as a preserver of property actually in his possession, he is a proper person, pending the appointment of a trustee, to carry out any orders which the court may make for the enforcement of the provisions of the Bankruptcy Act. *Matter of Gottlieb* (D. C., N. Y.), 40 Am. B. R. 247, 245 Fed. 139.

136. *In re Becker* (D. C., Pa.), 3 Am. B. R. 412, 98 Fed. 407.

thereof is necessary in order to preserve it.¹³⁷ But it must be remembered that pending and prior to an adjudication the property of the bankrupt still belongs to him, and title thereto only vests in the trustee after an adjudication has been obtained.¹³⁸ The importance of the question as to whether a sale by a receiver so appointed may be ordered is lessened, when it is considered that the court may direct a trustee when appointed to ratify a sale so made by the receiver.¹³⁹ General Order XVII provides for an order, upon the petition of a receiver directing him to sell part or the whole of the bankrupt's estate, if the same is perishable, and it appears that there will be loss if it is not sold immediately.¹⁴⁰ If there is any irregularity in a sale by a receiver the remedy is in the bankruptcy court upon the application of the trustee or of a creditor. It cannot be attacked by one who was not a creditor of the estate in an action against the alleged purchaser.^{140a}

(3) **SUITS BY RECEIVER.**—The question has also arisen as to whether a receiver before adjudication may be permitted to bring suit for the recovery of the property of the bankrupt not in his possession. The weight of authority is against the right of a receiver to sue to recover such property.¹⁴¹ But it has been held in a well-considered case that where property has been fraudulently and illegally transferred by a bankrupt within the four months period, the court may, acting under authority of § 2 (3), appoint a receiver of such property, since by the terms of the act¹⁴² such transfer was declared null and void and the property involved to be the property of the bankrupt.¹⁴³ In this and similar cases it was assumed that the court in the exercise of its equity jurisdiction could protect the rights of creditors by the appointment of a receiver, by injunction or any other appropriate remedy.¹⁴⁴ It is suggested that if the receiver is appointed "for the preservation of the estate," under the statute, his powers must be restricted, necessarily, to suits respecting property in the possession or which should have been in the possession of the

137. *Sale for preservation.*—In the case of *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747, it was held that as a general rule no order of sale should be made until after adjudication unless the property is of such a nature that a sale is necessary to preserve its value.

Perishable property.—In the case of *In re Garner & Co.* (D. C., Ala.), 18 Am. B. R. 733, 135 Fed. 914, and *In re Harris* (D. C., Ala.), 19 Am. B. R. 635, 153 Fed. 216, the court limited the right to order a sale of perishable property to cases in which it was clear to the court that the property was, in fact, perishable in part or in its entirety, or would greatly deteriorate, if held without a sale, and only that portion which was of such nature could be ordered sold.

Sales by receivers in bankruptcy are justified only when property is perishable or is rapidly depreciating in value on a falling market or for other reasons. *In re Desrochers* (D. C., N. Y.), 25 Am. B. R. 703, 183 Fed. 991; *In re Duke & Son* (D. C., Ga.), 28 Am. B. R. 195, 199 Fed. 199.

Rights of persons having claims.—Where a receiver in bankruptcy was forced to sell a herd of hogs very promptly, there being no funds to purchase feed, persons having any rights, claims or property in any of the hogs should be afforded an opportunity to litigate and establish them against the proceeds. *Gealey v. South Side Trust Co.* (C. C. A., 3d Cir.), 41 Am. B. R. 645, 249 Fed. 189.

138. *Bankr. Act, § 70-a, post*; *In re La Plume Condensed Milk Co.* (D. C., Pa.), 16 Am. B. R. 729, 731, 145 Fed. 1013.

139. *Ellis v. Feeney & Sheehan* (N. Y., App. Div.), 43 Am. B. R. 559, 187 App. Div. (N. Y.) 481. As to sales by trustee, see discussion un-

der § 70-b, sub-title "Sales by trustee."

140. See Gen. Ord. XVII, and cases cited thereunder, *post*.

140a. *Ellis v. Feeney & Sheehan* (N. Y. App. Div.), 43 Am. B. R. 559, 187 App. Div. 481.

141. *Boonville Nat. Bank v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891, in which the court said: "The receiver or marshal takes possession of the visible property of the bankrupt for delivery to the trustee, not to pursue the debtors of the estate, nor to enforce rights of action vested in the trustee alone, nor to involve the estate in possibly unnecessary litigation." *Guaranty Title & Trust Co. v. Pearlman* (D. C., Pa.), 16 Am. B. R. 461, 144 Fed. 550; *In re Dunseath* (D. C., Pa.), 22 Am. B. R. 75, 168 Fed. 973; *In re Lebrecht* (D. C., Tex.), 14 Am. B. R. 445, 135 Fed. 873; *Frost v. Latham & Co.* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866. *Contra*: *In re Fixen* (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748.

142. *Bankr. Act, § 67-e.*

143. *Horner-Gaylord v. Miller & Benedict* (D. C., W. Va.), 17 Am. B. R. 257, 147 Fed. 295. But see *Contra*: *Frost v. Latham* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866, in which it was held that receivers in bankruptcy may not maintain suits to recover fraudulent or preferential transfers made prior to bankruptcy.

Upon a fictitious sale of property shortly prior to the adjudication, no title passes to the fraudulent vendee, and the receiver is entitled to the possession of the property. *In re Siegel* (D. C., N. Y.), 21 Am. B. R. 154, 164 Fed. 559.

144. *In re Schrom* (D. C., Iowa), 3 Am. B. R. 352, 97 Fed. 760.

Filing petition to recover moneys fraudulently held.—It is the duty of a receiver to

bankrupt, and constitute the corpus of the estate. The recovery of property fraudulently or preferentially transferred is a function of the trustee, and ordinarily will be left to him. In any event a receiver may not be authorized to sue in a district other than the one in which he is appointed,¹⁴⁵ but an ancillary receiver may be appointed to aid in protecting the assets in any district pending the selection of a trustee.¹⁴⁶ Where the circumstances are such that it would be impossible for a receiver to apply to the court of his appointment to enforce the delivery of property belonging to the estate which might be dissipated and the estate suffer an irreparable loss, he may maintain a suit for its protection in any district where the property may be.¹⁴⁷ If property is wrongfully taken from a receiver he must retake it or recover the damages for the conversion and account therefor to the court.^{147a}

e. Possession by receiver.—(1) **CUSTODIAN OF PROPERTY.**—A receiver appointed under this section for the "preservation of the estate," is merely a custodian of the property of the alleged bankrupt, until the question of bankruptcy is adjudicated.¹⁴⁸ He takes no title to the property.¹⁴⁹

(2) **PROPERTY CLAIMED ADVERSELY.**—In the interim between Supreme Court decisions in *Bardes v. Bank*¹⁵⁰ and *Bryan v. Bernheimer*,¹⁵¹ it was generally conceded that receivers had not power to take possession of property claimed adversely, even if to act only as custodians. Since the latter case, however, the lower courts have been confirmed in their earlier opinions that the district court had power to direct receivers or the marshals to seize and hold the property of the bankrupt wherever found; this is something very different from a summary settlement of a controversy as to the title of property so seized, which must usually be by plenary suit.¹⁵² But, though such jurisdiction exists, it will rarely be exercised.¹⁵³ An injunction, either in the proceeding,¹⁵⁴ or in an ancillary action in equity to prevent the adverse claimant from disposing of the property,¹⁵⁵ will usually be enough. Nor should courts of bankruptcy, through their receivers, seize property claimed adversely and already in the custody of a State court; comity requires that the first court obtaining jurisdiction shall retain it until ousted by its consent.¹⁵⁶ Thus, though there is ample jurisdiction to take possession of such property, the trustee should always apply to the State court in the first instance.¹⁵⁷ If a

bring to the court's attention, by petition, any matters which may suggest the advisability of making an order that a third person shall turn over to the receiver moneys of the bankrupt held by him. *Matter of Gottlieb* (D. C., N. Y.), 40 Am. B. R. 247.

^{145.} *In re Nat. Mercantile Agency* (D. C., Pa.), 12 Am. B. R. 189, 128 Fed. 639; *Matter of Dunseath* (D. C., Pa.), 22 Am. B. R. 75, 168 Fed. 973.

^{146.} *In re Benedict* (D. C., Wis.), 15 Am. B. R. 232, 140 Fed. 55; *Matter of Dunseath* (D. C., Pa.), 21 Am. B. R. 742, 168 Fed. 973.

^{147.} *In re Dempster* (C. C. A., 8th Cir.), 22 Am. B. R. 751, 172 Fed. 353.

^{147a.} *Ellis v. Feeney & Sheehan* (N. Y. App. Div.), 43 Am. B. R. 559, 187 App. Div. (N. Y.) 481.

Assignment of cause of action.—A cause of action by a receiver for the conversion of property belonging to the bankrupt estate is not assignable by him and does not pass by implication. *Ellis v. Feeney & Sheehan* (N. Y. App. Div.), 43 Am. B. R. 559, 187 App. Div. 481.

^{148.} *Matter of Larkey* (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867; *In re Leonard* (D. C., Nev.), 24 Am. B. R. 97, 177 Fed. 503; *In re Michaelis v. Lindeman* (D. C., N. Y.), 27 Am. B. R. 299, 196 Fed. 718.

^{149.} *Matter of Larkey* (D. C., N. J.), 32 Am.

Am. B. R. 287, 214 Fed. 867; *Whittlesley v. Becker & Co.* (N. Y. Sup. Ct.), 25 Am. B. R. 672, 142 N. Y. Supp. 1040; *Vaughn-Carlton Co. v. Studebaker Corporation of America* (Ga. Ct. of App.), 42 Am. B. R. 402, 97 S. E. 99.

Respective rights of receiver in bankruptcy and bankrupt administratrix continuing decedent's business, see *Matter of Tietje* (D. C., N. Y.), 41 Am. B. R. 816, 253 Fed. 283.

^{150.} 4 Am. B. R. 163, 178 U. S. 525.

^{151.} 5 Am. B. R. 623, 181 U. S. 188.

^{152.} *In re Etheridge Furniture Co.* (D. C., Ky.), 1 Am. B. R. 112, 92 Fed. 329; *In re Young* (C. C. A., 8th Cir.), 7 Am. B. R. 14, 111 Fed. 158; *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 300.

^{153.} Compare "*Effect on Auxiliary Remedies*," in Section Twenty-three of this work.

^{154.} See "*Injunctions other than against Suits*," in this section, *post*.

^{155.} As in *Beach v. Macon Grocery Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 751, 116 Fed. 143.

^{156.} For instance, see *In re Russell* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248. But it may be questioned whether this doctrine of comity has not been carried too far in such cases, as in *re Shoemaker* (D. C., Va.), 7 Am. B. R. 437, 112 Fed. 648, and *In re Wells* (D. C.,

receiver of a bankrupt estate is in possession of goods the title to which is in dispute, and which are not included in the bankrupt's schedules, an action of replevin will not lie to recover the goods upon the theory that the receiver was holding the goods, not as an officer of the court, but as an individual.¹⁵⁸ Where a receiver, acting under an erroneous order, takes property from one claiming to be the owner, without his consent, the property should be returned to him, without charge of any kind.¹⁵⁹

f. Suits against receivers.—The Judicial Code provides in substance that a receiver appointed in a Federal court may be sued without leave of the court "in respect to any act or transaction of his in carrying on the business connected with" the property in his charge.¹⁶⁰ It has been held that this provision applies to receivers appointed in bankruptcy proceedings as well as other Federal receivers.¹⁶¹ If the action is not based "on an act or transaction in carrying on the business" of the receiver it may properly be stayed if not brought with leave of the court.¹⁶² A receiver may not defend, compromise or adjust claims against the estate of the bankrupt.¹⁶³ An action in a State court against a receiver upon an agreement which pertains to the preservation of the estate, or business connected therewith, may not be stayed by an order of the bankruptcy court.¹⁶⁴

g. Compensation of receiver.—(1) **IN GENERAL.**—The compensation of receivers was not limited by the original statute, but rested in the sound discretion of the court.¹⁶⁵ His compensation may only be allowed for services per-

Mo.), 8 Am. B. R. 75, 114 Fed. 222. See comment on these cases in the case of *In re Donnelly* (D. C., Ohio), 26 Am. B. R. 304, 306, 188 Fed. 1001. See also discussion under Section Eleven of this work, and "*Inflections other than against Suits*," *post*, in this section.

157. *In re Lengert Wagon Co.* (D. C., N. Y.), 6 Am. B. R. 535, 110 Fed. 927; *Mauran v. Crown Carpet Lining Co.* (Sup. Ct., R. I.), 6 Am. B. R. 734; *Carling v. Seymour Lumber Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; *In re Watts*, 10 Am. B. R. 113, 124, 100 U. S. 1, 23 Sup. Ct. 718; *Gealey v. South Side Trust Co.* (C. C. A., 3d Cir.), 41 Am. B. R. 645, 249 Fed. 189; *Cudahy Packing Co. v. N. J. Dairy Co.* (N. J. Ct. of Ch.), 43 Am. B. R. 674, 107 Atl. 147. It has been held that the State court which yields possession may retain the costs and expenses of its officer. *Wilson v. Parr*, 8 Am. B. R. 230. This rule was convincingly challenged in *In re Rogers* (D. C., Ga.), 8 Am. B. R. 723, 116 Fed. 435.

A bankruptcy court has power by summary order to compel a State court receiver to turn over money of the bankrupt to the bankruptcy court to await its action upon the question of compensation, fees and disbursements of that receiver. *Matter of Diamond's Estate* (C. C. A., 6th Cir.), 44 Am. B. R. 268, 269 Fed. 70; *Compare Carvagnaro v. Indian Tire Co.* (N. J. Ct. of Ch.), 44 Am. B. R. 137, 107 Atl. 643.

158. *Murphy v. John Hoffman Co.* (U. S. Sup. Ct.), 211 U. S. 542, 21 Am. B. R. 487, affg. 187 N. Y. 548.

159. *Beach v. Macon Grocery Co.* (C. C. A., 5th Cir.), 11 Am. B. R. 104, 125 Fed. 513, 60 C. C. A. 537. But a receiver should not be compelled to turn over property to a claimant where there is a question as to the interests of the parties in such property. *Matter of Mundle* (D. C., N. Y.), 13 Am. B. R. 490, 139 Fed. 691.

160. Judicial Code, § 60.

161. *In re Kanter & Cohen* (C. C. A., 2d Cir.), 9 Am. B. R. 372, 121 Fed. 984; *In re Smith* (D. C., N. Y.), 9 Am. B. R. 603, 121 Fed. 1014; *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 628, 102 Fed. 747.

162. *Matter of Kalb & Berger Mfg. Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 393, 165 Fed. 895.

163. **Rights and duties of receivers in respect to claims against estate.**—In the case of *In re Helm Milk Product Co.* (D. C., N. Y.), 26 Am. B. R. 746, 183 Fed. 787, the court said: "Receivers, prior to adjudication, are in no condition to adjust claims, liquidated or unliquidated, and have no power. They may not compromise claims or admit or reject them. They cannot properly defend, or, if they do, cannot act intelligently, as their office is of short duration, and their province is to care for and protect or preserve the property, not defend suits. In short, the act contemplates that all claims against the bankrupt, which are provable—and this is a provable claim—shall be proved and presented to the referee or court with such proof and then be allowed or disallowed and liquidated, if unliquidated, as directed by the referee or the court. Section 63. All pending suits against a bankrupt are to be stayed. Section 11. This section clearly indicates that suits against a bankrupt and the receivers are not to be authorized by the court in any event and not against any one prior to the appointment of a trustee who is to represent the creditors. Even then claims in controversy are not to be settled or liquidated by suit in the State courts unless the judge or referee so directs. This claim arises on a contract made by the alleged bankrupt, and is a claim against the bankrupt, and is not a claim against the receivers for some act or omission of theirs."

164. *Idem*: *In re Roberts* (C. C. A., 2d Cir.), 22 Am. B. R. 908, 169 Fed. 1022.

165. *In re Adams Sartorial* (D. C., Col.), 4 Am. B. R. 107, 101 Fed. 215; *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747; *In re Scott* (D. C., N. Car.), 8 Am. B. R. 625, 96 Fed. 607; *In re Cambridge Lumber Co.* (D. C., Mass.), 14 Am. B. R. 168, 136 Fed. 963; *Dunlap Hardware Co. v. Huddleston* (C. C. A., 5th Cir.), 21 Am. B. R. 731, 167 Fed. 433.

Reasonable compensation.—Upon the ad-

formed within the scope of his authority; he may not receive compensation for activities not authorized.¹⁶⁶ Where a receiver has been negligent in the performance of his duties, the court may, in a proper case, deny him any commissions.¹⁶⁷

(2) EFFECT OF AMENDMENT OF 1910.— Clause 5 of section 2, and section 48 of the bankruptcy act have been amended by the amendatory act of 1910 so that the discretion of the court in allowing additional compensation is limited by fixing the maximum commissions to be allowed receivers (1) for services rendered by them when appointed under § 2 (3) to take charge of and preserve the property of the alleged bankrupt, and (2) for services rendered by them in conducting the business of the bankrupt.¹⁶⁸ Some of the cases variously construing the act of 1903 amending § 2 (5) are cited in the foot-note.¹⁶⁹ These cases are not controlling under the law as amended by the amendatory act of 1910. The words added to subd. 5 by the act of 1903, "but not at a greater rate than in this act allowed trustees for similar services," were omitted by the amendment of 1910; they were held to be a limitation on the discretion of the court so far as they related to compensation allowed for continuing a going business. In such cases receivers are not entitled to greater allowances than the percentages fixed by § 48-a on moneys disbursed by trustees,¹⁷⁰ but where receivers have carried on the business of the bankrupt with skill and success they may be allowed the maximum compensation allowed to trustees under that section.¹⁷¹ The amount specified is not intended as a

ministration of assets subject to specific liens, reasonable compensation, not, however, in excess of the allowances made by the Bankruptcy Act, should be allowed to receivers, if appointed. *Matter of Rauch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982.

166. *Matter of Metropolitan Motor Car Co.* (D. C., Wash.), 35 Am. B. R. 539, 225 Fed. 274.

167. *In re Schoenfeld* (C. C. A., 3d Cir.), 25 Am. B. R. 748, 183 Fed. 219.

168. See §§ 1 and 9 of Amendatory Act of 1910, amending §§ 2 (5) and 48 of the Bankr. Act of 1898.

Compensation where receivers are changed by adjudication in another district.—Where, by order of the court in the Southern District of New York, the business of an alleged bankrupt was continued by the receiver and, pending the adjudication, the debtor was adjudicated a bankrupt in the Eastern District of New York and receivers appointed, and the adjudication previously made in the Southern District was vacated, by an order directing that all property held by the Southern District receivers be turned over to the Eastern District receivers, the court in the Southern District has jurisdiction to determine what is a proper compensation for its receivers, who actually continued the business for five days. *Matter of Isaacson* (C. C. A., 2d Cir.), 23 Am. B. R. 98, 174 Fed. 406.

169. Effect of amendment of 1903.—*In re Kirkpatrick* (C. C. A., 6th Cir.), 17 Am. B. R. 594, 148 Fed. 811, in which case the court held that the amendment to § 2 (5) had reference to services rendered by a re-

ceiver, marshal or trustee, in conducting the business of the bankrupt and not to services required of receivers and marshals by § 2 (3); *In re Martin Borgeson Co.* (D. C., N. Y.), 18 Am. B. R. 178, 151 Fed. 780. In the case of *In re Cambridge Lumber Co.*, 14 Am. B. R. 581, 127 Fed. 772, it seems to have been inferred that the amendment limited the exercise of the court's discretion in fixing the compensation to that allowed to trustees. In the case of *In re Sully* (D. C., N. Y.), 13 Am. B. R. 22, 133 Fed. 997, which arose subsequent to the amendment of 1903, a compensation much larger than that allowed to trustees was awarded to receivers who had rendered valuable services by collecting a large sum for the estate, which the judge thought was due to the experience and skill of the receivers. See *In re Falkenberg* (D. C., New Mex.), 30 Am. B. R. 718, 206 Fed. 835.

A receiver who is in possession of the bankrupt's property for not more than six days, during which he did not open the store more than three times for only a short period, when the property was sold through no effort of his, is not entitled to additional compensation. *Matter of Greisheimer* (D. C., Cal.), 31 Am. B. R. 567, 209 Fed. 134.

170. For the compensation of court receivers who have surrendered to receivers in bankruptcy, see *Mauran v. Crown Carpet Lining Co.* (Sup. Ct., R. I.), 23 R. I. 324, 6 Am. B. R. 734, 50 Atl. 331; *In re Allison Lumber Co.* (D. C., Ga.), 14 Am. B. R. 78, 137 Fed. 643.

171. *In re Richards* (D. C., Mass.), 11

fixed and invariable amount, to be awarded in all cases; the rate fixed should be determined in accordance with the value of the services rendered.¹⁷³

(3) **How PAYABLE.**—Petitioning creditors in case of a receiver in involuntary proceedings may be charged with the compensation of the receiver, and the cost and expenses of the receivership.¹⁷³ A receiver may be allowed compensation and the expenses of the receivership out of the assets, though the court, on dismissal of the proceedings, may ultimately charge such expenses in whole or in part against the petitioning creditors.¹⁷⁴ As a general rule where the estate is benefited by the receivership, and an adjudication is had, the compensation and expenses of the receiver should be paid from the fund.¹⁷⁵

h. Damages from receivership.—A complaint or petition by the trustee in bankruptcy addressed to the bankruptcy court in the exercise of its equity powers, asking an accounting for the damages, caused to the estate by the improvident appointment of a receiver is not beyond the jurisdiction of the bankruptcy court, nor does it violate any right to a jury trial.^{176a}

V. CONTINUANCE OF A GOING BUSINESS.

a. In general.—Section 2 (5) permits the court to authorize the business of a bankrupt to be conducted for a limited period by a receiver or marshal, or by the trustee when appointed. This is a power inherently belonging to the court independent of the statute. The chief function of a bankruptcy law is to distribute an insolvent's assets *pro rata*; this implies the power to marshal those assets. In ordinary cases, a court of bankruptcy will go no further. Yet occasion will often arise where a going business may be preserved and advantageously sold by keeping it alive under the management of the trustee. By this supervision, courts of bankruptcy are vested with

Am. B. R. 581, 127 Fed. 772; *In re Sully* (D. C. N. Y.), 13 Am. B. R. 22, 133 Fed. 997.

When receiver not "mere custodian."—A receiver who takes charge of a stock of goods and later sells them for more than their appraised value is more than a "mere custodian," and is entitled to compensation within the limits fixed by the general provisions of section 48-d, that is, not exceeding six per cent. of the first five hundred dollars, etc. *Matter of Ginsburg* (D. C. Tenn.), 31 Am. B. R. 240, 208 Fed. 160; service rendered by receivers examined and allowance by referee reduced. *Matter of Mills Tea & Butter Co.* (D. C. Mass.), 37 Am. B. R. 148, 235 Fed. 813. See Am. B. R. Digest, § 308.

If a composition is offered after the appointment of a trustee, a receiver, having completely earned his compensation, is entitled to such amount as the court may see fit to allow, up to the regular percentage. *Matter of Miller* (D. C. N. Y.), 40 Am. B. R. 155, 243 Fed. 242. If a receiver has already accounted, and his allowance has been fixed (and possibly paid) before composition is offered, the mere confirmation of the composition while the estate is in the hands of the trustee is not sufficient to revert back and reduce the receiver's allowance, nor can he be compelled to restore any of that already paid. *Matter of Miller* (D. C. N. Y.), 40 Am. B. R. 155, 243 Fed. 242.

172. *Matter of Mills Tea & Butter Co.* (D. C. Mass.), 37 Am. B. R. 148, 235 Fed. 813.

173. *In re Lavoc* (C. C. A., 2d Cir.), 15 Am. B. R. 250, 142 Fed. 960; *Beach v. Macou Grocery Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 751, 116 Fed. 143.

174. *In re Hill Co.* (D. C. N. Y.), 20 Am. B. R. 73, 157 Fed. 73; *Matter of Weissbord*, (D. C. N. Y.), 39 Am. B. R. 243, 241 Fed. 516.

Payment by petitioning creditors.—In the case of *Matter of Aschenbach Co.* (C. C. A., 2d

Cir.), 25 Am. B. R. 502, 183 Fed. 305, the proceedings were dismissed and the court held that where a receiver in bankruptcy has been appointed to conduct an alleged bankrupt's business pending its adjudication as an involuntary bankrupt, and the petition for adjudication is subsequently dismissed and the receivership vacated, the bankruptcy court has the discretion to assess the receiver's fees and other expenses in the first instance against the petitioning creditors instead of directing their payment first out of the property in his hands. But in the case of *In re Metals Extraction & Refining Co.* (C. C. A., 7th Cir.), 27 Am. B. R. 11, 193 Fed. 172, it was held that the petitioning creditors should not be charged with the costs of the receivership unless the proceedings had been instituted without reasonable cause or in bad faith.

Payment by petitioning creditors.—Where the entire estate of the bankrupt came into the hands of the receiver appointed to carry on the business, and remained there until it was turned over to the trustee, and the bankrupt practically consented to the appointment, and no creditor or lien holder ever objected, and it appears that the order appointing the receiver was improvident and should be vacated, the creditors petitioning for the receivership cannot be held directly liable for the debts incurred by the receiver with consent of the court. *Matter of Veler* (C. C. A., 6th Cir.), 41 Am. B. R. 736, 249 Fed. 633.

175. **Payment of compensation out of estate.**—In the case of *Matter of Wentworth Lunch Co.* (Ref. N. Y.), 25 Am. B. R. 612, 189 Fed. 831, Referee Dexter states the rules as follows: "It is a general rule of equity that the compensation and expenses of the receiver are payable out of the fund. The receiver does not act as the agent for either of the parties, but as

ample power to that end.^{175b} A referee should not exercise the power on the initiative of the trustee to carry into effect the unexecuted contracts of the bankrupt; nor should it be exercised for the benefit of general creditors at the expense of secured creditors who do not consent thereto.¹⁷⁶ A secured creditor's security may not be diminished by any expense of administration or operation of the business, unless such creditor has sought or acquiesced in the order continuing such operation.¹⁷⁷ When an order is made authorizing the continuance of the business it may not be attacked collaterally.¹⁷⁸

b. Limited period.—The business may be continued for a "limited period." These words are intended to indicate that the time should not be protracted, and that the receiver or trustee should use due diligence in bringing the active business affairs of the bankrupt to a speedy termination.¹⁷⁹

c. Contracting indebtedness.—A receiver who is authorized to conduct a business, for the successful conduct of which it is necessary and customary to receive credit and borrow money, has the implied power to purchase on credit and even to borrow money; where the power is expressly conferred by the court the limitations imposed must be observed.¹⁸⁰ Where receivers authorized to continue the business of the bankrupt go beyond the extent of their authority to contract indebtedness, the indebtedness so contracted is not a prior lien upon the assets of the bankrupt. It is the duty of those dealing with receivers in such cases to inquire as to the extent of their authority, and the orders of the court in respect to their powers will be regarded as notice to all persons.¹⁸¹

d. Conduct of business.—The conducting of daily auction sales by the trustee of the bankrupt's goods in his stores may be considered in effect as the continuance of business by the trustee for the purpose of allowing additional

the hand of the court. *Union Trust Co. v. Ry. Co.*, 117 U. S. 434; *Central Trust Co. v. Wabash*, 23 Fed. 863.

"He is not appointed for the benefit of either of the parties, but of all concerned. *Davis v. Gray*, 16 Wall. 203, 218. The expenses which the court creates are burdens necessarily on the property taken possession of, irrespective of the question who may be the ultimate owner or who may invoke the receivership. *Kneeland v. Am. Loan Co.*, 126 U. S. 89, 98; *Atlantic Trust Co. v. Chapman*, 208 U. S. 360.

"The only qualification of these familiar rules is that the court must have had jurisdiction of the subject matter and that the appointment of the receiver involved no irregularity. *Atlantic Trust Co. case, supra.*"

175a. *Matter of Veler* (C. C. A., 6th Cir.), 41 Am. B. R. 736, 249 Fed. 633.

175b. *Matter of Delmonico's* (D. C., N. Y.), 43 Am. B. R. 519, 256 Fed. 414.

176. *In re Bourlier Cornice & Roofing Co.* (D. C. Ky.), 13 Am. B. R. 585, 590, 133 Fed. 958, in which the court said: "I am much inclined to think that a referee should never permit a procedure for the carrying into effect of the unexecuted contracts of a bankrupt, to be commenced upon the initiative of the trustee. Much abuse of the power might be avoided and temptation for the trustee removed by putting that burden on the creditors. Such authorization should generally be made upon the application of some or all of the general creditors."

177. *In re Clark Coal & Coke Co.* (D. C., Pa.), 22 Am. B. R. 843, 173 Fed. 652.

178. *Matter of Isaacson* (C. C. A., 2d Cir.), 23 Am. B. R. 98, 174 Fed. 406.

179. *In re Lisk* (D. C., N. Y.), 21 Am. B. R. 674, 167 Fed. 411.

180. *In re Burkhalter & Co.* (D. C., Ala.), 25 Am. B. R. 378, 182 Fed. 353; *In re Restein* (D. C., Pa.), 20 Am. B. R. 832, 162 Fed. 986.

Modification of order to borrow money and continue business.—An application by an alleged bondholder of a bankrupt corporation for the modification of an order authorizing the receiver to borrow money and continue the business should not be passed upon by the court where the petitioner's ownership of the bonds is denied; such issue should be first settled by referring it to a special master. *Matter of Consumer's, etc., Brewing Co.* (D. C., N. Y.), 33 Am. B. R. 300, 216 Fed. 988.

181. *In re Erie Lumber Co.* (D. C., Ga.), 17 Am. B. R. 680, 707, 150 Fed. 817.

Unauthorized loans.—In the case of *In re Burkhalter & Co.* (D. C., Ala.), 25 Am. B. R. 378, 182 Fed. 353, the court held that where a bank, without authority of court, undertook to charge against funds of the bankrupt estate, deposited with it by the receiver, notes on which it had advanced money to the receiver in excess of the amount which he was authorized to borrow, it did so wrongfully, because it had no right to appropriate the trust funds to unauthorized loans, until it had been determined by the court that the proceeds of the loans had been used by the receiver for the benefit of the trust estate and because it thereby preferred a claim which was entitled to no preference.

Liability of trustee.—A trustee of a bankrupt contractor, who has not been authorized by order of the court to continue the business, is not liable, in his representative capacity, for injuries to an adjoining landowner inflicted in the course of construction work. *It seems*, that the trustee is liable personally. *McAuley v. Jackson*, 34 Am. B. R. 371, 165 N. Y. App. Div. 846.

compensation.¹⁸² A receiver should not be surcharged for losses or sales during the continuance of the business,¹⁸³ except, possibly, where by improper methods of conducting the business, losses have accrued.¹⁸⁴ Where a receiver is in possession of leased premises for the purpose of continuing the business, he should pay the *pro rata* rent at a reasonable value.¹⁸⁵ A garnishment against the wages of an employee of the bankrupt, is not effective against the trustee who continues the business unless the order has been served on him.¹⁸⁶

e. Compensation of receiver or trustee.—Section 48 of the act was amended by the act of 1910 so as to limit the amount which may be paid to trustees, marshals or receivers for services performed by them in the conduct of the business of the bankrupt. The ordinary fees of trustees and receivers and marshals are fixed by subdivisions *a* and *d* of such section 48. The fees allowed for the continuance of the business of the bankrupt are in addition to such compensation. The maximum amount of such additional compensation is six per centum on the first \$500 or less, four per centum on moneys in excess of \$500 and less than \$1,500, two per centum on moneys in excess of \$1,500 and less than \$10,000, and one per centum on moneys in excess of \$10,000.¹⁸⁷ The compensation of a trustee for continuing a going business was, prior to the amendment of 1903, based upon moneys received and paid out rather than work done.¹⁸⁸ It was held that under § 48-*a* as amended by the act of 1903 an additional allowance might be made to a trustee where he had performed services of value in respect to the bankrupt's business and had thus materially

182. *In re Dimm & Co.* (D. C., Pa.), 17 Am. B. R. 119, 146 Fed. 402.

What constitutes continuance of business.—Where at the time a receiver took possession of bankrupt's store, a widely advertised sale was being conducted, and the receiver permitted the employees of the bankrupt to go on with the business during the remainder of that day, but then closed the store and did not open it again except to deliver the stock in bulk to a purchaser at a judicial sale thereof, he cannot be said to have carried on the business, so as to be entitled to additional compensation. *In re Knocher & Co.* (C. C. A. 9th Cir.), 28 Am. B. R. 747, 197 Fed. 136.

183. *Matter of Isaacson* (C. C. A., 2d Cir.), 23 Am. B. R. 98, 174 Fed. 406.

184. *In re Consumers Coffee Co.* (D. C., Pa.), 20 Am. B. R. 835, 162 Fed. 786.

185. *In re Yodlesman-Walsh Foundry Co.* (D. C., N. Y.), 21 Am. B. R. 509, 166 Fed. 381.

186. *Matter of Murphy* (D. C., N. Y.), 34 Am. B. R. 522, 221 Fed. 49, decided under N. Y. Code Civil Procedure, § 1391.

187. See § 48-*a*, *d* and *e*, and discussion thereunder, *post*.

Purpose of amendment of 1910.—The report of the Senate judiciary committee of the 61st Congress (Rep. No. 691) contains the following statement as to the purpose and effect of the amendment to § 48 of the act relative to compensation of trustees, receivers or marshals in conducting the business of the bankrupt: "The present amendment fixes the maximum compensation that can be allowed receivers for the performance

of the ordinary duties at precisely this same rate (the rate allowed trustees under § 48-*a*) instead of leaving it to the unlimited discretion of the court. It also fixes the extra compensation, whether it be to the receiver or trustee, for the conducting of the business, to once again this same rate; so that at best, the ordinary and extraordinary compensation taken together, in the event that both a receiver and trustee have successively had charge of the estate, and even have both conducted the business, cannot exceed four times the amount allowable to a trustee by § 48-*a* of the act for the performance of his ordinary duties. The practical difficulty in the way of allowing commissions to receivers, where the receivers turn over to the trustee in specie the property which they have been taking care of, is obviated by the provision that the commissions are to be figured upon the amounts thereafter actually realized upon sale of such property so turned over in specie. Thus the bill seeks to reduce to the one rational basis of commissions, on moneys actually realized, the compensation, both ordinary and extraordinary, of both trustee and receiver; and by this is done away with also the unlimited discretion of the courts in the allowance of compensation to such officers. Of course the rates of commission prescribed are maximum limitations. Less but not more may be allowed, and it is hoped the courts will exercise their discretion still in allowing less amounts where proper."

188. *In re Epstein* (D. C., Ark.), 6 Am. B. R. 191, 109 Fed. 879; *In re Plummer* (D. C., N. Y.), 3 Am. B. R. 320.

increased the bankrupt's estate.¹⁸⁹ The amendatory act of 1910 amending § 2 (5) and § 48 has finally disposed of the entire question as to the allowances to be made to trustees and receivers for continuing the business of the bankrupt by prescribing the maximum amount which may be allowed such officers for such services. Where the receiver was more than a "mere custodian," performing valuable services to the estate, although not "conducting the business" within the meaning of § 48, he should be compensated by a reasonable amount for the services rendered.¹⁹⁰

VI. PUNISHMENT FOR CRIME; ENFORCEMENT OF OBEDIENCE TO LAWFUL ORDERS.

a. *In general.*—By subdivisions 4, 13 and 16 of § 2 a court of bankruptcy is clothed with ample power to punish violations of the bankruptcy act, to enforce obedience to the lawful orders issued thereunder and to punish persons for contempts committed in a bankruptcy proceeding. They are among the most important powers possessed by courts of bankruptcy and are essential for the proper carrying into effect of the provisions of the act. Other sections of the act relate to these powers and provide more in detail for the exercise thereof.

b. *Punishment for violations of the act.*—Subdivision 4 authorizes a court of bankruptcy to punish bankrupts, officers and other persons, including the agents, officers and directors of corporations, for violations of any provisions of the bankruptcy act. Section 29, *post*, specifies certain offenses and prescribes the punishment therefor. These specific offenses and the procedure required for the punishment thereof will be considered under that section. If an offense consists of a violation of the act not included in those specified in § 29, subd. 4 of § 2 confers the power of punishment. As to the right to a jury trial reference should also be made to § 19-a, *post*.

c. *Enforcement of obedience to lawful orders.*—The power to enforce obedience to its lawful orders is inherent in every court. Being clothed with power to make such orders as may be necessary to carry into effect the provisions of the act, it must possess the powers essential to enforce such orders.¹⁹¹ The act recognizes the power of the court to punish as for contempt any person who disregards its lawful orders. The exercise of the power is discretionary but cannot be invoked in any case unless the order is a lawful one.¹⁹²

VII. PUNISHMENT FOR CONTEMPT.

a. *In general.*—The power to punish for contempt committed before referees is expressly conferred by subd. 16 of this section. Section 41 of the

189. *Matter of Pequod Brewing Co.* (Ref., N. Y.), 18 Am. B. R. 352; *In re Dimm & Co.* (D. C., Pa.), 17 Am. B. R. 119, 146 Fed. 402; *Matter of Shiebler & Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 162, 174 Fed. 336. But the compensation of trustees for continuing the business of the bankrupt should not be fixed in advance of the services rendered. *In re Russell Card Co.* (D. C., N. J.), 23 Am. B. R. 300, 174 Fed. 202.

190. *Valuable service rendered by receiver.*—A receiver appointed to take charge of and preserve the bankrupt's assets pending the election and qualification of the trustee or until the dismissal of the petition, who, instead of merely holding possession of the accounts and bills receivable and the personal property, collected many of the accounts, pending the election of

the trustee, and thereby saved to the estate a considerable sum of money, was more than a "mere custodian," but was not "conducting of the business," within the meaning of section 48 the Bankruptcy Act, and should be compensated by a reasonable amount for the services rendered. *Matter of Metropolitan Motor Car Co.* (D. C., Wash.), 35 Am. B. R. 539, 225 Fed. 274.

Compensation for acting for bankrupt.—A receiver, when acting for the bankrupt in conducting his business after an offer of composition, should be paid only in a corresponding way to what he would be paid if he were acting for the benefit of the estate. *Matter of Miller* (D. C., N. Y.), 40 Am. B. R. 155, 243 Fed. 242.

191. See § 2, subd. 15, and discussion under title "Enforcement of act by necessary orders, process or judgment."

192. Compare a similar phrasing in Bankr. Act. § 7-a (2), *post*, and in § 14-b (6), *post*.

act specifies in detail the acts which constitute contempts before the referee, and prescribes the practice essential to secure punishment. The detailed discussion of contempts and their punishment is more appropriately placed under that section. Reference should be made to such section for a further consideration of this subject. We will confine ourselves at this point with the enunciation of general principles pertaining directly to the exercise by a court of bankruptcy of the power to punish a contempt. As already indicated the court has power under § 2 (13) to punish by fine or imprisonment any violation of a lawful order issued by it. This confers upon the court ample power in contempt proceedings. The power to punish for contempt in bankruptcy proceedings has always been recognized.¹⁹³ In many cases, as where the bankrupt or another contumaciously keeps property belonging to the estate in his possession, it is essential to the proper administration of the act. The proceeding is quasi-criminal, yet not one entitling the person proceeded against to a trial by jury.¹⁹⁴ The power to punish for contempt is a judicial one and cannot be referred or delegated.¹⁹⁵

b. Imprisonment for debt; constitutionality.—The power to imprison for contempt is not an infringement of the constitutional prohibition on imprisonment for debt; but a bankrupt cannot be imprisoned indefinitely for a contempt.¹⁹⁶ The constitutional provision here referred to is that contained in the constitutions of many of the States to the effect that no person shall be imprisoned for debt in any civil action unless in case of fraud. Where the

193. See *Ex parte Robinson*, 86 U. S. 505; *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 14 Am. B. R. 494, 134 Fed. 477, in which the court said: "These provisions of the bankruptcy act, authorizing courts of bankruptcy to enforce obedience to their orders by punishment as for contempt are neither novel nor unusual. They were included in every bankruptcy act and similar provisions have been enacted by almost every state in the Union, including the state of Arkansas. In proceedings supplemental to or in aid of executions, courts are authorized by these statutes to enforce the surrender of assets subject to execution, and for this purpose may commit to jail any person refusing to comply with such order."

194. *In re Debs*, 158 U. S. 564; *Ripon Knitting Works v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810.

Proceeding to punish a bankrupt for contempt in failing to obey an order to turn over assets are for civil contempt and cannot be reviewed by writ of error. *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873; *Matter of Stanny* (D. C., N. Y.), 36 Am. B. R. 79, 226 Fed. 517.

195. *Bank of Ravenswood v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131; *Smith v. Belford* (C. C. A., 6th Cir.), 5 Am. B. R. 291, 106 Fed. 658.

196. *Matter of Lavoc* (C. C. A., 2d Cir.), 15 Am. B. R. 290, 142 Fed. 960, in which case it was held that the enforcement of

an order directing the payment of the expenses of a receiver by imprisonment was not unlawful because an imprisonment for debt, since under the laws of New York (Civ. Pro. § 1241) disobedience of an order is punishable as for a contempt of court, where it required the payment of money to the court or to an officer of the court; *In re Leinweber* (D. C., Ct.), 12 Am. B. R. 175, 128 Fed. 641; *In re Taylor* (D. C., Col.), 7 Am. B. R. 410, 114 Fed. 607; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *Ripon Knitting Works v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810; *In re Anderson* (D. C., S. Car.), 4 Am. B. R. 640, 103 Fed. 854; *In re Schlesinger* (C. C. A., 2d Cir.), 4 Am. B. R. 361, 102 Fed. 117; *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562.

Enforcement of contempt order; imprisonment for debt.—Where the record in contempt proceedings shows that a bankrupt, who has been ordered to turn over property to his trustee, has neither possession of the property nor ability to comply with the order, he cannot be legally punished for contempt; and if, in such case, notwithstanding his inability, the court orders the bankrupt committed for failure to obey, such order has no justification as a contempt proceeding, but, having no purpose except to force by imprisonment the payment of money on debts, it amounts to an imprisonment for debt. *In re Purvine*, 2 Am. B. R. 787, 96 Fed. 192, and *Samel v. Dodd*, 16 Am. B. R. 163, 142 Fed. 68, discussed and the latter case approved. *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 412, 204 Fed. 709.

order of the court directs the surrender to the proper officer of property in respect to which the court has jurisdiction, the obligation and duty of the person to whom it is directed to surrender cannot be converted into a debt by his mere refusal to comply with the order.¹⁹⁷ The commitment for disobedience of an order directing that property belonging to the bankrupt's estate be delivered to the trustee, is not a punishment for non-payment of a debt. There is no debt due the trustee. The punishment is inflicted for failure to perform a legal duty.¹⁹⁸

c. When proceedings will lie.—(1) IN GENERAL.—The power of commitment should be cautiously exercised and only when its propriety is beyond a reasonable doubt; it should appear from the facts in the case that there has been a wilful disobedience of the order.¹⁹⁹ It should not be exercised to compel the payment of a debt, or to punish for a fraudulent transfer.²⁰⁰ There should be clear and convincing proof amounting at least to a fair preponderance of evidence, that the person charged with the contempt is guilty thereof.²⁰¹

197. *Schweer v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 328, *affd.*, 12 Am. B. R. 673, 195 U. S. 171; *In re Schlesinger* (C. C. A., 2d Cir.), 4 Am. B. R. 361, 102 Fed. 117.

198. Order to pay over not an order to pay debt.—In the case of *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68, the court said: "The order to pay over money, or to surrender other property as the case may be, in the possession of the bankrupt and forming part of his estate, is not an order for the payment of a debt, but an order for the surrender of assets of the bankrupt placed in *custodia legis* by the adjudication; and his commitment upon refusing to comply with the order is not imprisonment for debt." See also *In re Schlesinger* (C. C. A., 2d Cir.), 4 Am. B. R. 361, 102 Fed. 117; *Schweer v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 328, *affd.* 12 Am. B. R. 673, 195 U. S. 171; *In re Holland* (D. C., N. Y.), 23 Am. B. R. 835, 176 Fed. 624.

199. *Moody v. Cole* (D. C., Me.), 17 Am. B. R. 818, 148 Fed. 295, holding that in bankruptcy a contempt proceeding is criminal in its character, and the conclusion that a party is in contempt should be reached only upon evidence which induces belief beyond a reasonable doubt; *In re Switzer* (D. C., S. Car.), 15 Am. B. R. 468, 140 Fed. 976; *In re Adler* (D. C., Tenn.), 12 Am. B. R. 19, 129 Fed. 502; *In re Goldfarb Bros.* (D. C., Ga.), 12 Am. B. R. 386, 131 Fed. 643; *American Trust Co. v. Wallis* (C. C. A., 3d Cir.), 11 Am. B. R. 360, 126 Fed. 466; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 140; *In re De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328; *In re Schlesinger* (C. C. A., 2d Cir.), 4 Am. B. R. 361, 102 Fed. 111; *In re Anderson* (D. C., S. Car.), 4 Am. B. R. 640, 103 Fed. 854; *In re Deuell* (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 634; *In re Mayor* (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839; *In re Mc-*

Cormick (D. C., N. Y.), 3 Am. B. R. 340, 99 Fed. 56.

Power exercised with caution.—In the case of *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68, the court said: "While bankruptcy courts are vested with power to require bankrupts to surrender their property, and to enforce obedience to the order by attachment for contempt, yet the power is 'far reaching and drastic and should be exercised with cautious discretion.' Indeed, it may be said that it should never be exercised except in a plain case, and always with a due regard to the constitutional rights of the citizen. . . . It is objected, however, that the failure of the courts to exercise with a firm hand the power to punish, by contempt proceedings, designing and unscrupulous bankrupts, would practically deprive the law of its efficacy and convert it into a mere shield for the protection of dishonest debtors. In doubtful cases the power should not be exercised; and in view of the stringent provisions of law punishing fraudulent conduct, and other forms of dishonesty, on the part of the bankrupt, the objection is untenable. The original act not only contains ample provisions for the punishment of the bankrupt in the regular mode of trial by jury, for false swearing and for the fraudulent disposition of assets (§ 29), but section 14, as amended by the act of 1903 renders it extremely difficult, if not impossible, for the contumacious or dishonest bankrupt to secure a discharge from his indebtedness."

200. *In re Dickens* (D. C., Ala.) 23 Am. B. R. 659, 175 Fed. 808; *In re Holland* (D. C., N. Y.), 23 Am. B. R. 835, 176 Fed. 624.

201. *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68; *In re Mize* (D. C., Ala.), 22 Am. B. R. 577, 172 Fed. 945; *In re Dickens* (D. C., Ala.), 23 Am. B. R. 659, 175 Fed. 808; *In re Cramer* (D. C., Mass.), 23 Am. B. R. 635, 175 Fed. 879; *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 12 Am. B. R. 653, 131 Fed. 824; *In re Purvine*

(2) **POSSIBILITY OF PERFORMANCE.**—It should not be sought by proceedings for contempt to compel a person to do that which he has no power to do. If it is sought to compel the bankrupt to surrender to the trustee property belonging to the estate it must appear that such property is in the actual control or possession of the bankrupt and that it is possible for him to surrender it.²⁰² This fact should be established by clear and convincing proof,—by a fair preponderance of evidence, and in some cases it has been held that the evidence must be sufficient to satisfy the mind beyond a reasonable doubt.²⁰³ If the bankrupt denies under oath that he has the money or property in his possession, he should not be punished by commitment unless it is shown beyond a reasonable doubt that he is able to produce the same.²⁰⁴

(C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192.

^{202.} *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 118 Fed. 140; *In re Mize* (D. C., Ala.), 22 Am. B. R. 577, 172 Fed. 945; *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 215, 215 Fed. 873; *Matter of Elias* (D. C., N. Car.), 39 Am. B. R. 441, 240 Fed. 448; *Matter of Myerson* (D. C., Pa.), 42 Am. B. R. 337, 263 Fed. 510.

Impossible to perform.—In the case of *Goldfarb Bros.* (D. C., Ga.), 12 Am. B. R. 386, 131 Fed. 643, the court held that a bankrupt cannot be required, under a proceeding for contempt, to do that which is out of his power to do; the evidence in such a proceeding should satisfy the court beyond a reasonable doubt that the bankrupt has the money or goods in his possession or control and is able to turn them over when so ordered. *Schweer v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 328; *In re Adler* (D. C., Tenn.), 12 Am. B. R. 19, 129 Fed. 902; *In re Gertsel* (D. C., Ill.), 10 Am. B. R. 411, 123 Fed. 166; *Sinsheimer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898; *Matter of Adler* (D. C., Okla.), 21 Am. B. R. 371; *In re Mize* (D. C., Ala.), 22 Am. B. R. 577, 172 Fed. 945; *In re Reynolds* (D. C., Ala.), 27 Am. B. R. 200, 190 Fed. 967, *affd.* 29 Am. B. R. 412, 204 Fed. 709. An order will not be granted directing the bankrupt to turn over property alleged to have been in his possession six years prior thereto, the time of beginning the proceedings in bankruptcy, in the absence of proof of the bankrupt's ability to comply with the order. *In re Ruos* (D. C., Pa.), 21 Am. B. R. 257, 164 Fed. 749.

Where a bankrupt has no property in his possession or under his control he should not be imprisoned for contempt for failing to comply with an order of the referee to turn over money, although he has committed one of the offences mentioned in section 29 of the Bankruptcy Act. *Matter of McNaught* (D. C., Mass.), 35 Am. B. R. 609, 225 Fed. 511.

^{203.} See cases cited in preceding note.

Proof required.—Clear and convincing. *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68; *In re Levy & Co.* (C. C. A., 2d Cir.), 15 Am. B. R. 166, 142 Fed. 442; *In re Dickens* (D. C., Ala.), 23 Am. B. R. 659, 175 Fed. 808.

Beyond reasonable doubt, *In re De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328,

citing *Ripon Knitting Works v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810; *In re McCormick* (D. C., N. Y.), 2 Am. B. R. 340, 99 Fed. 56; *In re Purvine* (C. C. A., 5th Cir.), 2 Am. B. R. 787, 37 C. C. A. 446, 96 Fed. 192; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131; *In re Goldfarb Bros.* (D. C., Ga.), 12 Am. B. R. 389, 131 Fed. 643; *In re Cashman* (D. C., N. Y.), 21 Am. B. R. 284; *In re Mize* (D. C., Ala.), 22 Am. B. R. 577, 172 Fed. 945. Proceedings not criminal and same degree of proof not required, see *In re Cole* (C. C. A., 1st Cir.), 16 Am. B. R. 302, 144 Fed. 392; *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 14 Am. B. R. 194, 134 Fed. 477. Before a bankrupt may be committed for contempt in failing to obey an order to turn over property to his trustee, the court should be satisfied by proof beyond a reasonable doubt that he has present ability to comply. *Kirsner v. Taliaferro* (C. C. A., 4th Cir.), 29 Am. B. R. 832, 202 Fed. 51. If a district court cannot find affirmatively that the bankrupt had the property under his control or in his possession, he should not be punished. *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 412, 204 Fed. 709, *affg.* 27 Am. B. R. 200, 190 Fed. 967; *Matter of Dixon* (D. C., Mass.), 35 Am. B. R. 482, 224 Fed. 624.

^{204.} **Denial by person charged; proof required.**—In the case of *Ripon Knitting Works v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 304, 101 Fed. 810, the court said: "One of the principal grounds of defense upon which the respondent relies is contained in his answer denying that he has any money. His answer is not conclusive, but the rule in such cases requires that the denial be overcome by evidence proving beyond a reasonable doubt that the bankrupt actually has the present possession or control of money, or that any alleged transfer or other disposition of it is a mere subterfuge which does not prevent him from producing it." See *In re Mayer* (D. C.), 3 Am. B. R. 533, 98 Fed. 839; *In re Purvine* (C. C. A., 5th Cir.), 2 Am. B. R. 787, 37 C. C. A. 446, 96 Fed. 192; *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 512, 204 Fed. 709, *affg.* 27 Am. B. R. 200. So also in the case of *In re Adler* (D. C., Tenn.), 12 Am. B. R.

Bare denial of itself is not, for obvious reasons, conclusive.³⁰⁵ It must at least appear that the property directed to be surrendered is part of the bankrupt's estate, and that the person to whom the order is directed has control of it at the time.³⁰⁶ The order to restore may be directed to both the bankrupt and his wife, if either or both have had possession of the property.³⁰⁷

(3) **GOOD FAITH; FAILURE TO EXPLAIN.**—It should appear that the person complained of was acting in bad faith and for the purpose of evading the

19, 129 Fed. 502, the court said: "The court has no doubt of the power of the court, where it reasonably appears that the bankrupt has the money in his possession or under his control, to compel him to pay it over; but that fact must appear by something more substantial than mere presumptions or inferences taken from such circumstances as those which have been proven in this case. To invoke that power requires something like incontestable proof as against the bankrupt's denial that he has the money."

Denial of possession insufficient.—Where the evidence shows that at or shortly before his adjudication, certain goods or their value were in bankrupt's possession, they will be presumed to have remained in his possession, or under his control, until their disposition or disappearance is satisfactorily accounted for; and his sworn denial that he is in the possession of the goods or money, is insufficient. *Kirmer v. Taliaferro* (C. C. A., 4th Cir.), 29 Am. B. R. 332, 202 Fed. 51.

305. *In re Friedman* (D. C., N. Y.), 18 Am. B. R. 712, 153 Fed. 939, *affd.* 20 Am. B. R. 37, 161 Fed. 260; *In re Marks* (D. C., Pa.), 23 Am. B. R. 911, 176 Fed. 1018; *In re Goldfarb Bros.* (D. C., Ga.), 12 Am. B. R. 386, 131 Fed. 643; *In re Lasky* (D. C., Ala.), 20 Am. B. R. 729, 163 Fed. 99; *In re Gerstel* (D. C., Ill.), 10 Am. B. R. 411, 122 Fed. 166; *Schweer v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 178, 180 Fed. 323; *Matter of Myerson* (D. C., Pa.), 42 Am. B. R. 337, 253 Fed. 510; *Matter of Kramer & Muchnick* (D. C., Pa.), 31 Am. B. R. 525, 210 Fed. 977, holding that where bankrupts deny their ability to comply with an order to turn over moneys, but the evidence shows that such denial is false or fraudulent and that the case is one of simple concealment, they should be adjudged in contempt and committed.

306. *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 462; *In re Wilson* (D. C., Ark.), 8 Am. B. R. 612, 116 Fed. 419; *In re Adler* (D. C., Tenn.), 12 Am. B. R. 19, 129 Fed. 902.

Control of property.—Where it appears that money in the bank was taken by the bankrupt after a petition in involuntary bankruptcy was filed, but before adjudication, and it does not seem probable that the money was expended for the support of his family, it will be held to be under his control and he may be adjudged in contempt for failure to turn it over to his trustee. *In re Kane* (D. C., Pa.), 10 Am. B. R. 478, 125 Fed. 984; *In re Gerstel* (D. C., Ill.), 10 Am. B. R. 411, 123 Fed. 166. Where the

property is beyond the present control of the bankrupt and in the hands of third parties claiming title derived prior to the proceedings in bankruptcy, the court may not punish either of them for contempt, although the transaction is manifestly fraudulent. *In re Mayer* (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839. It would be different if the property claimed was in the bankrupt's possession. *In re DeGottardi* (D. C., Cal.), 7 Am. B. R. 723, 144 Fed. 328. Loss of money in gambling is not a sufficient defense. *Ripon Knitting Works v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810. Where it appeared that an alleged robbery of stock belonging to a bankrupt merchant never occurred and that such stock is still under his control, the disobedience of an order directing the bankrupt to deliver over the stock to his trustee is a contempt of court. *In re Levin* (D. C., N. Y.), 6 Am. B. R. 743, 113 Fed. 498.

Present possession.—In the case of *In re Barton Bros.* (D. C., Ark.), 18 Am. B. R. 98, 149 Fed. 620, the court said: "It is seen by an examination of the decisions last quoted, unless they were in possession of the money at the time the order is made to pay over, the court has no power to make the order." In the case of *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562, it was held that two essential facts condition the lawful exercise of the power to require a bankrupt or other person to pay or deliver to the trustee money or property in his possession: (1) the money or property directed to be delivered to the trustee is a part of the bankrupt estate and (2) that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time the order of delivery is made. See also *In re Dickens* (D. C., Ala.), 23 Am. B. R. 659, 175 Fed. 808; *In re Rogowski* (D. C., Ga.), 21 Am. B. R. 551, 166 Fed. 165.

Liability of alleged partner.—Where one of the members of a bankrupt partnership was a mere clerk, received what was equivalent to wages, and had nothing to do with the real conduct of the business, and actually turned over all the proceeds of property received a short time before bankruptcy to his partner, and never knew what became of them, he should not be held liable for failure to account for the same. *Matter of Vyse* (D. C., N. Y.), 34 Am. B. R. 378, 220 Fed. 727.

307. *Power v. Fuhrman* (C. C. A., 9th Cir.), 34 Am. B. R. 418, 220 Fed. 787.

provisions of the law;^{207a} thus, an attorney who in good faith, but wrongly, advises a State court as to the right of such court to compel a receiver in bankruptcy to surrender property in controversy cannot be adjudged guilty of contempt.²⁰⁸ The fact that the person complained of acted under advice of counsel may not in every case be a defense.²⁰⁹ A bankrupt who refuses to account for property which should have been in his possession without any effort to explain the loss of the property may be adjudged guilty of contempt.²¹⁰ The failure or refusal to explain what became of property not scheduled by the bankrupt, and in his possession immediately prior to his bankruptcy, as where he merely answers all material questions as to the disposition of such property by saying: "I don't know," or "I can't remember," connected with convincing proof that he had designed to convert his assets into money and defraud his creditors, will justify his commitment for contempt.²¹¹ The rule is that property of a bankrupt estate, traced to the

^{207a} The fact that there was no actual moral intent to defy the court or its order does not amount to a defense to contempt clearly committed, but it does serve to mitigate the punishment. *Matter of Braun* (D. C., Pa.), 43 Am. B. R. 685, 259 Fed. 308.

²⁰⁸ In *re Watts*, 10 Am. B. R. 113, 190 U. S. 1, 23 Sup. Ct. 718; In *re Zier & Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 646, 142 Fed. 102.

The attorneys for parties who were responsible for the seizure of property from the sheriff and its removal from the district when the bankruptcy proceedings were instituted are equally guilty with their clients of contempt, which may only be purged by a return of the property or payment of its full value. In *re Walsh Bros.* (D. C., Iowa), 20 Am. B. R. 472, 159 Fed. 560.

²⁰⁹ In *re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 147 Fed. 538.

²¹⁰ Advice of counsel.—In the case of *Orr v. Tribble* (D. C., Ga.), 19 Am. B. R. 849, 158 Fed. 897, it was held that a sheriff who is in possession of property by virtue of a levy will not be adjudged in contempt, where, in good faith and acting under advice of counsel, he refuses to surrender the property upon the demand of the receiver in bankruptcy. See In *re Strobel* (D. C., N. Y.), 20 Am. B. R. 754, 163 Fed. 380.

²¹¹ In *re Deuell* (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 633. Compare In *re Schlesinger* (D. C., N. Y.), 3 Am. B. R. 342, 97 Fed. 930, in which case the court committed a bankrupt who failed to account for a certain sum of money in his possession which had been directed to be paid to the trustee.

Concealment of property.—The mere fact that the possession and control by the bankrupt is not open and notorious would not prevent his punishment for contempt. A concealment of the property in controversy by the bankrupt and his refusal to disclose may be a contempt, and where the facts are such as to indicate concealment the court may enforce its order to surrender the property by commitment. In *re Shachter* (D. C., Ga.), 9 Am. B. R. 499, 119 Fed. 1010; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131, in which Judge Sanborn said: "The rule by which this issue is to be determined is that the property of the

bankrupt estate traced to the recent possession or control of the bankrupt is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance. He cannot escape an order for its surrender by simply adding perjury to fraudulent concealment or misappropriation." See also In *re Purvine* (C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192; In *re Wilson* (D. C., Ark.), 8 Am. B. R. 612, 116 Fed. 419; In *re Lessans* (D. C., Pa.), 21 Am. B. R. 23, 163 Fed. 614; In *re Rogowski* (D. C., Ga.), 21 Am. B. R. 553, 166 Fed. 165.

Explanation as to money in recent possession, but not scheduled.—Where the bankrupt, a woman, fails to account for a relatively large amount of goods which she had purchased prior to bankruptcy, to keep any books of accounts, and to make any explanation of the great discrepancies in the amount turned over to the trustee and the amount which she should have had on hand, and where the husband and son, who carried on business for her, have testified that they did not appropriate or have the goods or the money, she must either account for this money or pay the penalty by being committed for contempt until she accounts for and turns over to the trustee the sum which, after making all possible allowances in her favor, represents the amount unaccounted for. In *re Deuell* (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 633; In *re Richards* (D. C., Ark.), 25 Am. B. R. 176, 183 Fed. 501.

A bankrupt's willingness to admit that he gambled with everything upon which he could lay his hands does not excuse him from liability to account to his trustee for several thousand dollars in his possession a short time before bankruptcy. *Matter of Vyse* (D. C., N. Y.) 34 Am. B. R. 378, 220 Fed. 727.

²¹¹ In *re Richards* (D. C., Ark.), 25 Am. B. R. 176, 183 Fed. 501; In *re Meier* (C. C. A., 8th Cir.), 25 Am. B. R. 272, 182 Fed. 799; In *re Rosser* (D. C., Mo.), 2 Am. B. R. 746, 96 Fed. 308; *United States v. Appel* (D. C., N. Y.), 31 Am. B. R. 154, 211 Fed. 495. And see cases cited under § 41a, *post*.

recent control or possession of the bankrupt, is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance.²¹² But where the property is not described and the person proceeding against the bankrupt is unable positively to assert that particular property, or a particular sum, has been removed or concealed, contempt proceedings are not justified.²¹³

(4) **INSTANCES OF CONTEMPT.**—A surrender of property by a bankrupt, after a petition in bankruptcy had been filed, to a secured creditor may be punished as a contempt both on the part of the bankrupt and the creditor.²¹⁴ Likewise a bankrupt is guilty of contempt when, after the filing of an involuntary petition and the service of process, he pays an indebtedness.²¹⁵

²¹² *In re Laskey* (D. C., Ala.), 20 Am. B. R. 729, 163 Fed. 99; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 138, 53 C. C. A. 451 (opinion of Judge Sanborn); *In re Fidler & Son* (D. C., Pa.), 21 Am. B. R. 101, 163 Fed. 973; *In re Cramer* (D. C., Mass.), 23 Am. B. R. 635, 175 Fed. 879; *In re Epstein* (Ref., Pa.), 15 Am. B. R. 711; *In re Adler* (D. C., Tenn.), 12 Am. B. R. 19, 129 Fed. 502; *In re Kane* (D. C., Pa.), 10 Am. B. R. 478, 125 Fed. 984.

The recent possession of goods by a bankrupt, unexplained, is not of itself sufficient to show that he still has them and, therefore, sufficient to prove that he is in contempt in failing to obey an order to produce them, so as to dispense with the necessity of evidence. *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 412, 204 Fed. 709.

The presumption of law, in the absence of satisfactory explanation, is that property traced to the hands of the bankrupt a short time prior to the suspension of business remains in his hands, and the bankrupt must answer therefor. *In re Royce Dry Goods Co.* (D. C., Mo.), 13 Am. B. R. 257, 266, 133 Fed. 100, citing *In re Deuell*, 4 Am. B. R. 60, 100 Fed. 633; *In re Greenberg* (D. C., N. Y.), 5 Am. B. R. 840, 106 Fed. 466; *In re McCormick* (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566; *In re Mayer* (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839; *Good v. Kane* (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 956.

The fact that a bankrupt had goods or money in his possession at the time of his bankruptcy which he failed to turn over to his trustee does not of itself justify a finding in contempt proceedings, that he had the same goods nearly a year afterwards. *Matter of Elias* (D. C., N. Car.), 39 Am. B. R. 441, 240 Fed. 448.

Fraudulent disposition of assets.—In the case of *In re Shaffer & Stern* (D. C., N. Y.), 26 Am. B. R. 54, 185 Fed. 549, it appeared that the firm became bankrupt, and after unsuccessful effort to compromise with the creditors, one of the members of the firm transferred the assets of the firm to a corporation; the corporation did not assume the debts of the firm and subsequently the partner withdrew from the corporation a large sum of money, and it was shown that money belonging to the corporation was in his hands and he failed to account therefor; the stock of the corporation became worthless; it was held that the partner should be compelled to pay to the trustee in bankruptcy of said firm, the amount of money traced into his hands.

Burden of proving disposition.—Where unscheduled property is traced to the recent

possession or control of the bankrupt a presumption of fact arises that such property remains there until he satisfactorily accounts for its disposition; a presumption which varies in weight with the circumstances of each case; and the burden is upon the bankrupt to satisfactorily account for its non-production, in assuming which, however, he is entitled to the benefit of a reasonable doubt because the drastic means of imprisonment for contempt may be invoked to enforce the order to turn over. *In re Nisenson* (D. C., N. J.), 24 Am. B. R. 915, 182 Fed. 912.

As stated by the court in the case of *In re Meier* (C. C. A., 8th Cir.), 25 Am. B. R. 272, 182 Fed. 799: "But the settled rule is that, when property of a bankrupt estate is traced to the possession of one who receives it upon the eve of the bankruptcy of its owner, it is presumed that it remains in his possession or under his control until he satisfactorily accounts to the court of bankruptcy for its disposition or disappearance; that the burden is upon him to satisfactorily so account for it; and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224 22 Sup. Ct. 269, 46 L. Ed. 405; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 135-143, 53 C. C. A. 451; *Schweer v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 328, 64 C. C. A. 574; *In re Salkey*, 21 Fed. Cas. Nos. 12,253 and 12,254."

²¹³ *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68; *In re Rogowski* (D. C., Ga.), 21 Am. B. R. 553, 166 Fed. 165.

²¹⁴ *In re Arnett* (D. C., Tenn.), 7 Am. B. R. 522, 112 Fed. 770. See *Matter of Lutfy* (D. C., N. Y.), 19 Am. B. R. 614, 156 Fed. 873, to the effect that after notice of bankruptcy proceedings an attaching creditor and his attorney are guilty of contempt, if they take possession of the property.

²¹⁵ *Matter of Paris Mfg. Co.* (D. C., Mo.), 33 Am. B. R. 365, wherein the court said: "It is well established upon authority that the filing of a petition in bankruptcy and the service of process upon the bankrupt, if afterwards followed by an adjudication of

It is probable that any unlawful interference on the part of the bankrupt after adjudication, may be a contempt, although a mere threat to interfere would not be sufficient.²¹⁶ A person who takes and conceals, intentionally, property of the bankrupt in his possession at the time of the adjudication, having no title, lien or colorable claim thereto, will, since the bankruptcy proceeding is injunctive in character, be guilty of unlawful interference with assets in the legal custody of the court, which constitutes a contempt.²¹⁷ Any wilful disregard of an order requiring the bankrupt to pay to the trustee money which belongs to the estate may be punished.²¹⁸ A bankrupt may be committed for contempt because of his refusal to surrender his books of account to the receiver in bankruptcy.²¹⁹ So also may a stakeholder be adjudged guilty of contempt where he refuses to surrender to the marshal money placed in his hands by the bankrupt.²²⁰ False swearing, although punishable as perjury, is also punishable summarily as a contempt of court.²²¹ So, too, any intentional evasion and refusal to make proper explanation of material facts or a deliberate determination to conceal such facts may be punished.²²² A city marshal who proceeds in executing a writ of replevin, although notified that an injunction has been issued in bankruptcy proceedings, is guilty of a contempt.²²³ And the same is true of the disobedience by a creditor of an order staying an action in a State court by levying and selling exempt property before confirmation of the action of trustee in setting same aside.^{223a} But a creditor is not guilty of contempt merely by taking proceedings in a State court to enforce a dischargeable claim, even with knowledge that the bankrupt has obtained a discharge.^{223b}

d. Practice.—(1) **IN GENERAL.**—The practice outlined in the case of *Muller v. Nugent*,²²⁴ will be found useful in conducting proceedings in contempt. The mode of proceeding in a court of bankruptcy to determine whether the party complained of is guilty of contempt should conform as nearly as may be to the established practice in like cases in all other United State courts; whatever is legally sufficient to purge a contempt in any of

bankruptcy, constitutes a commanding injunction of the court against the interference of the bankrupt or third persons with, and their concealment or removal from the trustee or the court of any of the property of the bankrupt, and that a wilful violation of such injunction will be punished as a contempt of court."

Expenditure of money to effect compromise.—Where a bankrupt is charged with criminal contempt based on his failure to turn over moneys in his possession at the filing of the petition he cannot successfully defend on the ground that he used the money in an effort to effect composition, for the court is a participant in such proceedings and the bankrupt cannot, after a petition has been filed, dissipate the estate in personal efforts, out of court and without its knowledge, to effect a compromise with creditors. *Matter of Mardenfeld* (D. C., N. Y.), 43 Am. B. R. 613, 236 Fed. 920, citing *Collier on Bankruptcy* (11th Ed.), § 63.

^{216.} *In re McBryde* (D. C., N. Car.), 3 Am. B. R. 729, 99 Fed. 686.

^{217.} *Clay v. Waters* (C. C. A., 8th Cir.), 24 Am. B. R. 293, 178 Fed. 385; *In re Walsh Bros.* (D. C., Iowa), 20 Am. B. R. 472, 159 Fed. 560; *Matter of Paris Mfg. Co.* (D. C., Mo.), 33 Am. B. R. 565, holding that a member of a bankrupt firm who after its bankruptcy pays out firm money in satisfaction of a personal debt is guilty of a criminal contempt; *Matter of Dialogue* (D. C., N. J.), 32 Am. B. R. 183, 215 Fed. 462, holding that a person who, with full knowledge of the facts, forcibly removes property from the possession of a receiver is guilty of a criminal contempt of court.

^{218.} *In re Cole* (C. C. A., 1st Cir.), 20 Am. B. R. 761, 163 Fed. 180; *Gavilin v. Lugo* (D. C., Porto Rico), 39 Am. B. R. 326, 9 P. R. Fed. 344.

^{219.} *In re Wilson* (D. C., Ark.), 8 Am. B. R. 612, 116 Fed. 419. See as to failure to obey order directing bankrupt to turn over to the trustee certain missing papers, *In re Herr* (D. C., Pa.), 25 Am. B. R. 141, 182 Fed. 715.

^{220.} *Matter of Macon Sash, Door & Lumber Co.* (D. C., Ga.), 7 Am. B. R. 66, 112 Fed. 322.

^{221.} *Matter of Fellerman* (D. C., N. Y.), 17 Am. B. R. 785, 149 Fed. 244; *Matter of Bronstein* (Ref., N. Y.), 24 Am. B. R. 524, 182 Fed. 349; *Matter of Shear* (D. C., N. Y.), 32 Am. B. R. 833, 188 Fed. 677. But if he changes his mind, and swears truthfully, he ought not to be punished for contempt. *In re Gordon* (D. C., N. Y.), 21 Am. B. R. 290, 167 Fed. 230.

^{222.} *Matter of Schulman* (D. C., N. Y.), 21 Am. B. R. 288, 167 Fed. 237; *Matter of Shear* (D. C., N. Y.), 32 Am. B. R. 833, 188 Fed. 677; *Matter of Rosenblum* (D. C., Mo.), 45 Am. B. R. 384.

Concealment of assets; failure to explain.—Where a bankrupt, who has knowingly disposed of or concealed property after notice of involuntary bankruptcy proceedings and who had immediately preceding bankruptcy quandered or recklessly disposed of partnership assets under circumstances indicating an intent to defraud creditors, is ordered to account for the property disposed of, a failure on his part to appear before a special master and frankly explain the various transactions is punishable as for a contempt. *In re Smith* (D. C., N. Y.), 26 Am. B. R. 890, 185 Fed. 968.

such courts is sufficient for like purpose in a court of bankruptcy.²²⁵ In the case of *Mueller v. Nugent*, on the verified petition of the trustee, the referee issued a show cause to the party alleged to be in possession of the property coupled with an injunction. On the return day, a response on behalf of the claimant was filed. The matter was then heard summarily by the referee who found the response insufficient. Thereupon, the referee granted an order directing a surrender to the trustee within a limited period. On default being made, the referee certified the facts to the judge, recommending that the respondent be punished and committed for contempt. In this case, a review of this order was asked. The same result would have been accomplished had the respondent appeared voluntarily before the judge and brought up the whole matter on the merits, the judge not being in such case bound by the findings of fact of the referee.²²⁶ The judge, with all the facts thus before him, affirmed the order of the referee, found the respondent guilty of contempt, and called him to the bar for commitment. This practice is not fixed by rules. It may be varied to fit the circumstances of each case. Valuable precedents will be found in the Supreme Court decisions controlling the procedure to punish for contempts in other than courts of bankruptcy.

(2) NOTICE OF HEARING.—The person alleged to be in contempt must be given notice of the charge against him, and be given an opportunity to show cause why he should not comply with the order.²²⁷ An order committing a person for failure to comply with the direction of the court, granted without notice and an opportunity to be heard, violates one of the fundamental principles of our laws and cannot be sustained.²²⁸

²²⁵ *In re Wilk* (D. C., N. Y.), 19 Am. B. R. 178, 155 Fed. 943.

²²⁶ *Matter of Braun* (D. C., Pa.), 43 Am. B. R. 665, 259 Fed. 309.

²²⁷ *Matter of Weisberg* (D. C., Mich.), 42 Am. B. R. 616, 253 Fed. 833.

²²⁸ 184 U. S. 1, 7 Am. B. R. 224.

²²⁹ *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131.

See cases cited, Am. B. R. Dig., § 1169.

For rules to be observed in the exercise of jurisdiction to punish for contempt, see *Matter of DeGottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 323.

Turnover and contempt proceedings separate.—In a turnover proceeding the issue is whether the bankrupt had property within his possession or control at the date of bankruptcy which he had retained and concealed from his trustee. In a contempt proceeding the only question is whether the bankrupt is presently able to comply with the court's order previously made. *Frederick v. Silverman* (C. C. A., 3d Cir.), 42 Am. B. R. 24, 250 Fed. 75.

²³⁰ *In re Mayer* (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839.

²³¹ *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 462; *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 412, 204 Fed. 709, aff. 27 Am. B. R. 200, 190 Fed. 967; *Matter of Rosen* (C. C. A., 7th Cir.), 45 Am. B. R. 5, 263 Fed. 764.

A rule requiring the bankrupt to appear and show cause why he should not be punished for contempt in declining to answer sundry questions is sufficient where it refers to the transcript of proceedings filed by the referee. *U. S. v. Goldstein* (D. C., Va.), 12 Am. B. R. 755, 132 Fed. 789.

²³² **Opportunity to be heard.**—In the case of *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562, the court said: "The basic principle of English jurisprudence is that no man shall be deprived of life, liberty or property, without due process of law, without a

course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him and an opportunity to be heard respecting the justice of the order or judgment sought. And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim and produce witnesses to refute it if a question of fact is in issue, and if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principles of our laws and cannot be sustained."

Notice to bankrupt.—Where an order requiring the bankrupt to turn over property to his trustee is based upon a hearing had without notice to the bankrupt such order may not be enforced by punishment for contempt. *In re Frank* (C. C. A., 8th Cir.), 25 Am. B. R. 496, 182 Fed. 704.

Right to be heard.—In the case of *Matter of Banzai Mfg. Co.* (C. C. A., 2d Cir.), 25 Am. B. R. 497, 183 Fed. 298, the court held that where a person has been duly ordered to pay over to the trustee money found to be due the estate and he fails to do so, he is nevertheless entitled to be heard on the question whether he should be committed to jail for such failure, and an *ex parte* order judging him in contempt, of the application for which he had no notice, stating when or where such application would be made, will be reversed.

(3) **PLEADING; INTERVENTION.** A proceeding to punish a bankrupt for contempt should be brought by petition, alleging essential facts. A petition would be insufficient which merely contained such allegations as would be required for ordinary supplementary proceedings, without alleging that the bankrupt's failure to pay money or restore property was wilful and that he had the ability to do so if he would.²²⁹ Although if it had already been made to appear after a full hearing that the bankrupt had concealed available assets, it would not be necessary to allege inability to restore.²³⁰ Where the proceeding for the examination of a bankrupt is brought, prior to the appointment of a receiver or trustee, by petitioning creditors, an order to permit outside creditors to intervene for the purpose of punishing the bankrupt for contempt should not be granted.²³¹

(4) **CONDUCT OF PROCEEDINGS; ORDER OF COMMITMENT.**—The court will not be deceived by evasions, or deterred by consequences.²³² It has been held that the respondent's answer may not be traversed but that it should be taken as true, and if in fact false, prosecution should be had against him for perjury.²³³ An order which directs a marshal to confine the bankrupt in jail until he complies with the order is erroneous; the order should permit the bankrupt to show that he has complied therewith.²³⁴ Upon a motion to punish a bankrupt for contempt because of his refusal to obey the order of the referee directing him to turn over certain property to his trustee, the only question at issue is the disposition of the property by the bankrupt since the date of the order; the bankrupt is estopped from denying that he was in possession of the property directed to be turned over.²³⁵ A referee in bankruptcy has no jurisdiction, upon a petition by the bankrupt and some of his creditors, to order the trustee to refrain from taking further proceedings for the commitment of the bankrupt for failure to comply with an order of the court for delivery to his trustee of certain property; this question should be determined by the court upon the return of the bankrupt to an order to show cause.²³⁶ Section 41-b prescribes the procedure to be followed in the punishment of a contempt before a referee. The required steps must be closely followed. A further discussion of the required practice will be found under that section.²³⁷

e. Contempts before referee.—Subdivision (16) seems merely to confer on the judge power to punish for contempts other than those committed in his presence or consisting of violations of his own orders. He has the usual power, irrespective of statute, to punish for contempt committed in his presence. If the contempt is committed in the presence of the referee, § 41

²²⁹ *In re Cole* (C. C. A., 1st Cir.), 20 Am. B. R. 761, 163 Fed. 180.

²³⁰ *Matter of Stavrah* (C. C. A., 2d Cir.), 23 Am. B. R. 168, 174 Fed. 330. As to allegations in petition, see Am. B. R. Dig. § 1170.

²³¹ **Right of outside creditor to move to punish for contempt.**—Where no receiver or trustee of a bankrupt has been appointed, but only a custodian, and an order for examination has been obtained by the petitioning creditors, a motion by an outside creditor, without previous application to the court for leave to intervene to punish the bankrupt for contempt, should be denied, in the absence of any allegation of neglect or misconduct

on the part of the petitioning creditors. *Matter of Cantor* (C. C. A., 2d Cir.), 32 Am. B. R. 768, 215 Fed. 61.

²³² *In re Kane* (D. C., Pa.), 10 Am. B. R. 478, 125 Fed. 984.

²³³ *In re Purvine*, (C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192.

²³⁴ *In re Baum* (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410.

²³⁵ *In re Frankel* (D. C., N. Y.), 25 Am. B. R. 920, 184 Fed. 539.

²³⁶ *Matter of Eystein* (D. C., Pa.), 33 Am. B. R. 606, 219 Fed. 635.

²³⁷ See § 41, "*Contempts before referees*," *post*. See also Am. B. R. Dig., §§ 1170-1174.

applies. The district court may summarily try and determine the question as to whether an assault upon a trustee, as an officer of the court, had been committed, and if so whether it was a contempt of court.²³⁸

VIII. BRINGING IN ADDITIONAL PARTIES.

Subdivision 6 of this section authorizes the court in bankruptcy to bring in and substitute additional persons or parties when necessary for the complete determination of a matter in controversy. The case of *Bryan v. Bernheimer* is an instance where this power was recognized.²³⁹ This power is an important one in bringing about a complete determination of the rights of all parties interested in the property subject to the proceeding. The power has been exercised to bring in a non-joining partner,²⁴⁰ and persons who have filed mechanics' liens for labor and materials furnished to the bankrupt in the construction of a building.²⁴¹ It may be exercised where the name of a creditor has been inadvertently omitted from the schedule. The rule under the former law, that strangers to the proceedings cannot be compelled to come in, is probably still the law; for subsection (6) refers only to "proceedings in bankruptcy."²⁴² Under the case of *Bardes v. Bank*,²⁴³ consent of the proposed defendant was necessary, where the stranger to the proceeding claimed title adversely. Since the amendment of 1903, however, this distinction is not important. The court can order the trustee to sue in a district court, and thus in effect bring in strangers to proceedings in bankruptcy.²⁴⁴ The statute makes ample provision for the intervention of creditors who have failed for some sufficient reason to join with the original petitioners.²⁴⁵ The power to bring in additional parties as conferred by this subdivision, is sufficiently broad to permit the bringing in of any person who has any claim or interest which may be properly determined in the proceedings.

IX. COLLECTION AND DISTRIBUTION OF ESTATES AND DETERMINATION OF CONTROVERSIES.

a. In general.—By subdivision 7 of this section courts of bankruptcy have power to cause the assets of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto except as herein otherwise provided. It will not be attempted to discuss in this place the power hereinafter conferred upon trustees to sue to recover property preferentially and fraudulently transferred or of a court of bankruptcy generally to entertain a suit for the collection of the bankrupt's assets. These

²³⁸. *Ex parte O'Neal* (D. C., Fla.), 11 Am. B. R. 196, 125 Fed. 967.

²³⁹. 181 U. S. 188, 5 Am. B. R. 623.

²⁴⁰. *In re O'Brien*, 2 N. B. N. Rept. 312. See *In re J. & M. Schwarz* (D. C., N. Y.), 30 Am. B. R. 344, 204 Fed. 326.

²⁴¹. *In re Hobbs & Co.* (D. C., W. Va.), 16 Am. B. R. 544, 145 Fed. 211, holding that where it becomes necessary to complete the bankrupt's building contract in order to receive payment from the owners, the Bankruptcy Court has jurisdiction under section 2 (6) to bring persons who have filed mechanic's liens for labor and materials furnished to the bankrupt in the construction of

the building and to determine the validity of the liens, in order to make proper distribution of the funds arising under the contract of each lienor, and to determine what is due the bankrupt estate.

²⁴². *Sinsheimer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898. See also *In re Hobbs & Co.* (D. C., W. Va.), 16 Am. B. R. 544, 145 Fed. 211.

²⁴³. 178 U. S. 524, 4 Am. B. R. 163.

²⁴⁴. See *Loeser v. Savings Dep. Bank & Trust Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 845, 163 Fed. 212.

²⁴⁵. See section 59-1, and discussion under title "*Intervention by other creditors*," post.

powers are more appropriately considered under other sections of the act.²⁴⁶ It will only here be attempted to show how the power may be exercised generally and without special regard for other provisions of the act.

b. Collection and distribution.—(1) **IN GENERAL.**—The act of 1867 contained similar language conferring upon courts of bankruptcy the power to collect and distribute the estates of bankrupts. Precedents under that law will be found valuable. The power to turn a bankrupt's estate into money and distribute it *pro rata* would probably flow from subd. 15, were it not specifically conferred by subd. 7. The power conferred by this subdivision is broad and should be liberally construed in connection with other provisions of the act to accomplish the purposes thereof. The power to collect and reduce to money has a bearing upon the jurisdiction of the court to entertain and determine suits brought by receivers or trustees for the purpose of collecting and reducing to money all the assets of the bankrupt. This subdivision confers express power upon the bankruptcy court to aid duly authorized officers of the court in collecting and distributing the bankrupt's assets. Unless otherwise provided in the act, the power conferred by this subdivision appears to be plenary.²⁴⁷

(2) **RECOVERY OF PROPERTY.**—The extent of this jurisdiction and the conditions under which it will be exercised fall within the consideration of section 23 of the act, which confers jurisdiction upon bankruptcy courts in respect to suits by the trustee, for the recovery of property.²⁴⁸ The power to recover property by suit is subject to the limitation "except as otherwise provided in this act," which evidently has reference to the limitation on the jurisdiction of the district courts imposed by such section.²⁴⁹ It is this power to collect the estate of the bankrupt that authorizes the court to issue all necessary orders directing the bankrupt and others having property belonging to the estate to surrender the same to the trustee.²⁵⁰ It has been deemed sufficient to justify an order directing the bankrupt to sign and deliver to a stock exchange a request for the sale of his seat, and for the payment of the proceeds to the trustee in bankruptcy.²⁵¹ So, too, where property of bankrupt has been taken under a void attachment an order may be issued directing the surrender of the proceeds of the attachment sale to the trustee.²⁵² The court may compel the surrender of money or other assets of the bankrupt, or that of some one for him, on petition and rule to show cause.²⁵³ Where a fraudulent

246. As to jurisdiction of district courts to entertain suits by trustees or receivers in bankruptcy, see Bankr. Act, § 23-b, *post*. As to power of trustee to institute suits for the recovery of property, preferentially or fraudulently transferred, see Bankr. Act, §§ 60-b, 67-e and 70-e, *post*. As to the distribution of the bankrupt's estate among creditors, see Bankr. Act, § 65, *post*.

247. *In re Slevens* (D. C., Mo.), 1 Am. B. R. 117, 124, 91 Fed. 366. Compare *Kelley v. Aarons* (D. C., Cal.), 39 Am. B. R. 115, 238 Fed. 906.

Trust agreement with creditors.—A court of bankruptcy has jurisdiction to order that dividends due and payable to creditors of the bankrupt who signed a trust agreement be applied to the satisfaction of the claim of the trustee before payments to creditors who had expressly stipulated that the claim of the trustee should be first paid out of the assets of the bankrupt. *Searle v. Mechanics Loan & Trust Co.* (C. C. A. 9th Cir.), 41 Am. B. R. 786, 249 Fed. 942.

248. See Bankruptcy Act, § 23, and discussion thereunder.

249. See discussion in *Cohen v. American Surety Co.*, 20 Am. B. R. 65, 71, 192 N. Y., 227; *Lynch v. Bronson* (D. C., Conn.), 20 Am. B. R. 139, 180 Fed. 139.

250. *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 462; *Ripon Knitting Works v. Schreiber* (D. C. Wash.), 4 Am. B. R. 290, 101 Fed. 810; *Gavilan v. Lugo* (D. C., Porto Rico), 59 Am. B. R. 326, 9 P. R. Fed. 344.

After discharge.—A court of bankruptcy may compel a bankrupt to turn over assets in his possession after his discharge, or after the expiration of the statute of limitations against criminal prosecution for concealment of assets. *Matter of Levy* (D. C., Pa.), 44 Am. B. R. 248, 261 Fed. 432, *affd.* 45 Am. B. R. —.

Summary order compelling bankrupt to turn over property.—An order directing a bankrupt to pay over money to his trustee relates to funds under his control at the date of bankruptcy and not at the date of the order, and should so state. *Matter of Pennell* (C. C. A., 3d Cir.), 32 Am. B. R. 241, 214 Fed. 337.

transfer has been made, and the court is satisfied that there is danger of the property transferred being dissipated, the court may order a seizure of the property.²⁵⁴ The court may order property of the bankrupt in the hands of an agent to be delivered to the receiver pending the appointment of a trustee.²⁵⁵ If the court is convinced²⁵⁶ that a third person has money belonging to the bankrupt's estate, it is its duty to require the payment thereof to the trustee; if the money is traced into the hands of such third person the burden is on him to explain how it came there, what became of it, or that he did not have it when the order was made.²⁵⁷ But it is only in clear cases, in which the proof is decisive, that the court is justified in making a peremptory order against a third party directing the disclosure of concealed assets.²⁵⁸ If property mortgaged is not in the possession of a trustee, and the general creditors have no interest therein the court has no jurisdiction to set aside and cancel the mortgage.²⁵⁹ In the exercise of the jurisdiction here conferred the court will be governed by the provisions of section 60-b, which authorizes the trustee to recover property which has been transferred preferentially; of section 67-e, which requires a trustee to institute such suits and proceedings as may be required to reclaim or recover property which has been transferred or incumbered unlawfully; and generally of section 70-e which authorizes a trustee to avoid any transfer of the bankrupt's property which might have been avoided by any creditor of the bankrupt.

(8) SALE OF PROPERTY; ADMINISTRATION.—The power to cause the bankrupt's estate to be reduced to money implies the power to direct the sale of the estate, either subject to or clear from mortgages or other liens.²⁶⁰ It includes the power to preserve the estate, as well as the power to sell. Hence, it comprises the power to enjoin those who would interfere with the

251. *Matter of Hurlbutt, Hatch & Co.* (C. C. A., 2d Cir.), 13 Am. B. R. 50, 135 Fed. 504.

252. *In re Grassler* (C. C. A., 9th Cir.), 18 Am. B. R. 694, 154 Fed. 478.

253. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *In re Kane* (D. C., N. Y.), 20 Am. B. R. 616, 161 Fed. 633; *In re Fidler* (D. C., Pa.), 21 Am. B. R. 101, 163 Fed. 973; *Gavilan v. Lugo* (D. C., Porto Rico), 39 Am. B. R. 326, 9 P. R. Fed. 344; *Jones v. Blair* (C. C. A., 4th Cir.), 39 Am. B. R. 599, 242 Fed. 783.

254. *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 144 Fed. 245. In the case of *Matter of Belluscio* (Ref., N. Y.), 25 Am. B. R. 660, it appears that the bankrupt within the four months' period bought a large amount of goods on credit, the disposition of which or the proceeds of the sale thereof, he did not satisfactorily account for; it was held that an order should be made directing him to turn over to the trustees, the goods for which he did not account or the value thereof.

255. *Matter of Muncie Pulp Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 70, 139 Fed. 546; but not where the payment was of salary actually due the agent when the proceedings were instituted. *In re Lebrecht* (D. C., Tex.), 14 Am. B. R. 445, 135 Fed. 878.

256. *In re Feldser* (D. C., Pa.), 14 Am. B. R. 216, 134 Fed. 307.

257. *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 14 Am. B. R. 194, 134 Fed. 477. See cases cited under "Punishment for contempt," ante.

258. *Matter of Gilroy* (D. C., N. Y.), 14 Am. B. R. 627, 140 Fed. 733; *In re Weinreb* (C. C. A., 2d Cir.), 16 Am. B. R. 702, 146 Fed. 243.

A summary order may not be issued compelling

ing a bank to turn over to the trustee in bankruptcy the amount of checks which had been drawn against the bank by depositors, subsequent to the filing of the bankruptcy petition against them, where it appears that the bank had neither actual nor personal notice of the filing of such petition. *Matter of Zotti* (C. C. A., 2d Cir.), 26 Am. B. R. 234, 186 Fed. 84.

259. *Brumley v. Jones* (C. C. A., 5th Cir.), 15 Am. B. R. 578, 141 Fed. 318.

260. *In re Pittlekow* (D. C., Wis.), 1 Am. B. R. 472, 92 Fed. 901; *In re Worland* (D. C., Iowa), 1 Am. B. R. 450, 92 Fed. 893; *In re Kerski* (D. C., Wis.), 2 Am. B. R. 79; *In re Fite* (D. C., Pa.), 31 Am. B. R. 308, 61 Pitts. Leg. J. 109; *In re Benjamin* (C. C. A., 2d Cir.), 14 Am. B. R. 481, 136 Fed. 175, in which case it was held that a bankruptcy court had power to designate some auctioneer to act for the trustee in selling the bankrupt's estate.

In the case of *In re Arden* (D. C., N. Y.), 26 Am. B. R. 684, 188 Fed. 475, the court said: "This court may, under section 2 of the Bankrupt statute, sell an interest, such as a remainder in real property, and pay off a judgment or mortgage lien on said interest, if the proceeds be sufficient for that purpose, in order to preserve the equity in the property for the benefit of general creditors, but the lien and all rights accruing therefrom, must be respected by the bankruptcy court."

Property not scheduled.—A District Court has jurisdiction to sell a life-estate of the bankrupt, although it was not scheduled and surrendered. *Gray v. Gudger* (C. C. A., 5th Cir.), 44 Am. B. R. 228, 260 Fed. 331.

due administration of assets.²⁶¹ This power extends even to a refusal to administer burdensome property.²⁶² Under the present law, it has been asserted to the extent of ordering an assessment for unpaid subscriptions upon the stockholders of a bankrupt corporation.²⁶³ So also in respect to the liquidation of a claim for damages of the bankrupt against a creditor who has come into court with a claim against the estate.²⁶⁴ But the power does not include the power to direct the persons interested in the estate to accept a plan whereby it is proposed to reorganize the business of the bankrupt as a corporation and to deliver to the creditors bonds or other evidences of indebtedness binding upon the proposed corporation.²⁶⁵

(4) CUSTODY OF PROPERTY BY RECEIVER OR MARSHAL.—This subdivision is frequently considered in connection with that provision of the same section which authorizes an order directing the receiver or marshal to take charge of the property of the bankrupt.²⁶⁶ The provisions apply to the powers of receivers or the marshal to take charge of property of bankrupts in the hands of third persons after the filing of the petition, and until it is dismissed or the trustee has qualified.²⁶⁷

c. Settlement of controversies.—Subdivision 7 empowers courts of bankruptcy to determine controversies in relation to the estates of bankrupts, "except as herein otherwise provided." The exception has reference particularly to the limitation imposed upon the jurisdiction of such courts by § 23-b.²⁶⁸ The jurisdiction in respect to the determination of controversies, prior to the amendatory act of 1903, depended on who were the parties to the

²⁶¹. See under Section Eleven. See also "*Effect of Bryan v. Bernheimer*," 5 Am. B. R. 623, 181 U. S. 188, and "*Injunctions other than against Suits*," post; both under this section.

²⁶². Discussed under Section Seventy.

²⁶³. In re Miller Electrical Maintenance Co. (D. C., Pa.), 6 Am. B. R. 701, 111 Fed. 515.

Collateral attack.—The authority of a trustee to bring an action for the collection of unpaid stock subscriptions cannot be attacked collaterally. *Jeffery v. Selwyn* (N. Y. Ct. of App.), 39 Am. B. R. 259, 115 N. E. 275.

²⁶⁴. In re Harper (D. C., N. Y.), 23 Am. B. R. 918, 934, 175 Fed. 412.

²⁶⁵. Matter of Prudential Outfitting Co. (D. C., N. Y.), 41 Am. B. R. 621, 250 Fed. 504.

Reorganization of corporations.—In the case of Matter of Cornell Co. (D. C., N. Y.), 26 Am. B. R. 252, 186 Fed. 856, the court said: "Nor can a bankruptcy court compel a creditor to consent to have all the bankrupt estate transferred to a corporation and accept in settlement of his claim obligations of the new corporation, payable at a future date. There is no explanation in this bid of what the amount of the capital of the new corporation will be, or how it will be furnished, or how the money necessary to carry on the business will be obtained, but the bid states that any new indebtedness which may be necessarily created by the corporation for money borrowed for any purpose shall have priority over all the certificates of indebtedness proposed to be given in settlement of the debts of the bankrupt. The proposition therefore is that a court of bankruptcy is to authorize a transfer of all the assets of the bankrupt to a corporation, and compel

the creditors of the bankrupt to take the unsecured obligations of the new corporation, payable a long time in the future, and to leave it in the power of the new corporation to create obligations which shall be a prior lien on its assets over its liability upon its obligations to the creditors of the bankrupt. I am clear that a court of bankruptcy has no power to authorize such a sale, and, if it had, I should deem it inexpedient to do so."

In the case of In re Northampton Portland Cement Co., (D. C., Pa.), 25 Am. B. R. 565, 185 Fed. 542, the court held that it had no power to compel creditors of a bankrupt corporation to give up their existing claims, and in the place of such claims to accept stock in the new corporation to be formed to take over all the assets of the bankrupt, and to assent to other conditions contained in the plan of reorganization, even though the plan is a desirable one, and regular administration in bankruptcy would result in heavy loss to the creditors.

²⁶⁶. *McNulty v. Feingold* (D. C., Pa.), 12 Am. B. R. 338, 129 Fed. 1001; *Mason v. Wolowich* (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 699.

²⁶⁷. *McNulty v. Feingold* (D. C., Pa.), 12 Am. B. R. 338, 129 Fed. 1001.

²⁶⁸. In re Walsh Bros. (D. C., Ia.), 21 Am. B. R. 14, 17, 163 Fed. 352; In re Kornit Mfg. Co. (D. C., N. J.), 27 Am. B. R. 244, 192 Fed. 392.

A referee in bankruptcy may authorize a trustee to compromise a claim due to him from the bankrupts where it appears to be for the best interests of the creditors. Matter of Goldman Brothers (D. C., Pa.), 39 Am. B. R. 58, 241 Fed. 385.

suit.²⁶⁹ Since then, as to suits to recover property, it depends, as did the same jurisdiction under the law of 1867, on the subject-matter.²⁷⁰ When the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine the controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein.²⁷¹ If the property or fund is in the possession of the court, represented by one of its officers, as receiver or trustee, controversies in respect thereto are clearly within its jurisdiction.²⁷² If the property is in the possession of an adverse claimant the court cannot summarily direct him to turn the property over to an officer of the court.²⁷³ If an adverse claimant bases his right upon that of the bankrupt the controversy is within the summary jurisdiction of the bankruptcy court.²⁷⁴ The rule may be summarized as follows: Where there is a claim of adverse title to property of the bankrupt based on a transfer antedating the bankruptcy, a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title may be adjudicated. But if there is no such adverse claim of title, and the property is in the physical possession of a third party, or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee, it is not necessary to bring a plenary suit, but the court may act summarily.²⁷⁵ All of these rules are elaborated upon and discussed fully under section 23 which has special reference to suits by trustees in respect to property in the bankrupt estate.

269. *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163.

Subsection (7) applies only where the trustee is the adverse claimant, and leave to sue him in the State court will be denied. In *re McCallum* (D. C., Pa.), 7 Am. B. R. 596, 113 Fed. 393. See also *In re Siegel-Hillman Co.* (D. C., Mo.), 7 Am. B. R. 351, 111 Fed. 983, and *In re Kellogg* (D. C., N. Y.), 7 Am. B. R. 623, 113 Fed. 120, *affd.*, 10 Am. B. R. 7, 121 Fed. 333, 57 C. C. A. 547, holding on appeal that the controversies in relation to the bankrupt estate which do not come within the jurisdiction of the bankruptcy court are those where the trustee must bring suit to assert title to property not in his possession or under his control. Where, even before the amendment, the claimant is also a bankrupt, jurisdiction to decide between the two estates exists; In *re Rosenberg* (D. C., Pa.), 8 Am. B. R. 624, 116 Fed. 402.

270. *Kelly v. Smith*, Fed. Cas. 7,675. Under law of 1841, *Buckingham v. McLean*, 13 How. 151. See also Section Twenty-three.

271. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, in which case it was held that a district court could determine by plenary suit in equity the title to property claimed by trustee to have been surrendered to third parties by the temporary receiver after the filing of a voluntary petition in bankruptcy, without right and authority from the court; *Matter of Traunstein &*

White (D. C., Mass.), 34 Am. B. R. 482, 225 Fed. 317; *In re National Boat & Engine Co.* (D. C., Mo.), 33 Am. B. R. 154, 216 Fed. 211; *Matter of Larkey* (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867.

272. *In re Antigo Screen Co.* (C. C. A., 7th Cir.), 10 Am. B. R. 359, 123 Fed. 249, 58 C. C. A. 248; *In re Leeds Woolen Mills* (D. C., Tenn.), 12 Am. B. R. 136, 129 Fed. 922, holding further that the jurisdiction once acquired cannot be defeated by the surrender of the property to the alleged rightful owner; *Cleminshaw v. International Shirt & Collar Co.* (D. C., N. Y.), 21 Am. B. R. 616, 164 Fed. 797; *In re McDougall* (D. C., N. Y.), 23 Am. B. R. 762, 175 Fed. 400; *In re Drayton* (D. C., Wis.), 13 Am. B. R. 602, 135 Fed. 883; *Matter of McBride* (D. C., N. Y.), 12 Am. B. R. 81, 132 Fed. 285; *Whitney Central Trust & Savings Bank v. U. S. Construction Co.* (C. C. A., 5th Cir.), 41 Am. B. R. 351, 250 Fed. 784.

273. *Matter of Andre* (C. C. A., 2d Cir.), 13 Am. B. R. 132, 135 Fed. 736, 68 C. C. A. 374. The validity of an assignment of wages made prior to the filing of the bankruptcy petition must be determined by plenary suit. *In re Driggs* (D. C., N. Y.), 22 Am. B. R. 621, 171 Fed. 897.

274. *Goodnough Mercantile & Stock Co. v. Galloway* (D. C., Or.), 19 Am. B. R. 244, 156 Fed. 504; *In re Kane* (D. C., N. Y.), 20 Am. B. R. 616, 624, 161 Fed. 633; *In re Franklin Suit & Skirt Co.* (D. C., Pa.), 28 Am. B. R. 278, 197 Fed. 591.

275. *Babbitt v. Dutcher* (Sup. Ct.), 216 U. S. 102, 23 Am. B. R. 519.

X. CLOSING AND REOPENING ESTATES.

a. In general.—Subdivision 8 of section 2 invests courts of bankruptcy with the power to "close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered." The final accounts of trustees are to be filed with the court fifteen days before the date fixed for the final meeting of the creditors.²⁷⁶

b. Closing estates.—Under this subdivision an estate can only be closed when it appears that it has been fully administered.²⁷⁷ Where the final account of the trustee has been approved, the trustee discharged and all the funds of the estate distributed, the estate will be deemed "closed" within the meaning of this subdivision.²⁷⁸ Where there are no assets and no creditors appear at the first meeting, the appointment of a trustee may be dispensed with.²⁷⁹ It would seem to follow that where there are no assets, an estate may not be technically closed under this subdivision.²⁸⁰ The estate is usually closed by the entry of an order approving the accounts of the trustee and discharging him from his trust. By the terms of the subdivision the act of closing the estate consists of the approval of the final accounts and the discharge of the trustee.²⁸¹ As we have seen the general policy of the law requires trustees and other court officials to deal expeditiously with the administration of bankrupt estates.²⁸² The closing of the estate does not operate to transfer the title of unadministered assets back to the bankrupt,

276. See Bankr. Act, § 47-a, subd. 8, and cases cited thereunder. As to closing and reopening estate in bankruptcy, see cases digested in Am. B. R. Dig. §§ 623-629. *Matter of Sayer* (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397. (Quoting text.)

Notice to creditors.—An order of a referee closing a bankrupt's estate is a nullity, and the estate remains open under the original order of reference, where the referee fails to give to creditors the ten days' notice required by section 58. *Matter of Levy* (D. C., Pa.), 44 Am. B. R. 248, 261 Fed. 432.

277. *Matter of Sayer* (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397. (Quoting text.)

Necessity for affirmative action by court.—*Matter of De Ran* (C. C. A., 6th Cir.), 44 Am. B. R. 409, 260 Fed. 732.

278. *Kinder v. Scharff*, 129 La. 218, 26 Am. B. R. 765, 55 So. 769.

It is provided in section 11-d, that "suits shall not be brought by or against the trustee of a bankrupt estate subsequent to two years after the estate has been closed." There is no difficulty as to the time when an estate is deemed closed, where the trustee has assets in his possession and makes distribution thereof among the creditors. In such cases the time of closing is the date of the discharge of the trustee upon submission of his final account. More difficulty will arise in determining the time of closing when the estate of the bankrupt contains no assets. (See discussion of this subject under Section Eleven of this work, subtitle "*Limitation on Suits by Trustees*.")

279. General Order XV. See also *Clark v. Pidcock* (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745; *In re Levy* (D. C., Wis.), 4 Am. B. R. 108, 101 Fed. 247.

280. *Clark v. Pidcock* (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745, in which case the court said: "The estate, however, was not technically closed because there

was no final meeting of creditors or discharge of the trustee upon the settlement of his accounts."

281. **Settlement of estate.**—The final settlement of the bankrupt's estate will not be ordered until a full and complete record of the proceedings is made, showing that they have been conducted in accordance with the requirements of the act and the general orders of the Supreme Court and the district rules and a balance sheet is presented which can be understood, and from which the bankrupt and his creditors can see what has been done with their money. *In re Carr* (D. C., N. C.), 8 Am. B. R. 635, 116 Fed. 556.

The record of a referee made in a book retained by him, reciting "order allowing account and discharging trustee filed," is not in itself conclusive that the estate was closed. *Matter of De Ran* (C. C. A., 6th Cir.), 44 Am. B. R. 409, 260 Fed. 732.

282. See discussion under heading "*Expeditious exercise of jurisdiction*," ante.

In re Carr (D. C., N. C.), 8 Am. B. R. 635, 116 Fed. 556. See generally under Bankr. Act, § 47, post; and as to when an estate is "closed," see §§ 11 and 55, post.

Speedy administration.—In the case of *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131, the court said: "The bankruptcy act contemplates that proceedings in bankruptcy shall go forward with all reasonable dispatch compatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizens." See also *In re Paine* (D. C., Ky.), 11 Am. B. R. 354, 127 Fed. 346.

so as to permit recovery by the legal representatives of the bankrupt after his death.²⁸³

c. Reopening estates.—(1) **IN GENERAL.**—This subdivision recognizes the power of the court to reopen estates “whenever it appears they were closed before being administered.” Upon the proper showing of jurisdictional facts, it is the duty of the court to reopen the estate.²⁸⁴ The exercise of the power to reopen rests in the sound discretion of the court, upon the consideration of all the circumstances.²⁸⁵ The reopening does not reinstate the discharged trustee, but creates a vacancy in the office, to be filled as provided in § 44, post.²⁸⁶

(2) **LACK OF ADMINISTRATION SOLE GROUND.**—The subdivision provides for the reopening of an estate only when closed “before being administered.” This is the only ground for the reopening of an estate. It becomes essential therefore to ascertain whether there has been a lack of administration before granting the application to reopen.²⁸⁷ The common cause is, therefore, the discovery of unadministered assets, and it has been held that the allegations of the petition to reopen must be such as to satisfy the court that such assets exist.²⁸⁸ An application by the bankrupt to reopen the proceedings may be granted on the ground of newly discovered assets, although the time for filing claims has expired.²⁸⁹ And where the bankrupt failed to schedule an interest in a trust fund the estate should be reopened where it appears that the bankrupt has an interest in remainder or expectancy in such trust.²⁹⁰

(3) **PARTIES WHO MAY APPLY.**—The application for reopening must be made by some party interested in the estate, and who would be benefited by the reopening.²⁹¹ Creditors who have not proved their claims cannot apply for the relief.²⁹² A former trustee has no standing in court to seek the reopening of an estate.²⁹³

(4) **NOTICE AND PETITION.**—The practice is simple—an *ex parte* application to the judge for an order reopening, and, if granted, a reference to the referee and a meeting of creditors on notice, with the other subsequent

283. *Matter of Lighthall* (D. C., N. Y.), 34 Am. B. R. 594, 221 Fed. 791; and see *Fowler v. Jenks* (Minn. Sup. Ct.), 11 Am. B. R. 255, 90 Minn. 74, 95 N. W. 857, 96 N. W. 914.

284. *In re Newton* (C. C. A., 8th Cir.), 6 Am. B. R. 52, 107 Fed. 429; *Matter of Sayer* (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397 (quoting text).

Effect.—The reopening of a bankruptcy proceeding to let in other creditors to carry it on after the elimination from it of all who previously had been actors therein is in effect the institution of a new proceeding. *Trammell v. Yarbrough* (C. C. A., 5th Cir.), 42 Am. B. R. 727, 255 Fed. 529.

285. *Matter of Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246.

Discretion of court.—An application to reopen the estate of a bankrupt to enable the trustee to maintain an action to recover concealed assets is addressed to the discretion of the court, and its action will not be reversed except for an abuse of discretion. *In re Goldman* (C. C. A., 2d Cir.), 11 Am. B. R. 707, 129 Fed. 212; *Matter of Sayer* (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397 (quoting text).

286. *Matter of Rochester Baths Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 355, 222 Fed. 22; *Matter of Minners* (D. C., N. Y.), 41 Am. B. R. 773, 253 Fed. 300.

287. *Matter of Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246, in which the court said: “The power to reopen the case is given in one contingency only, namely, when it appears that the case was closed before being fully administered.” *Matter of Sayer* (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397 (quoting text).

Where a sale has been made by a trustee in bankruptcy without notice to the creditors the estate has not been “fully administered.” *Matter of Minners* (D. C., N. Y.), 41 Am. B. R. 773, 253 Fed. 300.

288. *In re Newton* (C. C. A., 8th Cir.), 6 Am. B. R. 52, 107 Fed. 439; *Matter of Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246; *Matter of Sayer* (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397 (quoting text); *Matter of Graft & Nevins* (C. C. A., 2d Cir.), 41 Am. B. R. 32, 250 Fed. 907, 42 Am. B. R. 741, 255 Fed. 241.

289. *In re Pierson* (D. C., N. Y.), 23 Am. B. R. 53, 174 Fed. 160.

290. *Pollack v. Meyer Bros. Drug Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 835, 233 Fed. 861.

291. *In re Chandler* (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637, 71 C. C. A. 87; *In re Meyer* (D. C., Or.), 25 Am. B. R. 44, 181 Fed. 904; *Matter of Guff & Nevins* (C. C. A., 2d Cir.), 41 Am. B. R. 32, 250 Fed. 997.

Creditors.—A creditor of a bankrupt estate continues to be such for the purpose of applying to have the estate reopened even though the bankrupt has in the meantime been discharged. *Matter of Levy* (D. C., Pa.), 44 Am. B. R. 276, 259 Fed. 314.

The purchaser's vendee is an interested party. *Matter of Minners* (D. C., N. Y.), 41 Am. B. R. 773, 253 Fed. 300.

292. *Matter of Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246; *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

293. *Matter of Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246.

proceedings as in the original case. The petition to reopen an estate need not be of any formal or technical character, but should reasonably satisfy the court of the requisite jurisdictional fact of non-administration.²⁹⁴ The petition is not required to show what property was surrendered by the bankrupt, or what representations were made in his schedules, nor that any creditor was deceived by his representations.²⁹⁵

(5) **HEARING ON APPLICATION.**—The jurisdictional facts must appear, that is, it must be established in some legal way that some assets belonging to bankrupt at the time of his bankruptcy were not administered in the proceeding.²⁹⁶ And to establish the essential facts the court may take into consideration anything that appears in the record of the original bankruptcy proceeding.²⁹⁷

(6) **WHEN APPLICATION GRANTED.**—The application may be granted where a probable fraudulent transfer of property is apparent; in such case the order reopening the estate should not be construed as authorizing the trustee to commence an action in a State court to set aside the transfer.²⁹⁸ The bankrupt's application to reopen made several months after his discharge, so as to permit him to amend his schedules by inserting the name of a creditor omitted therefrom, so that the bankrupt may be discharged also from such creditor's claim should be denied.²⁹⁹ But a reopening after a discharge has been permitted for the purpose of amending schedules by inserting a claim upon which an action was pending at the time of adjudication and to which a counterclaim had been pleaded.³⁰⁰ Where assets are discovered or become available which were not known or were unadministered when the estate was closed, an order may be made reopening the estate; such assets must have been in existence when the petition was filed, and must be such as would pass to the trustee.³⁰¹ And where an estate has been opened because of newly discovered assets the bankrupt will be permitted to amend his schedules to include exemptions, where he had received but a part of the

²⁹⁴. *Matter of Graff and Nevins* (C. C. A., 2d Cir.), 41 Am. B. R. 32, 250 Fed. 997; *In re Newton* (C. C. A., 8th Cir.), 6 Am. B. R. 52, 107 Fed. 430, holding that while a petition to reopen an estate once closed need not be of formal or technical character, it should, either in itself or in connection with supporting affidavits, be of such a nature as to reasonably satisfy the court of the requisite jurisdictional fact that there are some assets belonging to the bankrupt which have not been administered; and a petition which does not state substantial or definite facts, but simply asks for the appointment of a trustee, is not sufficient to warrant action by the court in this respect.

Unverified petition.—An order to open a closed estate will not be granted when the papers in the case are unverified, if affidavits of reputable, disinterested persons are filed which deny the statements in the moving papers. *In re Soper & Slada* (Ref., N. Y.), 1 Am. B. R. 193.

²⁹⁵. *Traub v. Marshall Field Co.* (C. C. A., 5th Cir.), 25 Am. B. R. 410, 182 Fed. 622.

Rights of bankrupt.—A bankrupt who has been discharged of his debts has no standing in court to move to, have a restraining order issued at the time of the reopening of the estate vacated on the ground that notice of the reopening was not given to him. *Matter of Levy* (D. C., Pa.), 44 Am. B. R. 276, 259 Fed. 314.

²⁹⁶. *In re Newton* (C. C. A., 8th Cir.), 6 Am. B. R. 52, 107 Fed. 430.

²⁹⁷. *Pollack v. Meyer Bros. Drug Co.* (C. C.

A., 8th Cir.), 36 Am. B. R. 835, 233 Fed. 861.

²⁹⁸. *In re Ryburn* (D. C., Ct.), 16 Am. B. R. 514, 145 Fed. 662.

²⁹⁹. *In re Spicer* (D. C., N. Y.), 16 Am. B. R. 802, 145 Fed. 431.

³⁰⁰. *In re McKee* (D. C., N. Y.), 21 Am. B. R. 306, 165 Fed. 269.

Honest mistake in scheduling claims.—Where a bankrupt makes a sincere and honest effort to schedule a creditor, and a mistake is made as to the identity of the creditor, the estate should be reopened and the bankrupt given a chance to make his schedule conform to the facts. *Matter of Adams* (D. C., Ga.), 40 Am. B. R. 22, 242 Fed. 335.

³⁰¹. *Matter of Lighthall* (D. C., N. Y.), 34 Am. B. R. 594, 221 Fed. 791, in which it was held that where a bankrupt duly scheduled as an asset a claim against a debtor and the latter's assignee, and it appeared that the debtor owned an interest in an insurance policy on the life of a third party, which was of little cash value, and on which the premiums were paid by others than the bankrupt, and the trustee did not abandon the claim, upon the death of the insured after the closing of the bankrupt's estate, the dividend on such claim resulting from the proceeds of the insurance policy belongs to the estate and is not after-acquired property.

Where proceedings are reopened a person who has in the meantime paid over to the bankrupt property belonging to him and remaining unadministered is not liable as for money wrongfully paid to the bankrupt. *Watson v.*

exemptions to which he was entitled, because of insufficiency of assets.³⁰² Where a discharge was refused because the bankrupt had not accounted for a large sum of money, the estate may be reopened.³⁰³ It has been held that, where the time to file claims has expired, a reopened case will redound to the benefit only of creditors whose claims were allowed in the original proceeding.³⁰⁴ Laches of the applicant may deprive him of his right to a reopening.³⁰⁵ Where the proceedings have been dismissed by consent of the creditors they will not be reopened.^{306a} It frequently becomes necessary to reopen estates that there may be a trustee on whom process may be served; thus, where burdensome property has vested in the trustee, and, by inadvertence, he has not been formally excused from taking the same, and a mortgagee wishes to foreclose.

XI. CONFIRMATION OR REJECTION OF COMPOSITIONS.

Subdivision 9 of this section authorizes a court of bankruptcy to "confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases." Section 12 of the act recognizes and specifies the compositions which are subject to confirmation by the court. This whole subject is discussed under that section. The power conferred upon the court to confirm or reject such composition is limited to those recognized in § 12.³⁰⁶

XII. ENFORCEMENT OF ACT BY NECESSARY ORDERS, PROCESS OR JUDGMENT.

a In general.—Subdivision 15 invests courts of bankruptcy with the powers "to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." This is the omnibus clause of the section. Generally speaking, it may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against, the enforcement of the law; provided the court of bankruptcy otherwise has jurisdiction of the person or the subject-matter.³⁰⁷ Under the power here conferred the bankrupt may be compelled to perform other duties than those enumerated in § 7; he may be restrained from leaving the juris-

Motley (Ala. Sup. Ct.), 39 Am. B. R. 750, 75 So. 147.

Omission to schedule worthless assets.—An estate in bankruptcy will not be reopened merely because the bankrupt inadvertently failed to schedule certain property which at the time and during the pendency of the bankruptcy proceeding was worthless, even though thereafter it acquired considerable value. *Matter of Graff* (D. C., N. Y.), 40 Am. B. R. 205, 242 Fed. 577.

Sale of assets discovered after closing estate.—A bankruptcy court may entertain an application by the bankrupt, after the estate is closed, for leave to turn over certain unscheduled property which was discovered after the estate was closed, and sell the same, in order to make title to those assets as to which the property was vested in the bankrupt estate, and as to which any question as to title may exist from the fact that they have not passed through the hands of the bankruptcy court. *Matter of Graff* (D. C., N. Y.), 40 Am. B. R. 205, 242 Fed. 577.

³⁰² *In re Erwin* (D. C., Pa.), 22 Am. B. R. 165, 177 Fed. 284.

³⁰³ *In re Barton* (D. C. Ark.), 16 Am. B. R. 569, 144 Fed. 540.

³⁰⁴ *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

Loss of original proof.—See *Matter of Reynolds* (D. C., N. Y.), 42 Am. B. R. 628.

³⁰⁵ **Laches in making application.**—In the case of *In re Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 248, the court held the proper rule to be that a fairly reasonable time, under all the circumstances of the case, should be allowed and that if the parties who had full knowledge delayed an unreasonable time to seek to reopen a case, their laches should authorize the court to refuse to do so. In the case of *In re Reese* (D. C., Ala.), 8 Am. B. R. 411, 115 Fed. 993, it was held laches on the part of a creditor, who had received notice of the filing of a petition, to fail to contest the bankrupt's claim to exemption. In the case of *Vary v. Jackson* (C. C. A., 5th Cir.), 21 Am. B. R. 334, 164 Fed. 840, a delay of seven years was held laches, especially since the petitioner failed to show when the alleged fraud was discovered. See also *Traub v. Marshall Field Co.* (C. C. A., 5th Cir.), 25 Am. B. R. 410, 182 Fed. 622.

^{306a} *Matter of Kaufman* (D. C., N. Y.), 41 Am. B. R. 771, 253 Fed. 301.

diction of the court in the proper case, by writ of *ne exeat*.³⁰⁶ This subdivision is not sufficiently broad to authorize an order requiring a bankrupt, who has been released from arrest, to give bail.³⁰⁷ It is ample to authorize a referee to order a creditor to file a bill of particulars as to a certain item in his claim.³¹⁰

b. Injunctions other than against suits.—(1) **IN GENERAL.**—Early in the administration of the present law, the injunction was frequently used to prevent the dissipation of assets to which the bankrupt had title.³¹¹ Through this power a court may extend the powers of receivers appointed under § 2 (3); in the exercise of it the court may compel the surrender by a bankrupt of his property. It is frequently called upon to justify the making of orders and the issuing of process required for the due administration of the bankrupt's estate. Many instances of such orders and process might be here cited, but it seems more appropriate to refer to them in connection with other parts of the act. The power to enjoin is inherent in the court of bankruptcy as a court of equity. It includes the power to grant stays, conferred by § 11, of pending suits in other courts. That the broad phrasing of subdivision 15 amounts to an express ratification of this inherent power has not been doubted. The exercise of it, like the quasi-criminal remedy of contempt, is essential to the due enforcement of the act, as was the additional process of seizure when the act complained of amounted to an act of bankruptcy or other fraud on the act.³¹² The power when exercised, is subject to the same rules and limitations as in the case of a writ of injunction issued under other circumstances; for instance its use is available to prevent the infliction of threatened or imminent, and not mere possible injury.³¹³ Where,

^{306.} *In re Frear* (D. C., N. Y.), 10 Am. B. R. 199, 120 Fed. 978.

^{307.} *In re Hicks* (D. C., N. Y.), 13 Am. B. R. 654, 133 Fed. 739. The language of the text was quoted with approval in the case of *In re Donnelly* (D. C., Ohio), 26 Am. B. R. 304, 307, 188 Fed. 1001.

Scope of subdivision.—In the case of *In re Swafford Bros. Dry Goods Co.* (D. C., Mo.), 25 Am. B. R. 282, 286, 180 Fed. 549, the court said: "It is said this section may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against the enforcement of the law; provided the court of bankruptcy otherwise has jurisdiction of the person or the subject-matter. For such purposes the court has the plenary powers of a court of equity and can exercise the powers of such a court for the ascertainment and enforcement of the rights and equities of the various parties interested in the estate of the bankrupt company." Citing *In re Seigel-Hillman Dry Goods Co.* (D. C., Mo.), 7 Am. B. R. 351, 111 Fed. 980-983; *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363-368, 66 C. C. A. 425; *Bardes v. Hawarden Bank*, 178 U. S. 524-535, 4 Am. B. R. 163, 20 Sup. Ct. 1000, 44 L. Ed. 1175. The power should be exercised so as to facilitate the prompt settlement of bankrupt estates, and technical pleas should be disregarded when no injustice will result. *In re Musica & Son* (D. C., La.), 30 Am. B. R. 535, 205 Fed. 413.

No power to direct a trustee to accept a bond for payment of money in dispute. *Matter of Reynolds* (D. C., N. Y.), 40 Am. B. R. 139, 243 Fed. 268, 272.

^{308.} *In re Cohen* (D. C., Ill.), 14 Am. B. R. 355, 126 Fed. 599; *In re Lipke* (D. C., N. Y.), 3 Am. B. R. 569, 98 Fed. 970; *In re Fleicher* (D. C., N. Y.), 18 Am. B. R. 194, 151 Fed. 82; *Matter of Berkowitz* (D. C., N. J.), 22 Am. B. R. 231, 173 Fed. 1012. Compare *In re Ketchum* (C. C. A., 6th Cir.), 5 Am. B. R. 532, 108 Fed. 35.

^{309.} *U. S. ex rel. Kelly v. Peters* (D. C., Ill.), 22 Am. B. R. 177, 166 Fed. 613.

^{310.} **Bill of particulars.**—Under section 63b and section 2 (15) of the bankruptcy act, a referee may in his discretion require creditors to file a bill of particulars as to a certain item of their claim, whether liquidated or unliquidated. *Matter of Siegel Co.* (D. C., Mass.), 35 Am. B. R. 128, 223 Fed. 368.

^{311.} For instance, see *In re Gutwillig* (C. C. A., 2d Cir.), 1 Am. B. R. 388, 92 Fed. 337, which is typical of the earlier cases, and *In re Kleinhans* (D. C., N. Y.), 7 Am. B. R. 604, 113 Fed. 107; *In re Smith* (D. C., Ga.), 8 Am. B. R. 55, 113 Fed. 993; *In re Tune* (D. C., Ala.), 8 Am. B. R. 235, 115 Fed. 908, and *In re Gutman* (D. C., N. Y.), 8 Am. B. R. 252, 114 Fed. 1009, among the later cases. Nor is it thought that the cases of *In re Shoemaker* (D. C., Va.), 7 Am. B. R. 437, 112 Fed. 648, and *In re Wells* (D. C., Mo.), 8 Am. B. R. 75, 114 Fed. 222, have any in their respective districts, abridged this very necessary power. Verbal notice of the injunction has been held enough. *In re Krinsky Bros.* (D. C., N. Y.), 7 Am. B. R. 535, 112 Fed. 972. For analogous cases, see also, under section eleven of this work.

^{312.} *In re Etheridge Furniture Co.* (D. C., Ky.), 1 Am. B. R. 112, 92 Fed. 329; *In re*

however, the property at which the process was aimed was claimed adversely by another and in that other's possession, the Supreme Court's decision in the *Bardes* case at once made it doubtful whether this jurisdiction could longer be exercised.³¹⁴ This doubt has now been removed by the amendments of 1903.³¹⁵ It may be suggested, however, that *Bryan v. Bernheimer*, *supra*, having affirmed the doctrines of the earlier decisions and to that extent limited the *Bardes* case, the power to take a bankrupt's property from the possession of one who holds it under a transfer which is in itself an act of bankruptcy, and the lesser power of enjoining his disposition of it, have always been available.³¹⁶ Indeed, the reasoning of *Bryan v. Bernheimer* indicates that where the possession, though adverse, is through an act which amounts to a fraud on the law, though possibly not an act of bankruptcy, the power to enjoin existed even before the amendment of § 23-b by the act of 1903.³¹⁷ In any event, as the law now stands, ample authority exists to prevent by injunction the disposition of property in the possession of adverse claimants, pending the determination of the controversy as to the title of such property,³¹⁸ provided there is no unreasonable delay on the part of the attacking creditors.³¹⁹

(2) ACTS PRIOR TO ADJUDICATION.—When a petition is filed the bankruptcy court may restrain by injunction the commission of any act that will interfere with or prevent the due administration of the act,³²⁰ for the purpose

Sievers (D. C., Mo.), 1 Am. B. R. 117, 91 Fed. 366; *In re De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328.

^{313.} *Matter of Penn Development Co.* (D. C., Cal.), 33 Am. B. R. 739, 220 Fed. 222. As to injunctions to restrain disposition of property transferred fraudulently, see *Moore on Fraudulent Conveyances*, Vol. 2, p. 1041-1046.

^{314.} See *In re Ward* (D. C., Mass.), 5 Am. B. R. 215, 104 Fed. 965.

^{315.} See Section Twenty-three of this work. Injunction to restrain disposition of property.—In the case of *In re Norris* (D. C., N. Y.), 24 Am. B. R. 444, 177 Fed. 598, the court said: "Under the circumstances, it would seem that the only safe way to protect the rights of the creditors is to continue the injunction until the rights of the parties have been determined by a proper tribunal. Formerly it was doubtful whether a court of bankruptcy could take jurisdiction to restrain the disposition of property in possession of a third person claiming title thereto; but the case of *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 21 Sup. Ct. 557, 45 L. Ed. 814, and the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. Supp. 1909, p. 1312]), to section 23-b of the bankruptcy act, removes any doubt that may theretofore have existed as to such power. If the proposed sale of the property, which is in the possession of the wife of the bankrupt therein, is not enjoined during the pendency of the plenary action, it is not difficult to perceive that the interests of the general creditors are liable to suffer." Citing *Collier on Bankruptcy* (7th ed.), p. 50.

^{316.} See *In re Bender* (D. C., Ark.), 5 Am. B. R. 632, 106 Fed. 873; s. c., on appeal *sub. nom.* *In re Young* (C. C. A., 8th Cir.), 7 Am. B. R. 14, 111 Fed. 158.

^{317.} Note also *In re Currier* (Ref., N. Y.), 5 Am. B. R. 639.

^{318.} *Lawrence v. Lowrie* (D. C., Pa.), 13 Am. B. R. 297, 183 Fed. 905; *Blake v. Neabett* (D. C., Mo.), 16 Am. B. R. 269, 114 Fed. 279; *Matter of Berkowitz* (D. C., N. Y.), 22 Am. B. R. 233, 173 Fed. 1013; *In re Norris* (D. C., N. Y.), 24 Am. B. R. 444, 177 Fed. 598. See cases cited Am. B. R. Dig. § 669.

^{319.} Injunction against officers of corporation; delay.—Where there is no testimony tending to show that property in the possession of an officer of a bankrupt corporation really belongs to the corporation or that it has any interest therein, and where there is nothing to challenge the officer's claim of personal ownership except suspicion due to the general situation, any impounding of the property while petitioning creditors look for evidence at least approaches the margin line of the rightful exercise of power; but in any event, only the briefest practicable delay can be allowed, and the exercise of diligence must be imposed upon the attacking creditors. *Matter of McGurley* (C. C. A., 6th Cir.), 33 Am. B. R. 612, 219 Fed. 159.

^{320.} *In re Hornstein* (D. C., N. Y.), 10 Am. B. R. 308, 122 Fed. 266, in which it was held that the court has power between the time an involuntary petition is filed and the selection of a trustee, to enjoin all persons within its jurisdiction from doing any act that will interfere with or prevent the due administration of the bankruptcy act, and comity does not require said court to compel persons whose rights are seriously jeopardized by proceedings in a State court to resort thereto for protection. *In re Smith* (D. C., Ga.), 8 Am. B. R. 55, 113 Fed. 903; *In re Goldberg* (D. C., N. Y.), 9 Am. B. R. 154, 117 Fed. 602; *In re Hines* (D. C., Ore.), 16 Am. B. R. 538, 144 Fed. 147; *Matter of Schow* (D. C., Conn.), 32 Am. B. R. 404, 218 Fed. 514.

of preserving the *statu quo* of the property until it may be ascertained whether or not an adjudication should be decreed.³²¹

(3) **INJUNCTION TO RESTRAIN SALES.**—Under this clause a court of bankruptcy may restrain a sale of the property of a bankrupt corporation, at the instance of its treasurer, to pay debts secured by a trust deed covering all the property, where it appears that the interests of all the parties would be protected by selling the property under the direction of the bankruptcy court.³²² The court may enjoin the sale of real property under foreclosure in a state court, where necessary to protect the interests of creditors of a bankrupt who has a substantial interest in such property;³²³ but the court should not intervene where the interests of the bankrupt's creditors in the property would be protected amply in the state court.³²⁴ Where the judgment of foreclosure antedated the four months' period before adjudication, the injunction will be denied.³²⁵ A bankruptcy court may not restrain a sale by the pledgee of property held by him under a valid agreement of pledge by the bankrupt and pursuant to its terms.³²⁶ Such a pledge and the rights of the parties thereto are governed by the law of the State where made,³²⁷ and, being valid and not forbidden by any provision of the bankruptcy act, cannot be interfered with by the court. A sale by a receiver of a corporation, who has been in possession for a considerable time prior to bankruptcy, should not be restrained unless it clearly appears that the interests of creditors will be thereby jeopardized.³²⁸

(4) **OTHER INSTANCES WHERE INJUNCTION WILL ISSUE.**—The power will be exercised to protect the bankrupt from the enforcement of a penalty imposed by a State law or city ordinance, for a failure to pay a dischargeable debt;³²⁹ and to protect the bankrupt from arrest while attending court or engaged in the performance of a statutory duty.³³⁰ Injunction will lie to prevent removal of property to a foreign country which is alleged to have

³²¹ *Matter of Schow* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514; *In re Hines* (D. C., Ore.), 16 Am. B. R. 538, 144 Fed. 147.

³²² *In re Jersey Island Packing Co.* (C. C. A., 9th Cir.), 14 Am. B. R. 689, 138 Fed. 625.

³²³ **Jurisdiction to enjoin sale under mortgage foreclosure.**—A bankruptcy court has jurisdiction to stop the sale of a bankrupt's property under a mortgage foreclosure in a State court where absolutely necessary under the facts of the particular case in order to protect the rights of the creditors or the trustee, which would otherwise be lost or impaired. Whether or not a sale should be enjoined, however, is a question of discretion and policy in each case under its peculiar facts. *Broach v. Mullis* (D. C., Ga.), 35 Am. B. R. 841, 228 Fed. 551.

Where a bankrupt has any substantial equity in real estate sought to be sold in foreclosure and partition actions, such sale should be stayed until a trustee is appointed and qualified so that he may protect the interests of the general creditors in such property. *Matter of Morse* (D. C., N. Y.), 32 Am. B. R. 207, 210 Fed. 900.

³²⁴ Where the trustee may assert all the

rights he has in the State court and where the sheriff of the State court has seized the property, the rule of comity prevailing between the courts would constrain a bankruptcy court to deny an injunction. *Broach v. Mullis* (D. C., Ga.), 35 Am. B. R. 841, 228 Fed. 551.

³²⁵ *Broach v. Mullis* (D. C., Ga.), 35 Am. B. R. 841, 228 Fed. 551.

Sale of real estate.—A bankruptcy court has not jurisdiction to stay the sale of real estate duly seized under a judgment rendered in an action to foreclose a mortgage, rendered long prior to the four months preceding the petition and adjudication of the mortgagor. *Sample v. Beasley* (C. C. A., 5th Cir.), 20 Am. B. R. 164, 158 Fed. 606.

³²⁶ *Matter of Mayer* (C. C. A., 2d Cir.), 19 Am. B. R. 356, 156 Fed. 432.

³²⁷ *Hiscock v. Varick Bank*, 208 U. S. 26, 18 Am. B. R. 1.

³²⁸ *In re Steelingworth Ry. Supply Co.* (D. C., Pa.), 21 Am. B. R. 342, 164 Fed. 591.

³²⁹ *In re Hicks* (D. C., N. Y.), 13 Am. B. R. 654, 133 Fed. 739; *In re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 187, 147 Fed. 538.

³³⁰ *Matter of Adler* (C. C. A., 2d Cir.), 16 Am. B. R. 414, 144 Fed. 659.

been preferentially transferred.³³¹ Where a contract is in existence in which the bankrupt has a valuable interest, the court may, at the instance of the trustee, restrain the violation of such contract.³³² An injunction to prevent the breach of a contract is a negative specific enforcement of it, and the test of the jurisdiction of equity to grant such an injunction is the inadequacy of the legal remedy.³³³ A bankruptcy court is empowered to protect a taxpayer whose property is in its custody from a fraudulent and excessive assessment.^{333a} An injunction will be granted restraining an intervenor from bringing any action, suit or proceeding in any court in respect of any orders of the bankruptcy court.^{333b}

c. Practice.— This protective process is frequently resorted to in involuntary cases, sometimes being included in and sometimes following the order appointing a receiver. Where possible, the order granted should be in the nature of a temporary stay, coupled with a show cause returnable on a day certain. The use of the writ itself is, however, not unusual, and, there being no limitation on its operation, as there is on the writ issued under § 11, it remains in force until modified or dissolved. Any one aggrieved can, on proper notice, move to dissolve. The application both for and to dissolve the injunction may be made on petition or affidavits, entitled in the case, and, if after the adjudication, should be made to the referee.³³⁴ It has been thought that the referee can grant no more than a temporary stay, the Supreme Court having, by General Order XII, limited the granting of injunctions on suits to the judge. But this general order affects the injunction here discussed only by analogy. Since *Mueller v. Nugent*, *supra*, it would seem that the referee, being vested with all the functions of a court of bankruptcy save a few, not inclusive of the power to enjoin, may grant permanent injunction orders having all the force of like orders issuing from the judge, except to stay proceedings of a court or an officer of the United State or of a State.³³⁵

d. Precedents under the law of 1867.— For precedents as to principles as well as practice, see discussion of injunctions against suits under Section Eleven.³³⁶

XIII. TAXATION OF COSTS.

By subdivision 18 of this section a court of bankruptcy may "tax costs, whenever they are allowed by law, and render judgments therefor against

³³¹ *Pyle v. Texas Transport & Terminal Co.* (D. C., La.), 25 Am. B. R. 829, 185 Fed. 309.

³³² **Authority to restrain violation of contract with trustee.**— A court of bankruptcy has jurisdiction, on the application of the trustee in bankruptcy of a brewing company, by injunction to compel the owner and lessor of certain premises and the lessee thereof to purchase malt liquors exclusively from the trustee during the period of a certain lease, the payment of which the bankrupt had guaranteed, in consideration of the tenant purchasing malt liquors from it exclusively, especially where the trustee had

withdrawn opposition to dispossess proceedings under an oral agreement by the owner and a proposed new tenant that the latter would enter into an agreement similar to the contract with the first tenant, to purchase malt liquors exclusively from the trustee. *Matter of Consumers' Albany Brewing Co.* (D. C., N. Y.), 35 Am. B. R. 358, 224 Fed. 235.

³³³ 1 *Joyce on Injunctions*, p. 646, § 429, and cases cited.

^{333a} *Cross v. Georgia Iron & Coal Co.* (C. C. A., 5th Cir.), 41 Am. B. R. 385, 250 Fed. 438.

the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy." This subdivision and General Order XXXIV must be read together. They are merely declaratory of the general power of courts of equity, including courts of bankruptcy, over the allowance and apportionment of costs.^{338a} The costs for which payment is herein authorized are such as are allowed by this act arising from the bankrupt proceedings in the administration of the estate.³³⁷ The costs taxable under this subdivision are something different from the costs allowed as fees and mileage of witnesses, and the allowances to the attorneys, which are considered under other sections of the act.³³⁸ So too, allowances for fees of stenographers are expressly provided for under § 38-a (5) and will be considered under that section. Costs must be allowed in all involuntary cases where the adjudication is contested.³³⁹ Only costs allowed by law may be taxed. Where there is no specific provision,³⁴⁰ this subdivision seems to assimilate costs in bankruptcy to those under the equity practice in the United States courts.³⁴¹ Under the former law, it was held that costs might be allowed the prevailing party in a proceeding to set aside a discharge;³⁴² under the present law, the same has been held as to a proceeding for a discharge.³⁴³

333b. *Matter of Ohio Copper Mining Co.* (D. C., N. Y.), 39 Am. B. R. 284, 241 Fed. 711.

334. *Allegations on information and belief.*—In a suit by a trustee in bankruptcy to set aside preferences, a motion for a temporary restraining order should be denied where the only allegations connecting the defendants with any claim to the property sold, or any intent to sell or dispose of same, is made upon information and belief, and no affidavit is filed from any one having personal knowledge of the facts, and there are no allegations tending to show irremediable damage. *Lyle v. Perry* (D. C., Fla.), 42 Am. B. R. 83, 250 Fed. 307. For form of petition for injunction other than against suits, see Form No. 73, *post*.

335. Gen. Ord. XII, 3; *In re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 143 Fed. 598; *In re Steuer* (D. C., Mass.), 5 Am. B. R. 209, 214, 104 Fed. 976.

For forms of referee's stays and show cause orders, and orders that writs of injunction shall issue, see Forms Nos. 74-75, *post* and Hager & Alexander's Bankruptcy Forms.

336. See also *Irving v. Hughes*, Fed. Cas. 7,076; *In re Muller*, Fed. Cas. 9,912; *Kellogg v. Russell*, Fed. Cas. 7,666; *U. S. ex rel. Hyde v. Bancroft*, Fed. Cas. 14,513; *In re South Side R. R. Co.*, Fed. Cas. 13,190.

336a. *Petition of Kurtz Brass Bed Co.* (D. C., Mich.), 42 Am. B. R. 3, 250 Fed. 116.

337. *Costs in administration of estate.*—In the case of *Matter of Kyte* (D. C., Pa.), 26 Am. B. R. 507, 189 Fed. 531, the court said: "Administration of an estate has been defined to mean, a term applied to denote the management of an estate by a person appointed by authority of law to take charge thereof in place of the legal owner. In a

bankruptcy court the legal owner of the estate is the bankrupt, who is required to turn over his entire estate to some one to be designated by the creditors and approved by the court, for the purpose of administering the same for the benefit of all the bankrupt's creditors. All acts necessary to be done to accomplish the purpose of converting the assets of the estate and distributing the same to and amongst the creditors legally entitled thereto, as well as any act tending to increase the value of the estate, or in some material manner benefit the estate of the bankrupt, whereby the general interests of all the creditors may be advanced, constitute the administration of the estate. The intent of the law is to administer the estate for the general interests of all the creditors with the least possible expense, and to this end when any proposition of interest, as well as detrimental to the creditors is made, the law provides that all the creditors shall have notice of a time and place to meet and either assent to or disapprove of such proposition. This undoubtedly is a provision of the law which has been created to throw a safeguard around the interests of the creditors so that the opportunity for abuse or mismanagement of their interests may be reduced to a minimum."

338. See Bankr. Act, §§ 62 and 64, *post*.

339. See Bankr. Act, § 3-e and General Order XXXIV. See also in *re Ghiglione* (D. C., N. Y.), 1 Am. B. R. 580, 93 Fed. 186; *In re Morris* (D. C., Pa.), 7 Am. B. R. 709, 115 Fed. 591; *Clark-Herrin-Campbell Co. v. Clafin Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 414, 218 Fed. 429.

340. As, for instance, in Bankr. Act, § 3-e.

341. See the Equity Rules and local rules in the different districts.

Where the bankrupt consents costs may be paid from the proceeds of the sale of exempt property, even if a creditor having an equitable lien thereon objects to such payment.³⁴⁴ Precedents as to costs on appeal will be found in the foot-note.³⁴⁵ A bankruptcy court has jurisdiction to order costs against creditor who has unsuccessfully opposed an involuntary petition.^{345a} It seems, too, that under the previous law, costs were allowed against creditors who unsuccessfully contested the validity of claims,³⁴⁶ and that, if the trustee refused to object to claims, creditors successfully contesting the same were allowed costs out of the estate.³⁴⁷ Where an involuntary petition is dismissed for want of jurisdiction costs cannot be allowed to the successful party.³⁴⁸ But costs, to be taxable under this subdivision, must be incurred "in proceedings in bankruptcy." Costs may be taxed by the referee.³⁴⁹

Attorney's docket fee on hearing before referee.—A referee in bankruptcy is not a "referee" within the meaning of section 824 of the U. S. Revised Statutes, allowing a docket fee of twenty dollars "on a trial . . . before referees, or on a final hearing in equity." . . . Nor is a hearing upon a claim against the bankrupt estate "a final hearing" within the meaning of the statute. Hence, a docket fee should not be allowed under the statute on the hearing of a claim before the referee. *Peck v. Richter* (C. C. A., 8th Cir.), 33 Am. B. R. 11, 217 Fed. 880.

³⁴² *In re Holgate*, Fed. Cas. 6,601.

³⁴³ *Bragassa v. St. Louis Cycle* (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77. Compare also *In re Wolpert* (Ref., N. Y.), 1 Am. B. R. 436, and *In re Gaylord* (D. C., N. Y.), 5 Am. B. R. 805, 106 Fed. 833.

³⁴⁴ *In re Castleberry* (D. C., Ga.), 16 Am. B. R. 430, 143 Fed. 1018.

³⁴⁵ *In re Orman* (C. C. A., 5th Cir.), 5 Am. B. R. 698, 107 Fed. 101; *In re Dickson* (D. C., N. Y.), 7 Am. B. R. 679, 111 Fed. 726; *Matter of Josephson* (D. C., Ga.), 9 Am. B. R. 608, 121 Fed. 142.

^{345a} *Petition of Kurtz Brass Bed Co.* (D. C., Mich.), 42 Am. B. R. 3, 250 Fed. 116.

³⁴⁶ *In re Troy Woolen Co.*, Fed. Cas. 14,203.

³⁴⁷ *In re Little River Lumber Co.* (D. C., Ark.), 3 Am. B. R. 682, 101 Fed. 558.

³⁴⁸ *In re Williams* (D. C., Ark.), 9 Am. B. R. 736, 120 Fed. 34.

³⁴⁹ *In re Scott* (Ref., Mass.), 7 Am. B. R. 710.

SECTION THREE.

ACTS OF BANKRUPTCY.

§ 3. **Acts of Bankruptcy.**— Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, *or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States;** or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if

* Amendment of 1903 in italics.

solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

Analogous provisions. In U. S.: Act of 1867, § 39 (as amended by Act of July 27, 1868), R. S., § 5021 (as amended by Acts of June 23, 1874, and July 26, 1875), Act of 1841, § 1; Act of 1800, §§ 1, 2.

In Eng.: Act of 1883, § 4; Act of 1890, § 1.

In Can.: Act of 1919, §§ 3, 8.

Cross-references: To the law. See generally as to definitions, § 1; as to jurisdiction of bankruptcy court, § 2.

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Preferential transfers, §§ 4, 59, 60-a-b, 67-c.

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I. ACTS OF BANKRUPTCY IN GENERAL.

a. **History and analogies.**—In most of the continental bankruptcy systems, acts of bankruptcy, in our sense of the term, are unknown. Mere cessation of payment is enough to entitle the creditors to resort to the court. In France, the debtor is legally bound to notify the court that he has stopped payment. Indeed, in several of the Latin systems, the court may declare a debtor a bankrupt on its own motion. Anglo-Saxon jurisprudence, while allowing the debtor to initiate bankruptcy by his own declaration or petition, not only does not otherwise permit the court to adjudicate save at the instance of creditors, but even affords further protection against arbitrary or unjust interference with the property of the individual, by providing that he shall not be amenable to bankruptcy unless he has done or suffered certain acts which either amount to actual or constructive frauds on creditors or are tantamount to declarations of hopeless insolvency. These acts are called under our present statute "acts of bankruptcy."

b. **Comparative legislation.**—The present English act,¹ as supplemented by § 1 of the amendatory act of 1890, specifies eight acts of bankruptcy, four of which² are practical equivalents of the first, second, fourth, and fifth acts found in § 3-a of our law. Of the others, absconding or concealing himself³ is ancient, while of the remaining three an unpaid levy outstanding for twenty-one days⁴ is but little more drastic than is our third act of bankruptcy, and the giving of a notice by the debtor that he has suspended payments,⁵ or the failure on his part to respond within seven days to a demand to pay a final judgment,⁶ are but statutory recognition of the continental doctrine that cessation of payments and the status of bankruptcy are one and the same thing. The two systems, therefore, aside from the difference which grows out of our definition of insolvency, are, as acts of bankruptcy, near akin. There has been a like paralleling at other periods.⁷ The new Canadian act contains eight acts of bankruptcy, six of them corresponding to the five of our law with two additional ones, viz.: absconding with intent to defeat or delay creditors, and violation of the Bulk Sales Act.^{7a}

1. English Bankruptcy Act of 1863, § 4.

2. Id., § 4 (1) a-b-c-f.

3. Id., § 4 (1) -d.

4. Eng. Bankruptcy Act of 1890, § 1.

5. Eng. Bankruptcy Act of 1863, § 4 (1)-h.

6. Id., § 4 (1) -g.

7. Compare the English Act of 1869 with our law of 1867.

7a. Canadian Bankruptcy Act of 1919, § 8.

c. **Former United States statutes.**—The acts of bankruptcy in our statute of 1800⁸ were largely copied from those then in force in England. Of the six acts of bankruptcy in the law of 1841,⁹ only three, the procuring or suffering of a levy or attachment, the concealing of property with intent to prevent a levy, and the fraudulently conveying or transferring of property, are similar to those now available; only the last is in effect an equivalent. There were nine acts of bankruptcy under the law of 1867. The third and fourth are comprised within the present § 3-a (1), and the eighth is similar to our § 3-a (2). Here the similitude ends, save that the making of a general assignment became by judicial construction in effect a tenth act of bankruptcy. Our third act is new, as is our fifth. We certainly have now nothing like such once well-known acts of bankruptcy as the alleged bankrupt's abscondence, or being in custody on a civil judgment, or, if a banker, merchant, trader, or manufacturer, stoppage of payment for a specified period. The decisions under the former law, while, of course, valuable, are not always controlling.¹⁰ Where the language of the former act has been incorporated in the present act, it may be assumed that the intent was to use such language with the meaning given to it by the courts under such act.¹¹ The practitioner, when citing, should observe the changes in § 39 of the former statute made by the acts of June 22, 1874, and July 26, 1876. It is often important, too, to note the difference in phrasing between the two statutes, even where there is a seeming equivalence.¹²

d. **Construction of the section.**—(1) **IN GENERAL.**—Section 3 clearly indicates what wrongdoing or acts on the part of the bankrupt must be alleged in the creditors' petition and established by them as a part of their proof on the trial. Such a petition, prepared after carefully observing the provisions of this section, and of § 4-b, indicating against whom such a petition may be filed, and § 59-b, declaring by whom it may be filed, and § 2 (1), specifying where it may be filed, and § 18-a, indicating how it is served, and § 63-a-b, specifying what are petitioning creditor's debts, will, provided the act of bankruptcy relied on is alleged with sufficient detail, render the petitioners reasonably secure against a plea in the nature of a demurrer.¹³

(2) **RULE OF CONSTRUCTION.**—The purpose of the act as a whole is remedial; but this portion of it, while not penal, is in derogation of common-law rights. The higher courts have, therefore, quite uniformly refused to read into this and the corresponding sections of previous laws, meanings which do not appear from the very words.¹⁴ Strong reasons may, however, be urged for a liberal construction. The law was intended to compel prorating,

8. Act of 1800, § 1.

9. Act of 1841, § 1.

10. Compare *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723, with *Wilson v. Nelson*, 183 U. S. 191, 7 Am. B. R. 142, 46 L. Ed. 147.

11. *Huntington v. Baskerville* (C. C. A., 8th Cir.), 27 Am. B. R. 219, 192 Fed. 813; *In re Levin* (C. C. A., 1st Cir.), 23 Am. B. R. 845, 176 Fed. 177, holding that the court will construe the provisions of the bankruptcy act and of the General Orders as similar provisions of the Act of 1867 and the General Orders thereunder were construed.

12. As bearing on the purpose of Congress in limiting the acts of bankruptcy to those

discussed in detail, *post*, reference to the Torrey bill in its latest form, the so called Lindsay bill (see § 40, S. 1032, 55th Congress, 1st Session; and compare also § 2 of the Henderson substitute, Cong. Rec. 55th Congress, 2d Session, Vol. 31, p. 2038) will prove suggestive.

13. Compare Form No. 3, and "Creditors' Petitions in Involuntary Bankruptcy," by Mr. Collier, 1 N. B. N. 62.

14. *Jones v. Sleeper*, Fed. Cas. 7,496; *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723; *In re Empire Metallic Bedstead Co.* (C. C. A., 2d Cir.), 3 Am. B. R. 575, 98 Fed. 581. And see *Maplecroft Mills v. Childs* (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415.

by halting frauds and checking preferences. As has been seen, defined acts of bankruptcy are merely limitations expressive of the caution inherent in Anglo-Saxon jurisprudence when dealing with the rights to property. Being limitations on the operation of a statute that is highly remedial, a broad construction, while not perhaps so safe, would in the long run accomplish more equity.¹⁵ As a rule, the statute as an entirety, as well as its sections other than § 3, are liberally construed.¹⁶

(3) NOT APPLICABLE TO VOLUNTARY BANKRUPTCY.—The section does not apply to voluntary bankruptcy. A petition by a voluntary bankrupt is not required to set up any of the specific acts of bankruptcy contained in this section. A voluntary petition is itself treated as an act of bankruptcy.¹⁷

e. *Insolvency when essential.*—(1) *IN GENERAL.*—What constitutes insolvency has already been considered.¹⁸ Insolvency has in all bankruptcy laws been a most important element of allegation and proof. Yet, where the act of bankruptcy consists of a general assignment for the benefit of creditors,¹⁹ insolvency is immaterial.²⁰ Although where the act of bankruptcy consists of the appointment or the application for the appointment of a receiver, insolvency is a material element.²¹ The bankruptcy act does not prevent an insolvent person from disposing of his property, providing his dealings are conducted without any purpose of hindering or defrauding his creditors, or of giving a preference.²² The act is not intended to cover all cases of insolvency to the exclusion of judicial proceedings in State courts, affecting the property of the insolvent.²³

(2) *PLEADING INSOLVENCY; SOLVENCY AS A DEFENSE.*—Under the present definition, it is conceivable that a debtor who “admits in writing his inability

15. Compare, as tending to support this view, *In re Gutwillig* (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 476; *In re Adams* (Ref., N. Y.), 1 Am. B. R. 94; *Southern Loan & Trust Co. v. Bemow* (D. C., N. Car.), 3 Am. B. R. 9, 96 Fed. 514; *Silverman's Case*, Fed. Cas. 12,855; *In re Mueller*, Fed. Cas. 9,912. The bankruptcy act is remedial and should be interpreted reasonably and in accordance with the fair import of its terms with a view to effect its objects and to promote justice. *Southern Loan & Trust Co. v. Bemow* (D. C., N. Car.), 3 Am. B. R. 10, 96 Fed. 514.

See discussion as to construction of act, under § 1. *ante*.

16. For instance, see *Blake v. Francis Valentine Co.* (D. C., Cal.), 1 Am. B. R. 372, 89 Fed. 491.

The several acts of bankruptcy defined by this section are independent of each other. *Greenwood Gum Co. v. Zimmerman* (C. C. A., 6th Cir.), 39 Am. B. R. 198, 240 Fed. 637.

17. *In re Fowler* (D. C., Mass.), 1 Lowell, 161, Fed. Cas. No. 4,998; *In re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137; *Matter of Dressler Producing Corp.* (C. C. A., 2d Cir.), 44 Am. B. R. 457, 262 Fed. 257. In the case of *Handover National Bank v. Moyses* (Sup. Ct.), 189 U. S. 181, 8 Am. B. R. 1, 10, 46 L. Ed. 1113, it was held that where a voluntary bankrupt has set up all the essential facts to warrant a decree, the filing of the petition constitutes an act of bankruptcy.

18. See discussion under Section One of this work, *ante*; subtitle “*Insolvency*.”

19. Bankr. Act, § 3-a (4).

20. *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098.

21. It is provided in subsection a (4) of

this section, that an act of bankruptcy is committed by a person *who being insolvent*, applies for a receiver, or where *because of insolvency* a receiver has been put in charge of his property.

22. *Richardson v. Shaw*, 203 U. S. 587, 19 Am. B. R. 717, 28 Sup. Ct. 512.

Transactions by insolvent.—There is nothing in the bankrupt act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously. *Cook v. Tullis*, 18 Wall. 332, 340, 21 L. Ed. 933.

23. *In re Wilmington Hosiery Co.* (D. C., Del.), 9 Am. B. R. 581, 120 Fed. 179.

In the case of *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723, the court said: “We do not construe the act as intending to cover all cases of insolvency to the exclusion of other judicial proceedings. It is very liberal in the classes of insolvents which

to pay his debts"²⁴ may still be solvent; yet insolvency need not be alleged or shown. But it is either a necessary element of, or its opposite, a conclusive defense to, the other acts of bankruptcy.²⁵ A general averment in an answer, that no act of bankruptcy, such as is charged, has been committed, may be deemed sufficient as a denial of insolvency, although if insolvency be alleged as a material element, it would be better to specifically deny the insolvency at the time the act was committed.²⁶

(3) TIME OF INSOLVENCY.—It is important to determine the time of insolvency. The language of the statute in respect to the second and third acts of bankruptcy, indicates that the insolvency must be shown to exist at the time either of these acts was committed.²⁷ It is not sufficient as an answer to a petition alleging either the second, third, fourth, or fifth acts of bankruptcy, to allege solvency at the time the petition was filed.²⁸ But the act itself provides that it is a complete defense to a petition alleging the first act of bankruptcy to show that the alleged bankrupt was not insolvent at the time of the filing of the petition.²⁹

(4) PROOF OF INSOLVENCY.—The facts and circumstances indicating a state of insolvency have already been considered under section 1 (15), subtitle "INSOLVENCY." It will also be necessary to discuss the question under other headings under this section where the various acts of bankruptcy are treated, and also under sections 60 and 67 relative to preferential and fraudulent transfer hindering or defrauding creditors. There is a general presumption in favor of the continuance of the solvency of a debtor where shown to exist immediately prior to the alleged wrongful act, which requires presentation of proof to rebut.³⁰ It should be noted, however, that under subsection c of this section, the burden of proving solvency, where the alleged act of bankruptcy consists of a transfer with intent to hinder, delay or defraud creditors, is on the bankrupt.³¹ That the act of bankruptcy itself brought about the insolvency is not enough.³² A general letter to creditors admitting insolvency will outweigh mere estimates.³³ Where upon the trial of the issue of insolvency the evidence is of such a conclusive character as to justify the court in setting aside a verdict in favor of solvency if one was awarded, the court

it does include, and needs no extension in this direction by implication. But it still leaves in the great majority of cases, persons who are really insolvent, to the chances that their energy, care and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy."

24. See discussion under this section, *post*; subtitle "Fifth Act of Bankruptcy; a Confession of Bankruptcy."

25. As to what constitutes insolvency, see § 1(15), *ante*, and the cases cited.

26. *Troy Wagon Works v. Vastbinder* (D. C., Pa.), 12 Am. B. R. 352, 130 Fed. 232, in which case the court held that where an involuntary petition charges as an act of bankruptcy a preferential transfer within the four months' period, a denial of the commission of the act of bankruptcy is sufficient as a denial of insolvency, where the petitioners so regarding it proceed to the taking of proof.

27. *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; *Elliott v. Toepfner* (Sup. Ct.), 187 U. S. 327, 9 Am. B. R. 50, in which case it was stated that under subsection a(2) (3) of this section, insolvency must exist at the time of the commission of the acts specified. *Johansen Bros. Shoe Co. v. Alles* (C. C. A., 8th Cir.), 28 Am. B. R. 299, 197 Fed. 274.

28. *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812.

29. *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098.

30. *Chamberlayn*, *Modern Law of Evidence*, Vol. 2, § 1046.

31. *Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 115, 228 Fed. 470; *Matter of Burg* (D. C., Tex.), 40 Am. B. R. 126, 245 Fed. 173.

32. *Chicago Title & Trust Co. v. Roebbing's Sons* (D. C., Ill.), 5 Am. B. R. 368, 107 Fed. 71.

33. *In re Lange* (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 190.

may direct a verdict of insolvency, although there is conflicting evidence as to details not essential to a conclusion.³⁴

(5) **INSOLVENCY OF PARTNERSHIP.**—If the insolvency of a partnership is at issue, it must not only be shown that the partnership assets are insufficient, but also that the assets of individual members, after paying their debts, are not enough to make up the deficiency.³⁵ It seems generally accepted, by the weight of authority, that the individual properties of the partners are to be considered in determining the question of the solvency of the firm.³⁶ It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and others, whether out of joint or separate estate, and hence the rule that a partnership is not insolvent unless all its partners are insolvent.³⁷ This entire question of solvency of a partnership is also considered under § 5 of the act.³⁸

II. ACTS OF BANKRUPTCY UNDER PRESENT LAW.

a. **First act of bankruptcy; a fraudulent transfer.**—(1) **IN GENERAL.**—The first act of bankruptcy prescribed by this section consists of a person having "conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors or any of them." The important elements of this act of bankruptcy are: (1) The disposition of the bankrupt's property either by himself or by his permission, and (2) the intent to defraud creditors. The distinction is not clearly drawn between the first and second acts of bankruptcy. It will frequently be difficult to determine which of these two acts of bankruptcy has been committed by a transfer. This is due possibly to the fact

34. *In re Iron Clad Mfg. Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 628, 197 Fed. 280.

35. *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; *In re Blair* (D. C., N. Y.), 3 Am. B. R. 588, 96 Fed. 76.

Insolvency of partnership.—In the case of *In re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B. R. 577, 588, 157 Fed. 363, it was said that "If a partnership is a distinct entity separate from the individuals who compose it,—if its property and its debts are separate and distinct from the property of its individual members, and from their individual debts, then it is insolvent under this act when the aggregate of its property is not sufficient to pay its debts." See also *Matter of Everybody's Market* (D. C., Okl.), 21 Am. B. R. 925, 173 Fed. 492; *In re Perlhefter* (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299; *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960.

36. **Individual properties of partners.**—In the case of *In re Perley & Hays* (D. C., Mo.), 15 Am. B. R. 54, 138 Fed. 927, the court said: "The real question in this case still remains. It is whether or not, the bankrupts were insolvent, within the meaning of the present Bankruptcy Act, or, to state it in another way, whether or not, the individual properties of the partners are to be considered in determining the question of insolvency. It has been held in a number of cases, that the individual properties must be con-

sidered, and I find no case to the contrary. *Vaccaro v. Security Bank of Memphis*, 4 Am. B. R. 474, 103 Fed. 436, 43 C. C. A. 279. This case, while not binding on this court, was decided by the Court of Appeals of the 6th Circuit. The same doctrine is distinctly held in the case of *Davis v. Stevens*, by Judge Corland, in 4 Am. B. R. 763, 104 Fed. 235. In both these cases the question was carefully considered, and these cases have the approval of this court." And see *Matter of Hensley & Adams* (D. C., Cal.), 36 Am. B. R. 1, 228 Fed. 564.

37. *In re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137. In the case of *In re Morgan & Williams* (D. C., Ga.), 25 Am. B. R. 861, 184 Fed. 938, the court said: "Assuming the entity doctrine to prevail under the more recent decisions of the courts as contended by counsel for the petitioning creditor, and that the firm's assets and liabilities, would be a test of solvency or insolvency as against the firm, and that notwithstanding the fact that the individuals composing the firm are proceeded against also, still it must appear to justify the adjudication in bankruptcy, that the real indebtedness on the part of an alleged bankrupt firm to a petitioning creditor or creditors, exceeds the aggregate at a fair valuation of the alleged bankrupt firm's property."

38. See discussion under Section Five, subtitle, "*When Partnership may be Adjudged Bankrupt.*"

that a transfer made with intent to prefer a creditor may have associated with it the intent to hinder, delay or defraud other creditors.³⁹ An intent to prefer is not to be confounded with an intent to defraud, nor a preferential transfer with a fraudulent one.⁴⁰ A preferential payment to creditors will, in most cases, amount to a transfer with intent to hinder, delay or defraud; but where such an act has been committed it falls under the second subdivision of subsection *a*. To constitute the first act of bankruptcy the disposition of the property and the intent must co-exist.⁴¹ It has been held that a transfer falling within the first clause of this section includes those which, according to the established course of authority, were fraudulent transfers at the time of the passage of the bankruptcy act; a mere preferential transfer as distinguished from a fraudulent transfer, is not an act of bankruptcy within the first clause of the section.⁴²

(2) BY WHOM MADE.—Any person who transfers any part of his property with intent “to hinder, delay or defraud his creditors” is guilty of this act of bankruptcy. The word “person” includes a corporation and a partnership.⁴³ An *ultra vires* act of a corporation, transferring, concealing or removing its property, with intent to hinder, delay and defraud its creditors is an act for which it may be adjudged a bankrupt.⁴⁴ Concealment of property with the intent to hinder, delay and defraud creditors, by a minority of the members of a firm without objection, constitutes an act of bankruptcy of the firm.⁴⁵

(3) DISPOSITION OF PROPERTY.—(I) *Statute of frauds*.—The particular acts referred to in subd. 1 of this section are those conveyances or transfers made with intent to hinder, delay or defraud, which were interdicted by the statute of frauds, now a part of the law of nearly every State.⁴⁶ The expression “transfer with intent to hinder, delay or defraud creditors” is familiar to the law of fraudulent conveyances and was used in the common law as declared in the old statute of Elizabeth.⁴⁷ There can be no doubt that the intent was to use the words with the same meaning, construction and effect as have for a long period of time been attributed to them.⁴⁷ The words as so

39. *In re Mingo Valley Creamery Ass'n* (D. C., Pa.), 4 Am. B. R. 67, 100 Fed. 282.

40. *Intent to prefer or defraud; distinction*.—In the case of *Githens, Ressermer & Co. v. Schiffer & Bros.* (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505, it was held that a cash sale of property by an insolvent debtor for a full consideration, not made for the purpose of putting the property out of the reach of creditors, is not a fraudulent transfer or act of bankruptcy, although the debtor intended to and did use the proceeds to prefer certain creditors, and to meet his own personal needs. See also *In re Belknap* (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646, in which case the court approved the case above cited and stated that “The intent to defraud is essential under clause (1), and differs from the intent to prefer which is essential to the act of bankruptcy described in clause (2);” *In re Duffy* (D. C., Pa.), 9 Am. B. R. 358, 118 Fed. 986.

41. *In re Flint Hill Stone & Construction Co.* (D. C., N. Y.), 18 Am. B. R. 81, 149 Fed. 1,007; *In re Tupper* (D. C., N. Y.), 20 Am. B. R. 824, 827, 163 Fed. 766; *Coder v. Arts* (Sup. Ct.), 213 U. S. 223, 22 Am. B. R. 1, 15, 53 L. Ed. 772.

42. *In re Bloch* (C. C. A., 2d Cir.), 15 Am. B. R. 748, 142 Fed. 676, 74 C. C. A. 250.

43. See definition of “persons” in Bankr. Act, § 1 (19) *ante*.

44. *Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 115, 228 Fed. 470; *Boston-West Africa Trading Co. v. Quaker City Morocco Co.* (C. C. A., 1st Cir.), 44 Am. B. R. 315, 261 Fed. 665.

45a. *Matter of Wellesley* (D. C., Cal.), 40 Am. B. R. 597, 252 Fed. 854.

45. 13 Elliz. c. 5. See *Githens etc., Co., v. Shiffer & Bros.* (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505.

46. *Statute of Frauds in United States*.—The statute of 13 Elizabeth, ch. 5, against fraudulent conveyances has been universally adopted in American law as the basis of our jurisprudence on that subject, and either re-enacted in terms or nearly so, or with some change of language, by the legislatures of practically all the states, or recognized as an exposition of the principles of the common law and, although not re-enacted, adopted as and held to be a part of the common law in force here. Moore on Fraudulent Conveyances, § 9, and cases cited.

47. *Lansing Boller & Eng. Works v. Ryerson* (C. C. A., 8th Cir.), 11 Am. B. R. 558, 128 Fed. 701, 63 C. C. A. 253, in which the court said: “The language of subsection 1 of § 3 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been

used have always been held to require in order to invalidate a conveyance that there shall be actual fraud; and it makes no difference that the conveyance was made upon a valuable consideration if it appears to have been for the purpose of hindering, delaying or defrauding creditors.⁴⁸

(II) *Particular transactions; chattel mortgages.*—Just what transactions will furnish a legal presumption that this act of bankruptcy has been committed will depend largely on the State decisions. The execution of a chattel mortgage by a debtor to secure a present loan to pay certain creditors may be an act of bankruptcy under this subdivision.⁴⁹ A chattel mortgage which authorizes the mortgagor to remain in possession of the mortgaged property and to sell the same in the usual course of business, without any obligation to apply the proceeds to the payment of the debt is, under the laws of some States, constructively fraudulent as against creditors. Such fraud may be an element in an act of bankruptcy under this clause, unless it be purged by the mortgagee taking possession of the mortgaged property, before the creditors seize it, or take any action in respect to it.⁵⁰

(III) *Conveyances as security.*—If conveyances are made in good faith with the intent only of securing the grantees as sureties for the grantor, their execution is not an act of bankruptcy.⁵¹ A conveyance as security for a debt which was subsequently paid, but which the creditor was permitted to retain as a continuing security for subsequent indebtedness with the understanding that he was to record it at any time, will be deemed an act to hinder, delay or defraud creditors, and an act of bankruptcy if recorded within four months prior to filing the petition in bankruptcy.⁵² A mortgage on all the debtor's property is not within the act if the equity remaining is sufficient to pay his debts.⁵³

attributed to those words." Compare *In re Salmon* (D. C., Mo.), 16 Am. B. R. 122, 127, 143 Fed. 395; *Rumsey & Sikemier v. Novelty Mfg. Co.* (D. C., Mo.), 3 Am. B. R. 704, 99 Fed. 699.

48. *Coder v. Arts* (Sup. Ct.), 213 U. S. 223, 22 Am. B. R. 1, 15, 53 L. Ed. 772.

49. *In re Pease* (D. C., Mich.), 12 Am. B. R. 66, 129 Fed. 446. See also *Martin v. Hulen & Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 510, 149 Fed. 992, where it was held that the giving of a mortgage to secure the purchase price of goods purchased, covering after-acquired stock, was not an act of bankruptcy.

50. *Chattel mortgage constructively fraudulent; law of Missouri.*—Although under the law of Missouri a conveyance to the use of the mortgagor, good between the parties, is constructively fraudulent as to creditors, in the absence of actual fraud, the constructive fraud implied from such a conveyance is purged away even as to creditors, by the mortgagee taking possession of the mortgaged property before creditors seize it or take any action to enforce their rights to it; and constructive fraud cannot be imputed to an alleged bankrupt so as to charge him with having committed an act of bankruptcy in transferring his property with intent to hinder, delay and defraud creditors, where in good faith and while solvent, he gave a chattel mortgage on his stock and fixtures, which although duly re-

corded three days afterwards, was constructively fraudulent as to creditors because it permitted the mortgagor to retain possession of the stock and sell the same in the usual course of business, but it appears that mortgagee took possession of the property by legal proceedings before the petition in bankruptcy was filed. *Johansen Bros. Shoe Co. v. Alles* (C. C. A., 8th Cir.), 28 Am. B. R. 299, 197 Fed. 274.

51. *Acme Food Co. v. Meier* (C. C. A., 6th Cir.), 18 Am. B. R. 550, 577, 153 Fed. 74.

Mortgage to secure advances made by the mortgagor's son, in the payment of debts, the mortgagor believing that she was solvent at the time, and it appearing that her indebtedness was reduced between the date of the mortgage and the filing of the petition in bankruptcy, and no unsecured debts were incurred after the mortgage was executed, is not an act of bankruptcy. *In re McLoon* (D. C., Me.), 20 Am. B. R. 719, 162 Fed. 575.

52. *In re Donnelly* (D. C., Ohio), 27 Am. B. R. 506, 193 Fed. 755.

53. *Lansing Boiler & Eng. Works v. Ryerson* (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701.

The equity of redemption should be considered in determining whether the mortgagor can pay his debts. *Acme Food Co. v. Meier* (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74.

(IV) *Cash sales and payments.*—Cash sales of property by the debtor, to meet an indebtedness, but the proceeds of which were not so applied, are not inhibited;⁵⁴ nor are such sales when made in the ordinary course of trade for full consideration, and not for the purpose of putting the property out of reach of creditors.⁵⁵ The payment of current expenses necessarily liquidated to continue the business would not be an act of bankruptcy.⁵⁶ The use of the alleged bankrupt's funds in the support of his family would not constitute an unlawful transfer; but a payment to an adult son who lives apart from the alleged bankrupt, or the transfer of property to his wife beyond her reasonable requirements may constitute an act of bankruptcy.⁵⁷

(V) *Voluntary transfers.*—Conveyances of real estate by a husband to his wife, without a present consideration, about a month prior to the filing of a petition against him is an act of bankruptcy.⁵⁸ And where such a conveyance is made, it will be deemed to have been made with the intent to hinder or delay creditors, although no fraudulent intention was shown or suspected.⁵⁹ But a mere voluntary transfer, impeachable only upon the ground that it is a preference, is not sufficient.⁶⁰

(VI) *Change of title.*—There can be no transfer in fraud of creditors unless the title to the property is changed. So an instrument executed by the officers of an alleged bankrupt, containing no words of conveyance or transfer, but merely designating persons as agents or attorneys for the stockholders, to wind up the affairs of the corporation, is not a fraudulent transfer and its execution does not constitute an act of bankruptcy.⁶¹ And a deed of trust executed by an alleged bankrupt and delivered in escrow, is not a transfer in fraud of creditors, where it appears that the creditors would within the period prior to final delivery of the deed be paid in full.⁶²

(4) *MEANING OF WORDS OF DEVOLUTION.*—The word "convey" has its common meaning and is the equivalent of "grant." The word "transfer" has a broad generic meaning; it is defined for the purposes of this act in § 1 (15). The payment of a partner's individual debts out of the assets of the

54. In re Belknap (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646.

55. Githens, etc., Co. v. Shiffer & Bros. (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505; Richardson v. Shaw, 203 U. S. 587, 19 Am. B. R. 717, 51 L. Ed. 329.

A transfer to a bona fide purchaser for a present fair consideration is not ordinarily such a transfer as to make the sale an act of bankruptcy. Tiffany v. Lucas, 15 Wall, 421, 21 L. Ed. 128; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; In re Franklin, Fed. Cas. 5,053, 8 Ben. 233; In re Pusey, Fed. Cas. 11,478.

56. Richmond Standard Steel Spike & Iron Co. v. Allen (C. C. A., 4th Cir.), 17 Am. B. R. 583, 148 Fed. 657.

57. In re Condon (D. C., N. Y.), 29 Am. B. R. 907, 198 Fed. 947.

58. Henkel v. Seider (D. C., N. Y.), 20 Am. B. R. 773, 163 Fed. 553.

59. In re Hughes (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872.

Intent to defraud: Where a conveyance is voluntary and therefore fraudulent and void as to then existing creditors of the debtor, though without intent to defraud, the intention of the parties is immaterial, and actual

fraudulent intent on the part of the grantor need not be shown. Moore on Fraudulent Conveyances, p. 570, and cases cited.

60. Githens, etc., Co. v. Shiffer Bros. (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505. It must also appear that the mortgage was given with intent to hinder, delay and defraud creditors. In re Flint Hill Stone & Construction Co. (D. C., N. Y.), 18 Am. B. R. 81, 149 Fed. 1,007.

Deed of trust with condition.—It has been held an act of bankruptcy where an insolvent debtor conveyed all his property to a trustee with directions as to the payment of creditors without preference, and the deed contained a condition of defeasance and an equity reserved in the property to the grantor after the satisfaction of the claims of the beneficiaries, in that such transfer was made to hinder, delay and defraud his creditors. Rumsey & Sikemier v. Novelty & Machine Mfg. Co. (D. C., Mo.), 3 Am. B. R. 704, 99 Fed. 699.

61. Matter of Matthews & Co. (D. C., N. J.), 36 Am. B. R. 501, 229 Fed. 309.

62. Carpenter & Co. v. Lybrand (C. C. A., 4th Cir.), 36 Am. B. R. 12, 230 Fed. 84.

partnership is, as to the creditors of the partnership, a transfer.⁶³ A discussion of what constitutes a concealment of property is had under § 29-b, *post*; to determine the meaning of this term reference should be made to § 1 (22). A debtor who absconds and takes part of his property with him, both "conceals" and "removes" the property.⁶⁴ When the quantum of the property is not kept under cover, but remains visible, even though the transaction is fraudulent, it is not such a concealment as to amount to an act of bankruptcy.⁶⁵ The word "removed" as used in this clause signifies an actual or physical change in the position or locality of the property constituting the subject of the removal.⁶⁶ Where property is removed by a creditor in the debtor's absence, and against his protest, the failure to take legal proceedings to recover such property is not an act of bankruptcy.⁶⁷ A person does not "permit" a removal or concealment of property who has neither the power nor right to prevent it.⁶⁸

(5) **INTENT TO HINDER, DELAY OR DEFRAUD.**—(I) *In general.*—The intent on the part of the debtor to hinder, delay or defraud his creditors must be shown in order to constitute the transfer an act of bankruptcy under this subdivision.⁶⁹ It is still an open question whether a voluntary receivership by an insolvent corporation under a State law may not be "with intent to hinder or delay creditors" and thus an act of bankruptcy, irrespective of the amendment of 1903.⁷⁰ In a proceeding instituted prior to the amendment

63. *Mattocks v. Rogers*, Fed. Cas. 9,300; *In re Gillette* (D. C., N. Y.), 5 Am. B. R. 119, 104 Fed. 760.

64. *In re Filer* (D. C., N. Y.), 5 Am. B. R. 332, 108 Fed. 209.

Concealment by partner.—A withdrawal by a partner of firm money from a bank, and a refusal to produce it, tell where it is kept, or to pay it to the creditors of the firm constitutes a concealment of the partnership funds, with intent to hinder, delay, and defraud creditors. *Matter of Wellesley* (D. C., Cal.), 42 Am. B. R. 412, 252 Fed. 854.

65. *Citizens' Bank v. DePauw Co.* (C. C. A., 7th Cir.), 5 Am. B. R. 345, 105 Fed. 926.

Concealment implies something more than a mere failure to disclose; it may include an act of the debtor which places his property beyond the reach of his creditors. *In re Shoemith* (C. C. A., 7th Cir.), 13 Am. B. R. 645, 135 Fed. 684; *Matter of Burg* (D. C., Tex.), 40 Am. B. R. 126, 245 Fed. 173. See also *In re Huseman*, Fed. Cas. 6,951; *In re Williams*, Fed. Cas. 17,703; *Anonymous*, Fed. Cas. 466; *O'Neill v. Glover*, 5 Gray (Mass.), 159.

The word "conceal," as used in section 3a (1), means to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of, or to withhold knowledge of; it has to do with what concerns others, and implies an act done or procured to be done which is intended to prevent or hinder. *In re Glazier* (D. C., Pa.), 28 Am. B. R. 391, 195 Fed. 1020.

66. *In re Wilmington Hosiery Co.* (D. C., Del.), 9 Am. B. R. 581, 120 Fed. 180, holding that the word "removed" has no application to the taking of property by a receiver of a corporation acting under competent authority. As to what constitutes concealing or removing property with intent to hinder, delay or defraud creditors, see *Anonymous*, Fed. Cas. 466, 1 Pac. L. Rep. 173; *Livermore v. Bagley*, 3 Mass. 489; *Fox v. Eckstein*, Fed. Cas. 5,009, 4 N. B. R. 373; *In re Shapiro*, 106 Fed. 495, 3 N. B. R. 385.

67. *In re Belknap* (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646.

68. *In re Wilmington Hosiery Co.* (D. C., Del.), 9 Am. B. R. 581, 120 Fed. 179.

69. *In re Cowles*, Fed. Cas. 3,297; *In re McKibbin*, Fed. Cas. 8,859; *Fox v. Eckstein*, Fed. Cas. 5,009; *In re Belknap* (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646; *In re Wilmington Hosiery Co.* (D. C., Del.), 9 Am. B. R. 581, 120 Fed. 180; *Lansing Boiler Works v. Ryerson & Son* (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701; *In re Tupper* (D. C., N. Y.), 20 Am. B. R. 824, 827, 163 Fed. 766; *Coder v. Arts* (Sup. Ct.), 213 U. S. 223, 22 Am. B. R. 1, 15, 53 L. Ed. 772.

70. See *In re Empire Metallic Bedstead Co.* (D. C., N. Y.), 1 Am. B. R. 136, 141 (this point not having been passed on when this case was subsequently reversed); *In re Gutwillig* (C. C. A., 2d Cir.), 1 Am. B. R. 388, at p. 390, 92 Fed. 337; *In re Harper & Bros.* (D. C., N. Y.), 3 Am. B. R. 804, 100 Fed. 266, and *Scheuer v. Smith* (C. C. A., 5th Cir.), 7 Am. B. R. 384, 112 Fed. 407.

Receivership of corporation.—In the case of *In re Wilmington Hosiery Co.* (D. C., Del.), 9 Am. B. R. 581, 120 Fed. 171, it was held that where an insolvent corporation, against which a bill was filed alleging its insolvency and praying the appointment of a receiver, and a receiver was thereupon appointed who took possession of its property, the corporation did not thereby permit its property to be removed, with intent to hinder or delay its creditors, within the meaning of § 3-a (1). To a similar effect see *In re Baker-Ricketson Co.* (D. C., Mass.), 4 Am. B. R. 605, 97 Fed. 489; *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; *In re Zeitner Brewing Co.* (D. C., N. Y.), 9 Am. B. R. 63, 117 Fed. 799.

of 1903 it was held that the appointment of a receiver of an insolvent partnership was not an act of bankruptcy under this clause.⁷¹ Thus, also, a transfer intended to delay was under the former statute held an act of bankruptcy.⁷² If the alleged bankrupt was insane at the time the transfer was made, he cannot be said to have made it with intent "to hinder, delay and defraud his creditors."⁷³

(II) *Allegations in petition.*—The petition should allege that the transfer or conveyance was made with intent to hinder, delay or defraud creditors.⁷⁴ The facts relied upon to establish the alleged fraudulent transfer must be set forth with such fullness as to apprise the alleged bankrupt of what he will be required to meet;⁷⁵ there must be a full disclosure concerning the alleged fraudulent transfers, and it is not sufficient to set forth merely rumor, suspicion or hearsay.⁷⁶ Allegations that the defendant transferred his property with intent to hinder, delay or defraud his creditors should be specific if possible, but the purpose of the law does not require greater detail than it is probable that creditors can furnish.⁷⁷ An allegation, in the language of the statute, of a disposition of property to hinder, delay and defraud creditors, is not sufficient; facts and circumstances should be stated from which the inference may be drawn that the disposition of the property was done with an evil intent.⁷⁸ A petition is insufficient which fails to describe the prop-

71. *Matter of Burrell & Corr Co.* (C. C. A., 2d Cir.), 9 Am. B. R. 625, 123 Fed. 414, 59 C. C. A. 508.

A deed of trust conveying all the debtor's property to be distributed ratably among his creditors was held presumptively fraudulent and an act of bankruptcy. *Rumsey v. Novelty & Machine Co.* (D. C., Mo.), 3 Am. B. R. 104, 99 Fed. 699.

72. *In re Goldschmidt*, Fed. Cas. 5,520.

73. *Intent of insane person.*—In the case of *In re Ward* (D. C., N. J.), 20 Am. B. R. 482, 486, 161 Fed. 755, the court said: "If the alleged bankrupt was, at the time of committing the alleged act of bankruptcy charged in the petition filed against him, so insane that he did not understand the nature of the act, its commission should be denied on the ground that, being insane, he could not commit it. On the trial of such an issue, the adjudication of lunacy may, perhaps, be offered as *prima facie* evidence of insanity, provided it shows lunacy at the time of the commission of the alleged act of bankruptcy."

74. *In re Tupper* (D. C., N. Y.), 20 Am. B. R. 824, 163 Fed. 824; *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 245 Fed. 442. See Am. B. R. Dig. § 216.

75. *In re Hallin* (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806, holding that a charge that the alleged bankrupt on a specified date, while insolvent and within four months of the date of the petition conveyed "certain of his property" to creditors whose names are unknown, with intent to hinder, delay and defraud other creditors, does not set forth an act of bankruptcy with the required particularity as to essential data and details.

76. *In re Blumberg* (D. C., Pa.), 13 Am. B. R. 343, 133 Fed. 845; *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 244 Fed. 442.

General averments in an involuntary peti-

tion that the alleged bankrupts within the four months' period, while insolvent, committed an act of bankruptcy by transferring a certain portion of their property to one or more of their creditors with intent to prefer, and that they have transferred and concealed large sums of money and valuable securities with intent to hinder, delay and defraud creditors, which concealment was and is continuous, are insufficient to sustain the petition upon demurrer. *In re Rosenblatt & Co.*, (C. C. A., 2d Cir.), 28 Am. B. R. 401, 193 Fed. 638; *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442.

77. *In re Mero* (D. C., Ct.), 12 Am. B. R. 171, 128 Fed. 630.

A petition charging that the act of bankruptcy was the giving of a chattel mortgage within the four months' period must allege facts sufficient to show that it was given either with intent to hinder, delay and defraud creditors, or with intent to prefer mortgagee over other creditors. *In re Flint Hill Stone & Construction Co.* (D. C., N. Y.), 18 Am. B. R. 81, 149 Fed. 1,007.

An allegation, unsupported by other facts, that certain claims due the alleged bankrupt were assigned by it without consideration to one who has commenced suit on such claims, and that such assignment was made for the purpose of concealment, and to hinder, delay and defraud creditors, is insufficient to justify a conclusion that the assignment was not made for the purposes of collection. *In re Radke Co.* (D. C., Cal.), 27 Am. B. R. 950, 193 Fed. 735.

78. *In re White* (D. C., Pa.), 14 Am. B. R. 241, 135 Fed. 199; *In re Hark Bros.* (D. C., Pa.), 14 Am. B. R. 400, 135 Fed. 608; *In re Pressed Steel Goods Co.* (D. C., Mich.), 27 Am. B. R. 44, 193 Fed. 811; *In re Condon*, 31 Am. B. R. 754, 209 Fed. 800.

erty alleged to have been transferred, the time of the alleged transfer, and to whom it was made.⁷⁹ A failure to allege that the transfer was made within the period of four months prior to the filing of the petition, renders the petition defective.⁸⁰ Where the act of bankruptcy consists of a concealment of the alleged bankrupt's property, the precise details of the act of concealment may not, from the nature of the act, be alleged; the manner and details of the concealment are matters of evidence and not of averment.⁸¹

(III) *Proof of intent.*—The intent of the transfer can rarely be established by direct proof.⁸² It may be inferred from the acts done and the surrounding circumstances, though the debtor denies such intent.⁸³ But the intent must be actual;⁸⁴ the mere fact that the transaction complained of has hindered or delayed creditors will not be enough.⁸⁵ The circumstances relied upon to show intent must be sufficient to lead to the conclusion that the debtor actually intended to hinder, delay or defraud his creditors. The words "hinder, delay or defraud" are used in the disjunctive; if a transfer is shown to have been made with intent to hinder and delay, it is not necessary to establish intent to defraud.⁸⁶ The intent may be established by the debtor's admission and declarations,⁸⁷ or it may be inferred from the act itself as a necessary consequence of it; for instance if a creditor in failing circumstances places all his property beyond the reach of his creditors, that fact may

79. *Conway v. German* (C. C. A., 4th Cir.), 21 Am. B. R. 577, 166 Fed. 67.

80. *Armour & Co. v. Miller* (C. C. A., 5th Cir.), 31 Am. B. R. 356, 209 Fed. 784; *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442.

81. *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 69.

82. *Van Wyck v. Seward*, 18 Wend. 375, 395.

Great latitude allowed.—In the investigation of questions of fraud, as a rule, great latitude is allowed in the admission of evidence, in order that the jury may be able to determine from all the circumstances whether the transaction was fraudulent or not. Questions of fraud can scarcely ever be proven by direct evidence, hence the necessity for the admission of all the circumstances fairly connected with the transaction. *In re Luber* (D. C., Pa.), 18 Am. B. R. 476, 152 Fed. 492.

83. *In re Larkin* (D. C., N. Y.), 21 Am. B. R. 711, 168 Fed. 100. Where the transfer is voluntary, the question of fraudulent intent is one of fact, but in the absence of explanation the presumption of fraud will prevail. *Butler v. Cantor* (D. C., N. Y.), 26 Am. B. R. 424, 185 Fed. 945.

84. *In re McLoon* (D. C., Me.), 20 Am. B. R. 719, 162 Fed. 575; *Matter of Fersco* (C. C. A., 2d Cir.), 41 Am. B. R. 395, 250 Fed. 357; *Marine Nat. Bank v. Swigart* (C. C. A., 6th Cir.), 45 Am. B. R. 162, 262 Fed. 854. *Houck v. Christy* (C. C. A., 8th Cir.), 18 Am. B. R. 330, 152 Fed. 612, in which the court said that "the fact that a sale, assignment, transfer or conveyance is made out of the usual and ordinary course of business, does not, without more, render it *prima facie* fraudulent; but it may be a badge of fraud, of little or considerable influence, depending upon the surrounding facts."

85. *Lansing Boiler Works v. Ryerson* (C. C. A., 6th Cir.), 11 Am. B. R. 553, 128 Fed. 701, 63 C. C. A., 253; *In re McLoon* (D. C., Me.), 20 Am. B. R. 719, 162 Fed. 575.

86. *Hinder and delay, intent to defraud.*—

In the case of *In re Hughes* (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872, the court said: "The question, therefore, is whether this was a conveyance 'with intent to hinder, delay, or defraud' creditors, or any of them. The statute is in the disjunctive, and while it may be admitted, and is I think true, that the words 'hinder' and 'delay' are synonymous (*Read v. Worthington*, 9 Bosw. [N. Y.] 628), it is not necessary, under the language of the statute itself, that any intent to defraud should be present. It is enough if any creditor is intentionally to be hindered or delayed. If the intent to hinder and delay exists, a conveyance made by an embarrassed debtor with a view, known to the purchaser, of securing the conveyed property from attachment, is voidable as against creditors, even though it be honestly made and the debtor intends, as *Hughes* says he did, that all creditors should be paid in full. *Kimball v. Thompson*, 4 Cush. (Mass.) 446, 50 Am. Dec. 799. This must necessarily be the correct view upon any consideration of language which traces its origin to the statute of Elizabeth; for a debtor's property is in legal theory subject to immediate process at the instance of any creditor, and a debtor will not be permitted to hinder or delay any creditor by any device which leaves his property, or the avails of it, subject to his control and disposition; and it makes no difference that the debtor intends to apply the avails of the same to the payment of his debts. It still remains true that he has hindered his debtors from applying the property in the way that they have a legal right to rely upon."

87. Compare *In re Foster* (D. C., Pa.), 11 Am. B. R. 131, 133, 126 Fed. 1014.

be considered in determining whether he did so in good faith, without intent to defraud.⁸⁸ The insolvency of the debtor at the time the transfer was made will not always of itself be sufficient to show intent to defraud or delay.⁸⁹ If a concealment be charged, the intent of the alleged bankrupt may be determined by the result of the act; but if the bankrupt fail to disclose the existence of the property, while retaining his control over it and claiming title thereto, the fact that he did not have a right to the property at the time may not be of much importance.⁹⁰ The burden of proving fraudulent intent is, of course, on him who asserts it.^{90a} Thus, in the absence of proof as to when or how assets were lost, the presumption is against fraud.⁹¹ There can be no intent to hinder, delay or defraud unless at the time the transfer was made the debtor knew or had reason to know of the existence of more than one creditor.⁹² The alleged bankrupt should be permitted to show that a deed which is relied upon as an act of bankruptcy, though absolute upon its face, was intended as a mere security and that there was no intent to defraud.⁹³

(6) **INSOLVENCY.**—We have already considered what constitutes insolvency,⁹⁴ and have also discussed the subject in respect generally to acts of bankruptcy under this section.⁹⁵ We will also hereafter under this section again refer to solvency as a defense to proceedings in bankruptcy and the proof necessary to establish the fact.⁹⁶ It is only necessary here to call attention to the fact that the insolvency of the debtor is not required to be shown. A person is not permitted to convey, transfer, conceal or remove any part of his property with intent to hinder, delay or defraud his creditors, and on becoming insolvent within four months thereafter, escape the bankruptcy law by showing that he was solvent when he so conveyed, transferred, concealed or removed his property.⁹⁷ The question is was he insolvent when the petition was filed. The act of bankruptcy is declared to consist of a transfer by the debtor with intent to hinder, delay or defraud his creditors. If the debtor shows that at the time of filing a petition in bankruptcy he was actually

88. *Bean Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co.* (C. C. A., 6th Cir.), 12 Am. B. R. 610, 131 Fed. 215; *In re Salmon* (D. C., Mo.), 16 Am. B. R. 122, 143 Fed. 395.

Intent implied.—Where it appears that the purpose of an alleged bankrupt in making certain transfers was to put his property beyond the reach of his creditors and he professes to be unable to tell of the disposition of the money received, the intent to defraud may be implied. *In re Minard* (D. C., Or.), 19 Am. B. R. 475, 156 Fed. 377. See also *Macon Grocery Co. v. Beach* (D. C., Ga.), 19 Am. B. R. 558, 156 Fed. 1,009. In the case of *In re Larkin* (D. C., N. Y.), 21 Am. B. R. 711, 168 Fed. 100, it was held that where one in debt transfers or conveys his property to one or more of his creditors, all the surrounding circumstances and conditions are to be considered in determining whether or not it was done with intent to hinder, delay or defraud his other creditors; the intent may be inferred from the acts done and surrounding circumstances, though the debtor denied such intent.

89. *Richardson v. Shaw*, 203 U. S. 587, 19 Am. B. R. 717, 51 L. Ed. 329, in which the court held that there is nothing in the bank-

ruptcy act which prevents an insolvent from disposing of his property, provided his dealings are conducted without any purpose of defrauding his creditors or giving a preference to any of them.

90. *In re Glasier* (D. C., Pa.), 28 Am. B. R. 391, 195 Fed. 1020.

90a. *Marine Nat. Bank v. Swigart* (C. C. A., 6th Cir.), 45 Am. B. R. 162, 262 Fed. 864.

91. *Davis v. Stevens* (D. C., S. Dak.), 4 Am. B. R. 763, 104 Fed. 242. Compare *In re Shapiro & Novick* (D. C., N. Y.), 5 Am. B. R. 839, 106 Fed. 495; *Houck v. Christy* (C. C. A., 8th Cir.), 18 Am. B. R. 330, 152 Fed. 612.

The burden is shifted to the debtor to explain the transaction where it appears that all his property has been removed to a vessel about to leave for a foreign country. *Hoffschlaeger Co. v. Young Nap.* (D. C., Hawaii), 12 Am. B. R. 517, 2 U. S. D. C. Hawaii 97.

92. *Merchants' Nat. Bank v. Cole* (C. C. A., 6th Cir.), 18 Am. B. R. 44, 149 Fed. 708; *Matter of Fersko* (C. C. A., 2d Cir.), 41 Am. B. R. 395, 250 Fed. 387.

93. *Acme Food Co. v. Meler* (C. C. A., 6th Cir.), 18 Am. B. R. 650, 153 Fed. 174.

94. See *Bankr. Act*, § (15) and discussion thereunder, *ante*.

95. See *ante*.

96. See *post*, p. 132.

97. *In re Larkin* (D. C., N. Y.), 21 Am. B. R. 711, 168 Fed. 100.

The burden of proof is on the alleged bankrupt to establish his solvency. *Matter of Burg* (D. C., Tex.), 40 Am. B. R. 126, 245 Fed. 173.

solvent it is a complete defense in a proceeding based upon the first act of bankruptcy.⁹⁸ The right of petitioning creditors to an adjudication against the debtor is only made out *prima facie*, when it is shown that within four months he has conveyed his property with intent to hinder, delay or defraud creditors; for the debtor may then come in and prove that he was solvent when the petition was filed.⁹⁹

(7) CREDITORS OR ANY OF THEM.—The act under this subdivision must have been committed with intent to hinder, delay or defraud “his creditors or any of them.” This means a creditor who owns a judgment or claim provable in bankruptcy.¹⁰⁰ An unliquidated claim for tort, unreduced to judgment at the time of an alleged transfer, does not constitute the claimant a creditor so as to authorize him to insist that such transfer is an act of bankruptcy.¹⁰¹

(8) COMPARISON WITH OTHER SECTIONS.—If the fraudulent transfer is within four months of the filing of the petition, it is not only an act of bankruptcy but void under § 67-e; it is also an objection to discharge under § 14-b (4); and, if also voidable under the State laws, it may be set aside under § 70-e, and the property or its value recovered by proper proceedings begun within the limitations as to time fixed by the State statutes.¹⁰²

b. Second act of bankruptcy ; a preferential transfer.—(1) IN GENERAL.—The second act of bankruptcy consists of a debtor transferring while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditor or creditors over his other creditors.^{102a} As in the case of the other acts of bankruptcy it must have been committed within the four months preceding the filing of the bankruptcy petition. The interdicted transaction here must be between a debtor and his creditors. Where at the time of the transfer there were no creditors, a subsequent creditor cannot complain.¹⁰³ An accommodation or other indorsers of a note of the alleged bankrupt are creditors, and preferential transfers to secure them fall within the act.¹⁰⁴ The act itself may not even be illegal or fraudulent. The debtor merely prefers to pay one creditor more than he does another.¹⁰⁵ The judicial definition of preference¹⁰⁶ is not controlling in this connection, for a preference which will

98. In re Schenkeln (D. C., N. Y.), 7 Am. B. R. 162, 113 Fed. 421; In re West (C. C. A., 2d Cir.), 5 Am. B. R. 734, 108 Fed. 940; Matter of Aschenback Co. (C. C. A., 2d Cir.), 23 Am. B. R. 95, 174 Fed. 396; Matter of Wellesley (D. C., Cal.), 40 Am. B. R. 597, 252 Fed. 854.

Insolvency; condition of bankruptcy, when determined.—The condition of a bankrupt at the time of the commission of the alleged acts of bankruptcy must be taken as the standard from which to view an alleged fraudulent transfer or other alleged act of bankruptcy “while insolvent” under section 3a of the bankruptcy act. But the condition of the bankrupt at the time of filing the petition is to be taken as the standard from which to test the defense of “solvency” in order to give jurisdiction in bankruptcy under section 3c of the bankruptcy act. Matter of Koble et al. (D. C., N. Y.), 35 Am. B. R. 389, 224 Fed. 106.

99. In re Hughes (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872.

100. Bankr. Act, § 1 (9) and 63-a-b, post. See in re Watson (D. C., Ky.), 30 Am. B. R. 871, 201 Fed. 962.

101. Beers v. Hamlin (D. C., Or.), 8 Am. B. R. 745, 99 Fed. 695. A creditor cannot complain of an act committed before he was a creditor. In re Brinckman (D. C., Ind.), 4 Am. B. R. 551, 108 Fed. 65.

102. These doctrines are further considered under the appropriate sections, post.

102a. Matter of Bloomberg (D. C., Mass.), 42 Am. B. R. 115, 253 Fed. 94.

103. Brake v. Collison (C. C. A., 5th Cir.), 11 Am. B. R. 797, 129 Fed. 201. The petition must allege that there were other creditors than the one preferred. In re Flint Hill Stone & Const. Co. (D. C., N. Y.), 18 Am. B. R. 81, 149 Fed. 1007. Preferential transfers as acts of bankruptcy, see Am. B. R. Dig. §§ 166-171.

104. In re O'Donnell (D. C., Mass.), 12 Am. B. R. 621, 131 Fed. 150.

105. Rex Buggy Co. v. Hearick (C. C. A., 8th Cir.), 12 Am. B. R. 726, 132 Fed. 310.

106. See In re Wright Lumber Co. (D. C., Ark.), 6 Am. B. R. 345, 114 Fed. 1011. See also under Sections One and Sixty of this work.

be an act of bankruptcy is something other and more than one voidable under § 60-b. Thus, the intent to prefer on the part of the debtor may not be accompanied by reasonable cause to believe on the part of the creditor.¹⁰⁷ A preferential transfer under this subdivision, must consist of: (1) a transfer of property, (2) insolvency and (3) intent to prefer.¹⁰⁸ In addition to this it must be shown that the transfer results in the depletion of the debtor's estate,¹⁰⁹ and that the creditor to whom the transfer is made thereby secures an undue advantage over other creditors of the same class.¹¹⁰

(2) TRANSFER OF PROPERTY.—(I) *In general*.—"Transfer" as here used has the enlarged meaning given it by § 1 (95).¹¹¹ It is immaterial how the transfer is made. It may be either directly to the creditor or indirectly through a third person for his benefit.¹¹² Whatever may be the nature of the transaction, if the result of it is to procure to a creditor a preference over any other creditor it may be an act of bankruptcy.¹¹³ The result of the transaction controls its character. If one or more creditors are paid and others are left unpaid as a result of the transfer, the transfer constitutes an act of bankruptcy. As for instance, where an insolvent person conveys his property and the grantee applies the proceeds of the sale to pay certain creditors of the grantor in preference over others, such conveyance is a preferential transfer.¹¹⁴ A transfer by an insolvent partner of his entire separate estate in satisfaction of a debt of his firm which had no assets, constitutes a preference over other firm creditors of the same class and is an act of bankruptcy on the part of the partner.¹¹⁵

(II) *Mortgage or security*.—A chattel mortgage is more than a mere security; it is a sale of the thing mortgaged and operates as a transfer of it to the mortgagee, and if given within the four months' period with intent to prefer it is an act of bankruptcy.¹¹⁶ The execution of a trust mortgage during

107. See *Crooks v. The People's Nat. Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604; *In re Wright Lumber Co.* (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1011; *Matter of Jones* (D. C., N. Y.), 44 Am. B. R. 253, 259 Fed. 927.

108. As to what evidence will establish this act of bankruptcy, see *Goldman v. Smith* (D. C., Ky.), 1 Am. B. R. 266, 93 Fed. 182. For analysis of the subsection see *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812.

109. *Martin v. Hulen* (C. C. A., 8th Cir.), 17 Am. B. R. 510, 149 Fed. 982.

110. *In re Douglass Coal & Coke Co.* (D. C., Tenn.), 12 Am. B. R. 539, 139 Fed. 769; *Matter of Bloomberg* (D. C., Mass.), 42 Am. B. R. 115, 253 Fed. 94.

111. See *ante*, under § 1.

112. *In re McGee* (D. C., N. Y.), 5 Am. B. R. 262, 105 Fed. 895; *Troy Wagon Works v. Vastbinder* (D. C., Pa.), 12 Am. B. R. 352, 130 Fed. 232; as where a mortgage is executed by the cashier of a bank to a state bank commissioner, in payment of a liability incurred by him under the banking act of the state to a creditor of the bank, such mortgage constitutes a preference; *Fulkerson v. Shaffer* (C. C. A., 8th Cir.), 33 Am. B. R. 526, 217 Fed. 355.

113. *Carson, Pirie & Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1,171; *Boyd v. Lemon, Gale Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 81, 114 Fed. 647; *Goldman v. Smith* (D. C., Ky.), 1 Am. B. R. 266, 93 Fed. 82.

Where an insolvent transfers his property to another who executes a mortgage thereon in favor of a creditor it is an act of bankruptcy. *Gibson v. Dobie*, Fed. Cas. 5,394.

Payment to wife.—Where an alleged bankrupt within four months of the filing of a petition in involuntary proceedings, and while he was insolvent, paid to his wife in settlement of an alleged indebtedness the proceeds of certain fire insurance policies as indemnity for a loss on his stock of goods, an act of bankruptcy was committed. *In re Pinson & Co.* (D. C., Ala.), 24 Am. B. R. 804, 180 Fed. 787.

114. *Boyd v. Lemon, Gale Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 81, 114 Fed. 647; *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897.

115. *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897.

116. *Matter of Riggs Restaurant Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 508, 130 Fed. 691. Compare *In re Bogen* (D. C., Ohio), 13 Am. B. R. 529, 134 Fed. 1,019. Same rule applies in respect to a mortgage given on real property. *In re Edelman* (C. C. A., 2d Cir.), 12 Am. B. R. 238, 130 Fed. 700; *In re Wright Lumber Co.* (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1,011; *In re Waite*, Fed. Cas. 17,044; *In re Rogers*, Fed. Cas. 12,002; *Baldwin v. Rosseau*, Fed. Cas. 803.

the four months' period to secure creditors who may become such between certain dates falls within the statute.¹¹⁷

(III) *Payment of money.*—There can be no question but that a payment of money by an insolvent is a transfer of property within the meaning of this subsection.¹¹⁸ Payments made by a corporation, however large, to creditors resulting in their preference over others will constitute an act of bankruptcy.¹¹⁹ Insubstantial payments of small amounts may be made under circumstances which would not constitute them preferential so as to make them acts of bankruptcy.¹²⁰ A preferential transfer of property to a creditor greater in value than the amount of the debt, the difference being paid in cash to the debtor, is an act of bankruptcy.¹²¹ And so also is the payment of one or more creditors in full to the exclusion of other creditors, out of the proceeds of the cash sale of the property of the debtor.¹²²

(IV) *Confession of judgment.*—A creditor who obtains a judgment which becomes a lien upon the debtor's property, thereby obtains security.¹²³ Under the definition of a transfer, [§ 1 (25)] any disposition of property by way of security constitutes a transfer. It would seem to follow that a debtor who aids a creditor in obtaining a judgment by means of which his debt is secured transfers his property. If this is done with intent to prefer, as where the debtor confesses judgment, and as a result the creditor obtains payment of his debt in preference over other creditors, the debtor has preferentially transferred his property within the second clause of subsection *a*.¹²⁴ The close connection between the confession of a judgment by an insolvent debtor, and the permitting a sufferance of a judgment in a legal proceeding must be noted. But

117. *Rouss v. Ottenness & Huxall* (C. C. A., 6th Cir.), 31 Am. B. R. 115, 208 Fed. 881.

118. *Landry v. Andrews*, 6 Am. B. R. 281, 22 R. I. 597; *Carson, Pirie & Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1171; *Matter of Everybody's Market* (D. C., Okl.), 21 Am. B. R. 925, 173 Fed. 492. An assignment of money due to an alleged bankrupt on a building contract to an accommodation indorser of his note is a preferential transfer. In re *O'Donnell* (D. C., Mass.), 12 Am. B. R. 621, 130 Fed. 150. So also is a transfer of accounts in lieu of materials pledged. *Anniston Iron & Supply Co. v. Anniston Rolling Mills* (D. C., Ala.), 11 Am. B. R. 200, 125 Fed. 974.

119. *Naylon & Co. v. Christiansen & Co.* (C. C. A., 6th Cir.), 19 Am. B. R. 789, 158 Fed. 290.

120. *Payments of small amounts.*—In the case of In re *Hovall Grocery Co.* (D. C., Ga.), 20 Am. B. R. 537, 161 Fed. 882, it was held that a payment of a debt of \$3 to a creditor, a week before the filing of an involuntary petition, did not constitute an act of bankruptcy. See also *Macon Grocery Co. v. Beach* (D. C., Ga.), 19 Am. B. R. 558, 156 Fed. 1009; In re *Douglass Coal & Coke Co.* (D. C.), 12 Am. B. R. 859, 131 Fed. 769, holding that the small size of the payment may be looked to as a circumstance, in connection with others, to justify the conclusion that no preference was intended; In re *Gilbert* (D. C., Or.), 8 Am. B. R. 102, 112 Fed. 951.

The size of the payment makes no difference if the requisite intent existed, but it does make a difference in determining whether or not the intent did exist. In re *Perlhefter* (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299.

Payments in the ordinary course of business of maturing debts, comparatively insignificant in amount, by a concern actively prosecuting its business in the usual manner, are not preferences within the meaning of section 3-a (2). In re *Columbia Real Estate Co.* (D. C., N. J.), 30 Am. B. R. 471, 205 Fed. 980, citing text.

121. *Johnson v. Wald* (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640.

122. *Matter of Farrell Co.* (D. C., N. Y.), 9 Am. B. R. 341, 36 Fed. 500; *Boyd v. Lemon, Gale Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 81, 114 Fed. 647; *Rex Buggy Co. v. Hearick* (C. C. A., 8th Cir.), 12 Am. B. R. 726, 132 Fed. 310; *Wise Coal Co. v. Small* (C. C. A., 8th Cir.), 35 Am. B. R. 682, 225 Fed. 524, holding that payments by a debtor through a sale of his property pursuant to a plan to pay local creditors, to the exclusion of non-resident creditors, constitutes an act of bankruptcy.

123. *Clark v. Iselin*, 21 Wall. 372, 373, 22 L. Ed. 577.

124. In re *Truitt* (D. C., Md.), 29 Am. B. R. 570, 203 Fed. 550; In re *Nusbaum* (D. C., N. Y.), 18 Am. B. R. 598, 152 Fed. 835.

the fact that confession of judgment by the debtor is usually with intent to prefer the judgment creditor, brings the act within the second class of acts of bankruptcy, although it might also be included within the third class.¹²⁵

(V) *Depletion of estate.*—The preferential transfer must result in the depletion of the debtor's estate, so as to leave the other creditors without property out of which their claims may be paid. If there is no depletion of the estate the creditors cannot complain.¹²⁶ If the payments are essential to the continuance of the debtor in business, as for instance the payment of arrears of rent of the building occupied by the bankrupt, or payments made for advertisements upon which such business depends, they do not deplete the debtor's estate, and are not acts of bankruptcy.¹²⁷ The payment of unearned premiums on policies of insurance would amount to a depletion.¹²⁸ An agreement to insure goods and assign the policies to secure a creditor is not necessarily prejudicial to the other creditors, and an assignment of such policies made in pursuance thereof after the debtor became insolvent, is not an act of bankruptcy.¹²⁹ Where the transaction consists of merely making an exchange of securities it does not constitute an act of bankruptcy, for in such a case there is no satisfaction of a debt nor depletion of the debtor's estate.¹³⁰ A debtor must necessarily be allowed some liberty in the settlement of maturing obligations. Arrangements honestly made for the purpose of obtaining funds to pay such obligations so that the debtor's business may be continued in its regular course are not interdicted.¹³¹ So where a chattel mortgage or other security is given for a present loan, the money being applied by the alleged bankrupt in the regular transaction of his business,¹³² or for the security of notes given for the purchase price of merchandise added to the alleged bankrupt's stock of goods, it is not against the interests of other creditors as tending to

125. See *Matter of Irish* (D. C., Pa.), 36 Am. B. R. 185, 228 Fed. 573, holding that an insolvent who confesses judgment to his wife in an amount equal to the value of his only assets, and withholds execution, does not commit an act of bankruptcy within the meaning of section 3a (3) of the Bankruptcy Act; but an involuntary petition stating such facts may be amended so as to allege the acts of bankruptcy defined in clauses (1) and (2) of the same section; *Matter of Fisher* (D. C., Pa.), 33 Am. B. R. 628, 219 Fed. 638.

126. *Martin v. Hulen* (C. C. A., 8th Cir.), 17 Am. B. R. 510, 148 Fed. 982; *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442, citing *Collier on Bankruptcy* (11th ed.). In *re Pearson* (D. C., N. Y.), 2 Am. B. R. 482, 95 Fed. 425, in which case the payment of debts which were a charge upon a leaseholder in order to protect the debtor's interest therein was held not to be an act of bankruptcy, since the payment did not injuriously affect his creditors. Compare *In re Lange* (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 197.

127. In *re Perleheffer & Shatz* (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299; In *re Pearson* (D. C., N. Y.), 2 Am. B. R. 482, 95 Fed. 425.

128. *Knickerbocker v. Comstock*, Fed. Cas. 7,879.

129. *Wilder v. Watts* (D. C., S. Car.), 15 Am. B. R. 57, 138 Fed. 426.

130. *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; In *re Weaver*, Fed. Cas. 17,307;

In *re Union Pacific R. R. Co.*, Fed. Cas. 14,376.

131. In *re Columbia Real Estate Co.* (D. C., N. J.), 30 Am. B. R. 471, 205 Fed. 980.

Chattel mortgage to cancel pre-existing mortgage.—A payment to a bank to take up a note, made from money loaned upon a chattel mortgage, the larger part of which was used to cancel a pre-existing mortgage on the same property, does not constitute a preference where, although the debtor was insolvent, it does not appear that he knew himself to be so, but notwithstanding that his creditors were pressing him for payment and his credit was very limited, he had quite a number of outstanding accounts, was endeavoring to pay his debts in full and the payment to the bank, which was small in comparison with his aggregate indebtedness, was made in the ordinary course of business, with the expectation on the part of the debtor of continuing his business and ultimately paying all of its obligations. In *re Hallin* (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806.

132. In *re Hallin* (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806, holding that the acceptance of less than the face value of the mortgage, the balance being a bonus or discount, or extra interest did not render the mortgage preferential.

deplete the estate and may not be deemed preferential.¹³³ The transfer must consist of the bankrupt's own property to constitute a preference; payment of a note of a bankrupt by an indorser would not be sufficient.¹³⁴ A renewal within the four months' period of a chattel mortgage, given as security for a pre-existing debt, is not an illegal preference.¹³⁵ A payment by an attorney, out of his own funds, of a claim against his client, which does not deplete his client's estate is not a preference constituting an act of bankruptcy.¹³⁶ The payment of a relatively small amount as a bonus for a loan secured by a chattel mortgage, although unlawful as between the alleged bankrupt and his mortgagee is not a preference constituting an act of bankruptcy.¹³⁷

(3) **INTENT TO PREFER.**—To authorize an adjudication of bankruptcy it must appear that the transfer alleged to constitute an act of bankruptcy was made with the intent to prefer the creditor to whom it was given; if no such intent exists it may be a preference but it is not an act of bankruptcy.¹³⁸ As indicated in the preceding paragraph, ordinary business transactions by a going concern, necessary for the continuance of the business are not prohibited, even if it happen that through some circumstance the debtor become insolvent. Payments to creditors in an ordinary business way made by a debtor who did not regard himself as insolvent, are not necessarily made with intent to prefer.¹³⁹ If a mortgage is given to a person not a creditor to secure advances made in the payment of debts, and the mortgagor believed at the time that she had ample property to meet all demands against her, it is not a preference.¹⁴⁰ The intent will be presumed when the transaction consists of a transfer of personal property by way of payment.¹⁴¹ If the bankrupt did not know of an alleged claim against him when he made payments to his only other creditors in due course of business, such payments were not made with intent to prefer and do not constitute acts of bankruptcy.¹⁴² If a debtor did not know of a claim against him, he cannot have intended to give a preference against such claim; but there is a strong presumption that he does know whether a claim is paid.¹⁴³ The intent of the creditor to whom the preferential transfer is made is not material; it need not be shown that the creditor knew or had reasonable grounds to believe that the transfer was preferential.¹⁴⁴ The intent of a corporation may be presumed from the knowledge and acts of its officers and agents.^{144a} The question of intent is one for the jury.¹⁴⁵

133. *Martin v. Hulen & Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 510, 149 Fed. 982.

134. *Mason v. Nat. Herkimer Co. Bank* (C. C. A., 2d Cir.), 22 Am. B. R. 733, 172 Fed. 529, aff'd. 225 U. S. 173, 28 Am. B. R. 218, 56 L. Ed. 1042.

135. *In re Cutting* (D. C., N. Y.), 16 Am. B. R. 751, 145 Fed. 388.

136. *In re Kerlin* (C. C. A., 6th Cir.), 31 Am. B. R. 12, 209 Fed. 42, 135 C. C. A. 1, rev'g. 30 Am. B. R. 816.

137. *In re Hallin* (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806.

138. *In re Gilbert* (D. C., Or.), 8 Am. B. R. 101, 112 Fed. 951; *In re Trulitt* (D. C., Md.), 29 Am. B. R. 570, 203 Fed. 550; *Matter of Cotting Coal Co.* (D. C., Mass.), 32 Am. B. R. 489, 212 Fed. 548; *Matter of Bloomberg* (D. C., Mass.), 42 Am. B. R. 115, 253 Fed. 94. See cases cited. Am. B. R. Dig., §§ 168, 169.

139. *Goodlander-Robertson Lumber Co. v. Atwood* (C. C. A., 4th Cir.), 13 Am. B. R. 510, 152 Fed. 978; *Matter of Jones* (D. C., N. Y.), 44 Am. B. R. 253, 259 Fed. 927.

140. *In re McLoon* (D. C., Mo.), 20 Am. B. R. 719, 723, 162 Fed. 575.

Preferential transfer must be made to or for benefit of creditor. *Richardson v. Shaw*, 203 U. S. 587, 19 Am. B. R. 717.

141. *Johnson v. Wald* (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640; *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; *In re Gilbert* (D. C., Or.), 3 Am. B. R. 101, 112 Fed. 951; *In re Flint Hill Stone & Construction Co.* (D. C., N. Y.), 18 Am. B. R. 81, 149 Fed. 1007.

142. *In re Morgan and Williams* (D. C., Ga.), 25 Am. B. R. 861, 124 Fed. 983.

143. *In re Pangburn* (D. C., Mich.), 26 Am. B. R. 40, 125 Fed. 673.

144. *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; *In re Wright Lumber Co.* (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1,011.

144a. *Matter of Boston & West Africa Co.* (D. C., Mass.), 43 Am. B. R. 382, 255 Fed. 924.

145. *In re Bloch* (C. C. A., 2d Cir.), 6 Am. B. R. 300, 109 Fed. 790.

(4) **PROOF OF INTENT.**—As in the case of a transfer to hinder, delay and defraud creditors, the intent to prefer may be implied from the actual result of the transaction.¹⁴⁶ One is presumed to intend the probable consequences of his acts,—that is, those consequences which would naturally follow, and which a person of ordinary intelligence would expect as the natural result thereof; this presumption is of weight in determining the debtor's intent to prefer, and has been frequently applied.¹⁴⁷ If the debtor knows that he is insolvent he must be presumed to know that a transfer made to one creditor to the exclusion of others will result in a preference, without regard to his actual intent in making such transfer.¹⁴⁸ Payment of a claim by one knowing himself to be insolvent raises a conclusive presumption of intent to prefer;¹⁴⁹ if it be shown that it was made in the honest belief that he is solvent, the burden shifts to the creditors.¹⁵⁰ Where a preference is given with the approval of

146. In re Douglass Coal & Coke Co. (D. C., Tenn.), 12 Am. B. R. 539, 131 Fed. 769; In re Wright Lumber Co. (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1,011; In re McGee (D. C., N. Y.), 5 Am. B. R. 262, 105 Fed. 895; In re Bloch (C. C. A., 2d Cir.), 6 Am. B. R. 300, 109 Fed. 790; In re Rome Planing Mills (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; Johnson v. Wald (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640.

As to proof of intent, see Am. B. R. Dig., § 265.

147. Macon Grocery Co. v. Beach (D. C., Ga.), 19 Am. B. R. 558, 156 Fed. 1,009; Matter of Bloomberg (D. C., Mass.), 42 Am. B. R. 115, 253 Fed. 94, citing Collier on Bankruptcy (11th ed.), p. 102; Matter of Jones (D. C., N. Y.), 44 Am. B. R. 253, 259 Fed. 927.

Under the former law.—Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Wager v. Hall, 10 Wall. 584, 21 L. Ed. 504; Traders' Bank v. Campbell, 14 Wall. 87, 20 L. Ed. 832; Samson v. Borton, 5 Ben. 325; In re Dibles, 3 Ben. 283; Terry v. Cleaver, 2 Biss. 356; Rison v. Knapp, Fed. Cas. 11,861, 1 Dill. 186; Driggs v. Moore, Fed. Cas. 4,085, 1 Abb. C. C. 440; In re Silverman, 1 Sawy. 410; In re Oregon Bulletin Print. & Pub. Co., Fed. Cas. 10,559; Miller v. Keyes, Fed. Cas. 9,578.

148. In re Condon (C. C. A., 2d Cir.), 31 Am. B. R. 754, 209 Fed. 800; In re Wright Lumber Co. (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1,011, in which case the court said: "If it be said that the testimony shows that the bankrupt did not intend to prefer a claimant, the answer is that he was insolvent, and he knew it, and he must be held to have intended that which was the necessary consequence of his act. He cannot be heard to say that he did not intend to do a thing when the necessary and logical consequence of his act was to do that very thing."

Presumption where transfer is made by insolvent.—Where a debtor known to be insolvent transfers a large portion of his property to one creditor to the exclusion of others, such transaction must be taken as conclusive of an intent to give a preference. In re McGee (D. C., N. Y.), 5 Am. B. R. 262, 105 Fed. 895. The debtor's intent to give a preference may be presumed from a transfer, while insolvent, of a large portion of his property to a single creditor. When this is proved, the burden is upon him to show that he was ignorant of his insolvency and had reason to believe that he could pay his debts

in full. In re Rome Planing Mills (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812. If a merchant is hopelessly insolvent during the four months preceding the filing of a petition in involuntary bankruptcy against him, and with knowledge of such condition of insolvency pays to certain of his creditors substantial sums of money in full satisfaction of their claims, and denies payment to others whose claims are due and equally entitled to payment he has committed an act of bankruptcy under this clause (§ 3-a (2)). His payments under such circumstances inevitably result in giving the creditors so favored a preference over the others. The debtor is presumed to intend the necessary results of his own intelligent acts. Rex Buggy Co. v. Hearick (C. C. A., 8th Cir.), 12 Am. B. R. 726, 132 Fed. 310. See Johnson v. Wald (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640, and note as to proof of intent under former act, in 2 Am. B. R. 84-86.

Proof of knowledge of insolvency.—In order to charge a debtor with having committed an act of bankruptcy in the giving of a preference by the payment to a creditor of a past-due account, it is necessary to show that he intended thereby to give such creditor more than the other creditors would get; and this element is not met by showing that he ought to have thought so; but where it appears that though the debtor hoped to overcome a temporary embarrassment, yet knew that the result was very doubtful, and did not make such payment to carry his affairs through successfully, he must be deemed to have intended a preference. In re Condon (D. C., N. Y.), 29 Am. B. R. 907, 198 Fed. 947, affd. 31 Am. B. R. 754, 209 Fed. 800.

149. In re Billings (D. C., Ala.), 17 Am. B. R. 80, 45 Fed. 395; In re Wright Lumber Co. (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1,011; Driggs v. Moore, Fed. Cas. 4,085; Rison v. Knapp, Fed. Cas. 11,861; In re Silverman, Fed. Cas. 12,855, 1 Sawy. 410; In re Dibblee, Fed. Cas. 3,884.

150. Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; In re Munn, Fed. Cas. 9,925, 3 Biss. 442; Morgan v. Mastick, Fed. Cas. 9,803; In re Rome Planing Mills (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; In re Bloch

certain creditors such creditors are estopped from objecting to the transfer as an act of bankruptcy.¹⁵¹ It is possible that, under the new definition of insolvency, one may not always know the fair valuation of his property, and, therefore, may not be able to show that he knew whether he was solvent or not. But the presumption is that a person has knowledge of his financial condition.¹⁵² If a debtor honestly believes himself to be solvent when the transfer is made, or if he establishes his want of knowledge of his insolvency, the presumption of an intent to prefer is rebutted.¹⁵³ Where an insolvent debtor, before the entry of judgment on a verdict against him, gives a mortgage to secure another creditor, the intent to prefer will be presumed.¹⁵⁴ If a debtor, while insolvent, transfers all or nearly all his property to some of his creditors, leaving others unprovided for, the intent to prefer will be presumed.¹⁵⁵ The effect of this presumption will vary according to the proportionate amount of the transfer,¹⁵⁶ and is not conclusive.¹⁵⁷ If the amount of the transfer is comparatively small and it does not materially deplete the estate, the intent to prefer will not be presumed.¹⁵⁸ The circumstance that a mortgage executed within the four months' period was not recorded for a considerable time thereafter may be considered in determining whether such mortgage con-

(C. C. A., 2d Cir.), 6 Am. B. R. 300, 109 Fed. 790; In re McLoon (D. C., Me.), 20 Am. B. R. 719, 162 Fed. 575.

Production of books.—If the bankrupt does not submit to an examination or submit his books so that his financial condition may be ascertained the presumption of a general assignment for creditors will be taken against him. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102. See under "Solvency and the second and third acts of bankruptcy," *post*. The burden is shifted to creditors if alleged bankrupt appears with his books. *Matter of Election Chemical Co.* (D. C., N. Y.), 31 Am. B. R. 471, 208 Fed. 954.

151. *Matter of Freeman Cotting Coat Co.* (D. C., Mass.), 32 Am. B. R. 489, 212 Fed. 548.

152. In re Gilbert (D. C., Or.), 8 Am. B. R. 101, 104, 112 Fed. 951; In re Jacobs (Ref., La.), 1 Am. B. R. 518; In re Silverman, Fed. Cas. 12,855, 1 Sawy. 410.

153. In re Gilbert (D. C., Or.), 8 Am. B. R. 101, 104, 112 Fed. 951; In re Rome Planing Mills (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812.

A payment to a bank to take up a note, made from money loaned upon a chattel mortgage, the larger part of which was used to cancel a pre-existing mortgage on the same property, does not constitute a preference where, although the debtor was insolvent, it does not appear that he knew himself to be so, but notwithstanding that his creditors were pressing him for payment and his credit was very limited, he had quite a number of outstanding accounts, was endeavoring to pay his debts in full and the payment to the bank, which was small in comparison with his aggregate indebtedness, was made in the ordinary course of business, with the expectation on the part of the debtor of continuing his business and ultimately paying all of its obligations. In re Hallin (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806.

154. In re Smith (D. C., N. Y.), 28 Am. B. R. 864, 176 Fed. 426.

155. *Nylon & Co. v. Christiansen Co.* (C. C. A., 6th Cir.), 19 Am. B. R. 789, 158 Fed. 290; *Boyd v. Lemmon, Gale & Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 81, 114 Fed. 647; *Johnson v. Wald* (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640; *Goldman v. Smith* (D. C., Ky.), 1 Am. B. R. 206, 93 Fed. 182; In re Grant (D. C., N. Y.), 5 Am. B. R. 837, 106 Fed. 497; In re Waite, Lowell, 407; In re Drummond, Fed. Cas. 4,094; In re Foster, Fed. Cas. 4,964; *Morrison v. Rienman* (C. C. A., 7th Cir.), 41 Am. B. R. 325, 249 Fed. 97.

Intent to prefer by transfer of large part of property.—In the case of *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481, the court said: "The transfer in any case by the debtor of a large part of all his property while he is insolvent, to one creditor without making provision for an equal distribution of its proceeds to all his creditors necessarily operates as a preference to him and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts."

156. In re Gilbert (D. C., Or.), 8 Am. B. R. 101, 106, 112 Fed. 951.

157. *Matter of Freeman Cotting Coat Co.* (D. C., Mass.), 32 Am. B. R. 489, 212 Fed. 548.

158. In re Kerlin (C. C. A., 6th Cir.), 31 Am. B. R. 12, 209 Fed. 42, revg. 30 Am. B. R. 816.

The paying of small sums to certain creditors in order to keep the business going does not give rise to this presumption. In re *Douglass Coal & Coke Co.* (D. C., Tenn.), 12 Am. B. R. 549, 131 Fed. 769; In re *Stovall Grocery Co.* (D. C., Ga.), 20 Am. B. R. 537, 161 Fed. 882; In re *Perihelfter* (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299.

stitutes an act of bankruptcy.¹⁵⁹ Where the proof is that the property was transferred to a mortgagee who was a creditor in an amount larger than the value of the property transferred, the presumption of intent to prefer will be negated.¹⁶⁰ If insolvency at the time of the transfer is not shown, the question of intent is immaterial.¹⁶¹

(5) **INTENT AS DISTINGUISHED FROM MOTIVE.**—There must be design to give an advantage. Where the transfer is in pursuance of an effort to extricate the transferor from his embarrassments, it will not be held a preference.¹⁶² Likewise, where the physical transfer is in pursuance of a valid contract antedating the bankruptcy.¹⁶³ But a transfer is not less a preference because given in answer to a request or in fulfillment of a prior promise made at the time of contracting the debt.¹⁶⁴ Evidence of a failure to record a mortgage until several months after its execution may justify a finding that it was given with an intent to prefer.¹⁶⁵ So whatever may have been the motive in making the transfer, it is immaterial as bearing upon the question of intent. However honest or proper may have been the motive, yet if the intent to prefer exists and is coupled with the other essential elements, an act of bankruptcy is the result.¹⁶⁶

(6) **ALLEGATIONS AS TO PREFERENCE.**—The specific facts as to the preference relied on to constitute an act of bankruptcy must be alleged.¹⁶⁷ The

159. *In re Edelman* (C. C. A., 2d Cir.), 12 Am. B. R. 238, 130 Fed. 700.

160. *Livingston v. Bruce*, Fed. Cas. 8,410; *Catlin v. Hoffman*, Fed. Cas. 2,521.

161. *In re Kassel* (C. C. A., 2d Cir.), 28 Am. B. R. 233, 195 Fed. 492.

Proof of intent under former law.—Any fact which tends to establish the existence or non-existence of intent is admissible evidence. *Linkman v. Wilcox*, Fed. Cas. 8,374; *Giddings v. Dodds*, Fed. Cas. 5,405. The testimony of the party himself is entitled to little weight. *Oxford Iron Co. v. Slafter*, Fed. Cas. 10,637. Transfers of one's property afford a violent, almost conclusive, presumption of intent to prefer, if there are creditors unprovided for. *In re Waite*, Fed. Cas. 17,044. Proof of an antecedent indebtedness is, in general, necessary to establish that a payment or security is a preferential transfer. *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *Burnhisel v. Firman*, 22 Wall. 170, 2 L. Ed. 766; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235.

162. *In re Wolf* (D. C., Iowa), 3 Am. B. R. 555, 98 Fed. 84.

163. *Sabin v. Camp* (D. C., Or.), 3 Am. B. R. 578, 98 Fed. 974. For analogous cases under the law of 1867, see *Winter v. Railway Co.*, Fed. Cas. 17,890; *In re Hapgood*, Fed. Cas. 6,044.

164. *Arnold v. Maynard*, Fed. Cas. 561.

165. *In re Edelman* (C. C. A., 2d Cir.), 12 Am. B. R. 238, 130 Fed. 700.

166. *Hardy v. Binninger*, 7 Blatch. 262, 4 N. B. R. 262, Fed. Cas. 1,420; *Strain v. Gourdin*, 2 Woods 380, 11 N. B. R. 156, Fed. Cas. 13,521.

167. *In re Nelson* (D. C., Wis.), 1 Am. B. R. 63, 98 Fed. 76. An omission of the specific date does not render the petition demurrable. *In re Vastbinder* (D. C., Pa.), 11 Am. B. R. 118, 126 Fed. 417.

Sufficiency of petition; general averments.—A petition in involuntary bankruptcy which merely charges that the alleged bankrupt on a specified date, while insolvent and within four months of the date of the petition, transferred and conveyed "certain of his property" to creditors whose names are unknown, with intent to hinder, delay and defraud other creditors or with intent to prefer said creditors over others of the same class, does not set forth an act of bankruptcy with the required particularity as to essential data and details, does not apprise the alleged bankrupt of what he is called upon to meet and, therefore, does not warrant the granting of any relief. *In re Hallin* (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806. See also *In re Rosenblatt & Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 401, 193 Fed. 638.

Preferential transfer.—A petition by creditors, representing about one-third of one per cent. of the total indebtedness (\$200,000) of the bankrupt, averring that the alleged bankrupt is insolvent and that, within four months next preceding the date of the petition, he paid certain unknown amounts to creditors whose names are unknown, with intent to prefer such creditors, is insufficient. *Matter of Mason-Seaman Transportation Co.* (D. C., N. Y.), 37 Am. B. R. 677, 235 Fed. 974. See Am. B. R. Dig., § 217.

petition should allege the amounts paid and to whom.¹⁶⁸ It should also allege that the alleged act was committed with an intent to prefer.¹⁶⁹

c. Third act of bankruptcy; preference through legal proceedings.—

(1) IN GENERAL.—The third act of bankruptcy consists of a person having “suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings, and not having five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference.” If any of these elements, i. e. (1) insolvency, (2) suffering or permitting a creditor to obtain a preference through a legal proceeding, (3) not avoiding the preference five days before the sale, where (4) the property to be sold is affected by such preference, is missing, the act is not an act of bankruptcy under this clause.¹⁷⁰ This has been well termed the passive act of bankruptcy. It differs from the corresponding act in the law of 1867, in that intent is not material. It is in harmony with § 67-f, under which liens through legal proceedings are void, irrespective of intent on the part of the debtor, or pressure due to knowledge, on part of the creditor. There is a similar provision in the Canadian Bankruptcy Act of 1919.¹⁷¹ The corresponding clause in the English bankruptcy act is also of interest.¹⁷² The Torrey bill in its last form,¹⁷³ and the Henderson substitute, contained words which seems to include these two foreign provisions. The exact phrasing of the present law did not appear until the bill had been agreed to in conference committee. Changes narrowing its scope were then made. In spite of them, it is the most virile and available of the acts of bankruptcy.

(2) COMPARISON WITH THE ACT OF 1867.—Section 39 of that act provided that an insolvent who should “procure or suffer his property to be taken on legal proceedings, with intent to give a preference to one or more

168. In re Blumberg (D. C., Pa.), 13 Am. B. R. 343, 133 Fed. 845. Where this is done the failure to state names of creditors is not fatal. In re Lackrow (D. C., Pa.), 14 Am. B. R. 514, 140 Fed. 573.

169. In re Tupper (D. C., N. Y.), 20 Am. B. R. 824, 827, 163 Fed. 766; In re New Chattanooga Hardware Co. (D. C., Tenn.), 27 Am. B. R. 77, 79, 190 Fed. 241, citing text.

170. Matter of Fisher (D. C., Pa.), 33 Am. B. R. 628, 219 Fed. 638; Matter of Fineman (D. C., Pa.), 34 Am. B. R. 245, 223 Fed. 652; Matter of Herlehy Co. (D. C., N. Y.), 41 Am. B. R. 171, 247 Fed. 369; Matter of McGraw (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442.

Elements constituting act of bankruptcy under subdivision a (3).—The act of bankruptcy defined by section 3a (3) of the Bankruptcy Act consists of three elements. The first is the insolvency of the debtor; the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execution or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim

than other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceeding. The third element must also be present else there is no act of bankruptcy within the meaning of this provision. Citizens Banking Co. v. Ravenna Natl. Bank, 234 U. S. 360, 32 Am. B. R. 477, 58 L. Ed. 1352.

171. Canadian Bankruptcy Act, § 3 (e). See Appendix C of this work.

172. Eng. Bankruptcy Act of 1890. § 1, provides that: “A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the high court, and the goods have been either sold or held by the sheriff for twenty-one days.”

173. S. 1035, introduced by Senator Lindsay, March 23, 1897.

of his creditors" thereby committed an act of bankruptcy; and, by § 35, it was provided that any attachment or seizure under execution of a person's property "procured by him" with a view to give a preference, should be void. The doubt which long divided the lower courts as to the meaning of these clauses was finally settled in *Wilson v. City Bank*,¹⁷⁴ wherein the Supreme Court held that no intent could be inferred from the mere neglect of the alleged bankrupt, properly sued on a just claim, to interpose an answer when there was no valid defense; and, therefore, that that intent which was an essential element of this act of bankruptcy could not be predicated on mere passive non-residence. This case has been the storm-center of the decisions on the subsection now under consideration.

(3) **INTENT NOT ESSENTIAL.**—On the question as to whether intent is an element in this act of bankruptcy, the earlier and most of the later cases have held that intent had been dropped out, and that result,—the inequity flowing from the transaction, rather than the animus of it—had been substituted instead.¹⁷⁵ Two decisions, however, held to the older doctrine, that mere passivity was not enough.¹⁷⁶ The earlier case seems to have been decided without the difference between the statutes being noted; the later is of great ability and for a time substituted doubt for what had grown to be certainty. The question reached the Supreme Court late in 1901, and was then settled by a five-to-four decision in *Wilson Bros. v. Nelson*,¹⁷⁷ which, reversing the court below, upholds the majority of the previous cases, and finally determines that intent is not an element of pleading or proof where the third act of bankruptcy is relied on.¹⁷⁸ As therein stated the act "makes the result obtained by the creditor and not the intent of the

174. 17 Wall. 473, 21 L. Ed. 723.

175. In re Meyers (Ref., N. Y.), 1 Am. B. R. 1; In re Reichman, 1 Am. B. R. 17, 91 Fed. 624; In re Moyer (D. C., Pa.), 1 Am. B. R. 577, 97 Fed. 324; In re Ferguson (D. C., N. Y.), 2 Am. B. R. 586, 95 Fed. 429; In re Rome Planing Mills (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; *Parmenter Mfg. Co. v. Stoeber* (C. C. A., 1st Cir.), 3 Am. B. R. 220, 97 Fed. 330; In re Thomas (D. C., Pa.), 4 Am. B. R. 571, 103 Fed. 272; In re Miller (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764; In re Harper (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900; *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, 58 C. C. A. 55; *Matter of Rung Furniture Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 12, 139 Fed. 526; In re Truitt (D. C., Md.), 29 Am. B. R. 570, 203 Fed. 550.

176. In re Nelson (D. C., Wis.), 1 Am. B. R. 63, 88 Fed. 76; *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839. Compare In re Kersten (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929.

177. 183 U. S. 191, 7 Am. B. R. 142, 46 L. Ed. 147.

Result and not intent essential fact.—The court in this case drew a distinction between the present act and the act of 1867, and noted the effect of omitting certain phrases, which, under the earlier act, clearly indicated that a preference must have been intended by the

act of procuring or suffering property to be taken on legal proceedings. The court said: "The act of 1898 differs from that of 1867 in wholly omitting the clauses 'with intent to give a preference to one or more of his creditors' or 'to defeat or delay the operation of this act;' and in substituting for the words 'procures or suffers his property to be taken on legal process,' the words 'suffered or permitted while insolvent, any creditor to obtain a preference through legal proceedings,' and not having, five days before a sale of the property affected, 'vacated or discharged such preference.' . . . Taking together all the provisions of the act of 1898 on this subject and contrasting them with the provisions of the act of 1867, there can be no doubt of their meaning. The third clause of § 3, omitting the word 'procure,' and the phrase 'intent to give a preference,' of the former statute, makes it an act of bankruptcy if the debtor has 'suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings,' and has not 'vacated or discharged such preference' five days before a sale of the property. . . . *This act of 1898 makes the result obtained by the creditor, and not the intent of the debtor, the essential fact.*"

178. *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, 58 C. C. A. 55, affg. 9 Am. B. R. 441.

debtor the essential fact.”¹⁷⁹ In other words, it is now the settled law that an insolvent may be thrown into bankruptcy by the requisite number of his creditors, if a judgment has been entered against him, execution issued and levy made, and sale five or less days away, irrespective of whether he procured or merely could not prevent the judgment against him. This, from the creditor's standpoint, is the high-water mark of Anglo-Saxon “acts of bankruptcy.”¹⁸⁰

(4) **SUFFERED OR PERMITTED.**—“Suffered or permitted” includes passive non-resistance as well as non-ability to resist.¹⁸¹ A debtor who does not pay a lawful debt when due, and stands by while his creditor secures a judgment against him, and levies upon his property, “suffers and permits” such judgment to be taken, and such levy to be made, and commits an act of bankruptcy under this clause.¹⁸² The mere fact of resistance by defense conducted in good faith is not material.¹⁸³ And even though an appeal is

179. *Matter of Rung Furniture Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 12, 135 Fed. 526.

Preference by legal proceedings; intent.—While a preference effected through judicial proceedings may constitute an act of bankruptcy either under subdivision a (3) or a (2) of section 3 of the Bankruptcy Act, the two subdivisions do not necessarily overlap. The distinction is to be found in the presence or absence of an actual intent on the part of the debtor to give a preference. If he has acted in such a way as to give a preference with the intent and purpose so to do, it is immaterial by what means such purpose is accomplished. In such case the act falls within subdivision a (2). But, if, through legal proceedings, a preference has in fact been permitted or procured, but without any intent or purpose on the part of the debtor to give it, then the act falls within the terms of subdivision a (3). *Matter of Musgrove Mining Co.* (D. C., Idaho), 37 Am. B. R. 628, 234 Fed. 99. See Am. B. R. Digest, § 175.

180. See further discussion of this subject by Referee Hotchkiss in *Matter of Rung Furniture Co.* (Spec. M., N. Y.), 10 Am. B. R. 44, in which the cases interpreting § 3-a (3) are collated.

181. *In re Gallagher* (Ref., Mass.), 6 Am. B. R. 255.

182. *Bogen & Trummel v. Protter* (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533.

An affirmative act on the part of the debtor is not required. If he remains passive and supine and permits his property to be taken by one creditor at the expense of the others, he has “suffered” or “permitted” a preference to be obtained. *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; *In re Thomas* (D. C., Pa.), 4 Am. B. R. 571, 103 Fed. 272; *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764; *In re Harper* (D. C., Ill.), 5 Am. B. R. 576, 105 Fed. 900. *Contra*: *Duncanson v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839, holding that there must be some act on the part of the alleged bank-

rupt either by way of active procurement or voluntary acquiescence, arising from connivance, co-operation or participation. *In re Truitt* (D. C., Md.), 29 Am. B. R. 570, 203 Fed. 550.

A petition, alleging that the debtor is insolvent and has suffered and permitted certain of his creditors to obtain a preference through legal proceedings by suffering a judgment and an attachment in execution to be issued thereon against an insurance company as garnishee; that judgment has been obtained against the garnishee in the proceedings, the amount of which is about to be paid over to the creditors thus preferred; and that the debtor has failed to have the preference thus obtained vacated, is sufficient, and alleges an act of bankruptcy. *Matter of Fineman* (D. C., Pa.), 34 Am. B. R. 245, 223 Fed. 652.

183. *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779.

Fact of resistance.—In the case of *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, the court said: “Whether or not an insolvent makes resistance to legal proceedings of a creditor to obtain preference is not very material. It may show good faith on his part, but the act of bankruptcy declared in the law is ‘suffering or permitting,’ a judgment which will result in a preference, and a failure to vacate the same within at least five days before a sale or disposition of the property affected by such preference. The Bankrupt Law seeks to prevent and, if obtained, by any means, to set aside preferences obtained against an insolvent within four months; and, in order to effect an equal distribution of the insolvent's property among creditors, it contemplates a resort to the bankruptcy court in all cases of such preferences, no matter whether the bankrupt has consented thereto or opposed the same. If the bankrupt fails to discharge a preference obtained through legal proceedings within at least five days before the property affected by the pref-

taken from the judgment, a failure to vacate it may be a preference, no attempt being made to stay an execution and sale by giving security on appeal, and it appearing *prima facie* that the debtor was insolvent.¹⁸⁴ The failure to vacate or discharge the lien of an attachment at least five days before a sale or final disposition of the property attached, where the lien was created by attachment proceedings instituted more than four months prior to the filing of an involuntary petition, does not constitute an act of bankruptcy.¹⁸⁵

(5) CREDITORS TO BE AFFECTED.—A creditor must have been preferred over other creditors by this act of bankruptcy.¹⁸⁶ The term "creditor" is defined in § 1 (9). The creditor preferred must have a provable claim;¹⁸⁷ a surety on a bond given by a corporation to secure claims for services of laborers on a public work is a creditor, and a judgment and sale in favor of the surety is a preference constituting an act of bankruptcy.¹⁸⁸ Where it is shown that the petitioning creditors induced a judgment creditor to levy execution on his judgment, they are estopped from setting up such levy as an act of bankruptcy.¹⁸⁹

(6) PREFERENCE.—"Preference" as used in this subsection refers to a resultant inequality between creditors of the same class.¹⁹⁰ The intent and purpose of this act of bankruptcy is, like all the others, to avoid a preference and to provide for an equal distribution of the debtor's property among his creditors.¹⁹¹ If the proceedings do not result in such inequality the debtor is not subject to attack.¹⁹² For instance if the property is not subject to sale under execution and the levy is therefore invalid, the proceedings do not result in a preference, and do not fall within this clause.¹⁹³ The preference must be to a creditor over other creditors of the same class, so where a landlord distrains for his rent he does not procure a preference, since he is the only creditor of his class and is entitled to the priority which the law affords him.¹⁹⁴

erence is disposed of, that is an act of bankruptcy, and on proof of the same the insolvent may be adjudged a bankrupt."

Result, a preference.—A preference may consist not only in bankrupt's procuring or suffering a judgment to be entered against him or making a transfer of his property within four months of the filing of the petition in bankruptcy, but also in the creation of a lien by way of attachment, or the confession of a judgment within four months of the filing of the petition, the existence and enforcement of which will work a preference. *Folger v. Putnam* (C. C. A., 9th Cir.), 28 Am. B. R. 173, 194 Fed. 793.

184. *Matter of Rung Furniture Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 12, 139 Fed. 526.

185. *Colston v. Austin Run Mining Co.* (C. C. A., 3d Cir.), 28 Am. B. R. 92, 194 Fed. 929.

186. See discussion, *ante*, under "First act of Bankruptcy."

187. In *re Crafts-Riordan Shoe Co.* (D. C., Mass.), 26 Am. B. R. 449, 185 Fed. 931, in which the court said: "To be creditors of the bankrupt, the plaintiff in the suit must own a demand or claim provable against him in bankruptcy."

188. *United Surety Co. v. Iowa Mfg. Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 726, 179 Fed. 55.

189. *Matter of Marks* (D. C., Pa.), 15 Am. B. R. 457, 142 Fed. 279.

190. Bankr. Act, § 60-a, *post*. See also discussion under preceding acts of bankruptcy.

191. In *re Chapman* (D. C., Ga.), 3 Am. B. R. 607, 99 Fed. 395; *Richmond Standard Spike & Iron Co. v. Allen* (C. C. A., 4th Cir.), 17 Am. B. R. 583, 148 Fed. 657; In *re Ferguson* (D. C., N. Y.), 2 Am. B. R. 586, 588, 95 Fed. 429.

192. In *re Chapman* (D. C., Ga.), 3 Am. B. R. 607, 99 Fed. 395.

193. In *Missouri* a mortgagor's equity of redemption, after condition broken and possession is in the mortgagee, is not subject to sale under execution, and a levy thereon is invalid. Hence, the failure of a mortgagor to vacate a levy within five days prior to the sale thereunder does not constitute an act of bankruptcy. *Matter of Moark-Nemo Mining Co.* (D. C., Mo.), 34 Am. B. R. 201, 219 Fed. 340.

194. In *re Belknap* (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646. As to whether labor-

(7) **LEGAL PROCEEDINGS.**—(I) *In general.*—“Legal proceedings” means proceedings in a court to assert a legal remedy or obtain an equitable relief.¹⁹⁵ They include all proceedings in a court of justice interlocutory or final, whereby the property of a debtor is seized and diverted from his general creditors.¹⁹⁶ The issuance of execution and a levy under a confession of judgment are “legal proceedings” within the clause.¹⁹⁷

(II) *Attachment proceedings.*—Attachment proceedings are legal proceedings within the meaning of the clause.¹⁹⁸ Attachment proceedings which have not been followed by a judgment are not of themselves sufficient; there must be an actual determination of the claim and the consequent judgment, execution, levy and a day of sale appointed.¹⁹⁹

(III) *Receivership; supplementary proceedings.*—A suit in a State court for the appointment of a receiver whereby certain creditors were preferred is

ers having judgments for wages are in the same class as general creditors, see *Matter of Toledo Portland Cement Co.* (Ref., Mich.), 17 Am. B. R. 375; *Mather v. Coe, Powers & Co.* (D. C., Ohio), 1 Am. B. R. 504, 92 Fed. 333.

195. Compare *In re Emalie* (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed. 291, revg. 3 Am. B. R. 282, 97 Fed. 929.

196. *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812.

197. *In re Thomas* (D. C., Pa.), 4 Am. B. R. 571, 103 Fed. 272; *Wilson Bros. v. Nelson*, 183 U. S. 191, 7 Am. B. R. 142.

A confession of judgment by a debtor may under certain circumstances constitute a transfer and if made with intent to prefer would constitute an act of bankruptcy under clause a(2) of this section. *In re Truitt* (D. C., Md.), 29 Am. B. R. 570, 203 Fed. 550; *In re Nusbaum* (D. C., N. Y.), 18 Am. B. R. 598, 152 Fed. 835. See Am. Bankr. R. Dig., § 181.

Allegations as to confession of judgment.—A petition, alleging as an act of bankruptcy, that the debtor confessed a judgment with an intent to prefer, is not insufficient for failure to set forth the facts and circumstances from which such intent may be inferred. *Matter of Musgrove Mining Co.* (D. C., Idaho), 37 Am. B. R. 628, 234 Fed. 99.

198. *In re Putnam* (D. C., Cal.), 27 Am. B. R. 923, 193 Fed. 464.

199. *In re Vetterman* (D. C., N. H.), 14 Am. B. R. 245, 135 Fed. 443; *In re Standard Steel Casting Co.* (D. C., Va.), 10 Am. B. R. 594, 124 Fed. 75.

Attachment proceedings.—In the case of *In re Crafts-Riordan Shoe Co.* (D. C., Mass.), 26 Am. B. R. 449, 185 Fed. 931, it appeared that, within the four months' period, a plaintiff in a suit against the bankrupt had obtained an attachment lien upon property of the bankrupt which was sold simply because it could not be kept without great and disproportionate expense, but no judgment against the bankrupt was obtained prior to bankruptcy. It was held that the fact that bankrupt failed to vacate the attachment at least five days before such sale

did not create a preference constituting an act of bankruptcy within section 3-a (3) since there was no “final disposition” of the property and such section was not intended to include sales which merely substitute money for property without rendering the alleged preference obtained by the attachment any more effective than it was before the sale. In this case the court said: “In the cases which have held preferences to have been obtained through legal proceedings, and an attachment has formed part of the proceedings, the attachment has been either after judgment in the suit, or, if before judgment, has been followed by a judgment before the petition in bankruptcy, so that the attachment lien has passed beyond the stage during which it remains wholly uncertain whether there is really any claim against the defendant or not.”

In the case of *Parmenter Mfg. Co. v. Stoevers* (C. C. A., 1st Cir.), 3 Am. B. R. 220, 97 Fed. 330, 38 C. C. A. 200, there had been such an attachment more than four months before the involuntary petition. This had been followed by judgment, execution, seizure, and sale within the four-month period. In affirming adjudication on the petition, it was said that the preference permitted was the execution sale, and that the four-month period referred to in the statute ran, not from the attachment, but “from a date connected with the proceedings after judgment.” If the sale constituted the preference, no preference was obtained merely by the attachment, and none until there had at least been judgment in the suit. See also *In re Harper* (D. C., Ill.), 5 Am. B. R. 576, 105 Fed. 960; *In re Windt* (D. C., Conn.), 24 Am. B. R. 536, 177 Fed. 584.

Failure to vacate attachment lien.—Although the mere suffering or permitting, while insolvent, a creditor to obtain a preference, alone does not constitute an act of bankruptcy under section 3-a (3), but the debtor must have failed at least five days before a sale or final disposition of the property to have vacated or discharged such preference, it is incumbent upon an insolvent person to discharge or vacate a lien, secured

such a proceeding,²⁰⁰ and so also are supplementary proceedings whereby a debtor of a judgment debtor is directed to pay a certain amount to the sheriff to apply on the judgment.²⁰¹

(IV) *Distress for rent; statutory liens.*—A distraint of goods under a landlord's warrant is not "a legal proceeding" under this clause.²⁰² Where distraint is allowed it exists because of a lien upon the property found upon the leased premises.²⁰³ The rule is that a proceeding to enforce a statutory lien which is not in any way affected by the adjudication of bankruptcy does not fall within this clause.²⁰⁴

(8) *SALE OR DISPOSITION.*—"Sale or final disposition" as used in this clause means an act having the effect of a sale, whereby the ownership and control of the property is transferred from one person to another;²⁰⁵ an insolvent debtor does not commit an act of bankruptcy, rendering him subject to involuntary adjudication, by mere inaction for the period of four months after the levy of an execution on his real estate. Such inaction does not amount to a "final disposition."²⁰⁶ If the transaction is fictitious, invalid or otherwise ineffectual, because the proceedings are unauthorized so that the estate of the debtor is not depleted, or the rights of creditors affected, it does not constitute a sale or disposition.²⁰⁷ The securing by a creditor of the amount of his claim through attachment in execution proceedings is a "final disposition of any property affected by such preference," as effectually as if he had received payment from the proceeds of a sale under a writ.²⁰⁸ The

by an attachment upon his property, at least five days before a period of four months expires following the date of the levy of such attachment, and if he fails to do so he commits an act of bankruptcy. *Folger v. Putnam* (C. C. A., 9th Cir.), 28 Am. B. R. 173, 194 Fed. 793. This case seems to have been overruled in effect by *Citizens Banking Co. v. Ravenna Nat. Bank*, 234 U. S. 360, 32 Am. B. R. 477.

The failure of an alleged bankrupt to release the levy of an attachment upon his supposed interest in property transferred by him nearly seven years previously does not constitute an act of bankruptcy, even though followed by averments that such transfer was a fraudulent one. *Matter of Murphy* (D. C., Cal.), 35 Am. B. R. 320, 228 Fed. 1018.

^{200.} *In re Kersten* (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929; but otherwise where there is no such preference. *In re Empire Metallic Bedstead Co.* (C. C. A., 2d Cir.), 3 Am. B. R. 575, 98 Fed. 981; *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436.

^{201.} *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764.

^{202.} *In re Belknap* (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646; *Richmond Standard Spike & Iron Co. v. Allen* (C. C. A., 4th Cir.), 17 Am. B. R. 583, 148 Fed. 657.

^{203.} *Distraint by landlord.*—In the case of *Richmond Standard Steel Spike & Iron Co. v. Allen* (C. C. A., 4th Cir.), 17 Am. B. R. 583, 148 Fed. 657, the court said: "Under the law of Virginia, the right of the landlord to distraint the property of the tenant for rent has a priority over any lien created

on such property after it is carried onto the leased premises. In other words, as we understand the Virginia statute, the lien of the landlord for rent attaches to the property of the tenant as soon as it is placed on the premises, and this lien continues and is capable of being enforced in the manner and under the conditions provided in the statute. It has priority over all other liens subsequently created and retains this position of dignity provided the landlord pursues his right in apt time. It has been held that the preference by legal proceedings contemplated by the Bankruptcy Act does not include a levy upon a judgment of foreclosure of a lien which affects only the property bound by the lien."

^{204.} *In re Mero* (D. C., Ct.), 12 Am. B. R. 171, 123 Fed. 630; *Owen v. Brown* (C. C. A., 8th Cir.), 9 Am. B. R. 717, 120 Fed. 812; *In re Chapman* (D. C., Ga.), 3 Am. B. R. 607, 99 Fed. 395; *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442. See *Bankr. Act*, § 67-f, *post*.

^{205.} *Citizens Banking Co. v. Ravenna National Bank*, 234 U. S. 360, 32 Am. B. R. 477, 58 L. Ed. 1352.

^{206.} *Citizens Banking Co. v. Ravenna Nat. Bank*, 234 U. S. 360, 32 Am. B. R. 477, 58 L. Ed. 1352.

^{207.} See under § 60, sub-head "Estate must be diminished," *post*. *Matter of Moark-nemo Cons. Mining Co.* (D. C., Mo.), 34 Am. B. R. 201, 219 Fed. 340.

^{208.} *Matter of Fineman* (D. C., Pa.), 34 Am. B. R. 245, 223 Fed. 652. And see also *In re Harper* (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900; *In re Goldie Fisher* (D. C., Pa.), 33 Am. B. R. 628, 219 Fed. 638.

"final disposition" of the property of the debtor may take place without a sale, in which case the time of the disposition is the day that the property finally passed irrevocably from the control of the debtor.²⁰⁰ But as held by the Supreme Court the term signifies an affirmative act of disposal, not a mere lapse of time which leaves the lien intact and still requiring enforcement.²¹⁰

(9) VACATING OR DISCHARGING PREFERENCE.—(I) *In general*.—It is not the judgment itself, or the levy thereunder, which constitutes the act of bankruptcy, but the failure on the part of the debtor to have the same vacated or discharged five days before a sale or final disposition of the property.²¹¹ The act of bankruptcy seems to be consummated five days before the sale, if at that time the levy has not been lifted; the sale having been noticed, and nothing having been done by the judgment debtor to set aside the preference, the creditors may file a petition against him; they are not required to wait for the sale.²¹²

200. *In re Harper* (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900; *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764, holding that a payment of money on an execution was a technical levy, and was a "final disposition," (although a sale was not had) and constituted an act of bankruptcy. *Scheuer v. Smith & Montgomery Book Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 384, 112 Fed. 407.

Final disposition.—In the case of *In re Tupper* (D. C., N. Y.), 20 Am. B. R. 824, 829, 163 Fed. 766, the court said: "It seems to me that effect is to be given to the words 'the final disposition of any property affected by such preference.' The 'final disposition' is not a gift of the property to some third person, or a voluntary transfer to the creditor in satisfaction of a preferential judgment as that would be merely a sale in payment. Congress had in mind when it enacted this law, the fact that there are different ways or modes of disposing of property, of enforcing executions, judgments, liens, and it referred to the ordinary method of disposition by way of sale, and then used the words 'or final disposition,' to cover every other method of passing the control and dominion of the property from the debtor, insolvent person, to another or to others, either absolutely or as security to the preferred creditor, to the exclusion of his other creditors. The purpose of the law is that no one creditor shall be preferred over the others by an insolvent person, but that all creditors shall share equally, except as to honest liens created more than four months prior to the filing of a petition in bankruptcy. It was not intended that a creditor should obtain a lien on all the real estate of an insolvent person, by a judgment filed and docketed, and then lie still, without issuing execution or making a levy and advertising the property for sale for four months, and until such judgment had become unimpeachable under the bankruptcy act or otherwise, thereby gaining a preference, an absolute security for the debt, and it might be to the extent of the entire

property of the insolvent person, and thus excluding other creditors from any share in the estate. It has been held that the advertised, or even proposed sale is not in all cases necessary under subdivision 3 of § 3." Citing *In re Harper* (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900; *In re Miller et al.* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764; *Scheuer v. Smith & Montgomery Book, etc., Co.*, 7 Am. B. R. 384, 112 Fed. 407, 50 C. C. A. 312. The decision in the *Tupper* case was approved and followed in *Ravenna Nat. Bank v. Curtiss* (D. C., Ohio), 30 Am. B. R. 818; *s. c. sub nom Citizens Banking Co. v. Ravenna Nat. Bank*, 234 U. S. 360, 32 Am. B. R. 477, which in effect renders absolute the rule laid down in the *Tupper* case.

210. *Citizens Banking Co. v. Ravenna Nat. Bank*, 234 U. S. 360, 32 Am. B. R. 477, 58 L. Ed. 1352; *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442. See also *Matter of Herlchy Co.* (D. C., N. Y.), 41 Am. B. R. 171, 247 Fed. 369.

211. *In re Vastbinder* (D. C., Pa.), 11 Am. B. R. 118, 121, 126 Fed. 417; *Matter of Rung Furniture Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 12, 139 Fed. 526; *Folger v. Putnam* (C. C. A., 9th Cir.), 28 Am. B. R. 173, 194 Fed. 793.

Failure to discharge by partnership.—Where an execution was levied upon the property of an insolvent partnership after its dissolution the failure to discharge the levy constitutes an act of bankruptcy by all the members of the firm, for which it and all the partners may be adjudged bankrupt. *Holmes v. Baker & Hamilton* (C. C. A., 9th Cir.), 20 Am. B. R. 252, 160 Fed. 322.

212. *In re National Hotel & Cafe Co.* (D. C., Pa.), 15 Am. B. R. 69, 138 Fed. 947.

Validity of execution.—Where the only ground upon which creditors claimed an adjudication in bankruptcy was that of preferring an execution creditor by failing to discharge the lien, and where the testimony of the deputy sheriff shows clearly that he made on actual levy and the alleged bankrupt protested against the levy from the beginning and had a right to have its validity determined by a proper tribunal,

(II) *Day set for sale.*—It must appear that the sale or final disposition of the property had been arranged for before the act of bankruptcy may be consummated.²¹³ "Five days before a sale" has been held to mean the same as "five days before the day set for the sale."²¹⁴ This enlargement of meaning would seem essential to carry out the clear intent of the act; if a petition could not be filed until after the actual sale, creditors would often be remediless.²¹⁵ The debtor has all of the fifth day prior to the sale or disposition on which to vacate or discharge the preference.²¹⁶ If he fails so to do the act of bankruptcy is then complete and a petition may then be filed against him.²¹⁷ There must be a legal notice or advertisement of the sale specifying the day when it is to take place.²¹⁸ Until some day is authoritatively fixed for the sale or disposition, the time for the consummation of this act of bankruptcy does not commence to run.²¹⁹ It has been held, however, that where a preference was obtained through legal proceedings, and the insolvent debtor has put it out of his power to procure the vacating or discharging of such preferences, an act of bankruptcy has been committed.²²⁰

(III) *Time when lien obtained immaterial.*—There is nothing in the provisions of subdivision a (3) which suggests that the time when the lien is obtained has any bearing upon when the property must be freed from it to avoid an act of bankruptcy. It will suffice if the lien is lifted five days before a sale or final disposition of any of the property affected. This is so notwithstanding the provisions of sections 3-b, 67-c, and 67-f of the bankruptcy act.²²¹

(10) CONSTRUCTION OF SUBSECTION.—The courts have interpreted this subdivision broadly. A payment of money to a sheriff by a debtor of the judgment debtor against whom an execution has been issued is a technical levy and available as an act of bankruptcy.²²² So also is a garnishee process issued after execution unsatisfied.²²³ So also is failure to pay matured judgment

the act of bankruptcy alleged, was not committed. *In re Bodek* (D. C., Pa.), 26 Am. B. R. 476, 188 Fed. 817.

213. *In re Windt* (D. C., Conn.), 24 Am. B. R. 536, 177 Fed. 584.

214. *In re Meyers* (Ref., N. Y.), 1 Am. B. R. 1; *In re Elmira Steel Co.* (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456. And compare *Re North* (1895), 2 Q. B. 264.

215. *Bogen v. Protter* (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533. See also *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764; *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 612, in which case the court said: "The act of bankruptcy is not consummated until the expiration of the time in which the debtor may vacate or discharge the lien, and the last day for doing this is five days before the day of sale of the property is advertised."

216. *Pittsburgh Laundry Supply Co. v. Imperial Laundry* (C. C. A., 3d Cir.), 18 Am. B. R. 756, 154 Fed. 662. See also as to computation time, *Bankr. Act*, § 31, *post*.

217. *In re Nusbaum* (D. C., N. Y.), 18 Am. B. R. 598, 152 Fed. 835, in which case Judge Ray says: "I am of the opinion that, while such failure to discharge a levy five days before the sale is an act of bank-

ruptcy, such failure four and three and two days and one day before the sale are also distinct acts of bankruptcy, as is the failure on the day of sale." This is important in determining when the four months' period begins to run.

218. *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812.

219. *In re Vetterman* (D. C., N. H.), 14 Am. B. R. 245, 135 Fed. 443; *Seaboard Steel Casting Co. v. Trigg* (D. C., Va.), 10 Am. B. R. 594, 124 Fed. 75; *Matter of Herlehy Co.* (D. C., N. Y.), 41 Am. B. R. 171, 247 Fed. 368. Compare *In re Harper* (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900, as to meaning of "final disposition."

220. *Scheuer v. Smith & Montgomery Book Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 384, 112 Fed. 407. Compare *In re Moyer* (D. C., Pa.), 1 Am. B. R. 577, 93 Fed. 188; *In re Reichman* (D. C., Mo.), 1 Am. B. R. 17, 91 Fed. 624.

Judgment acquired before but execution levied and returned within four months' period.—*Matter of Superior Jewelry Co.* (C. C. A., 2d Cir.), 39 Am. B. R. 575, 243 Fed. 368.

221. *Citizens Banking Co. v. Ravenna Nat. Bank*, 234 U. S. 360, 32 Am. B. R. 477, 58 L. Ed. 1352.

222. *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764.

223. *In re Harper* (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900.

Securing claim through attachment in execution.—The securing of the creditor of

notes followed by entry of judgment and execution issued.²²⁴ Though the judgment is more than four months old, the levy, if within that period, followed by a sale, is an act of bankruptcy.²²⁵ But a mere entry of judgment without the issue of an execution is not.²²⁶ The enforcement of a lien of a judgment obtained prior to the enactment of the bankruptcy act by the issue of an execution is not a preference and the provisions of § 3-a (3) do not apply.²²⁷

d. Fourth act of bankruptcy; a general assignment or receivership.—(1) **IN GENERAL.**—By subsection 4 of this section an act of bankruptcy is committed by a person having made “a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a territory, or of the United States.” The making of a general assignment for the benefit of creditors, with or without preferences, has been an act of bankruptcy for over one hundred years.²²⁸ Though not so in words under the law of 1867, late in the history of that statute it was quite generally held that, being a palpable fraud on the law, it was an act of bankruptcy.²²⁹ While, under the decisions, there would seem little doubt that a general assignment is an act of bankruptcy, because intended to hinder or delay creditors,²³⁰ this new clause, § 3-a (4), removes all question and is an affirmative declaration of great importance to the system. Such an assignment, whether of a person or copartnership, or of one of that class of corporations mentioned in § 4-b, even though without preferences, is now, if made within four months of the filing of the petition, a constructive fraud on the act,²³¹ and, in itself, without either insolvency or intent, an available act of bankruptcy.²³² This does not mean that general assignments are no longer lawful; rather, that the assignor and his counsel thereby set the door of the court of

the amount of his claim through attachment in execution proceedings is a “final disposition of property affected by such preference” as effectively as if he had received payment from the proceeds of a sale under a writ. *Matter of Fineman* (D. C., Pa.), 34 Am. B. R. 245, 223 Fed. 652.

²²⁴ *In re Thomas* (D. C., Pa.), 4 Am. B. R. 571, 103 Fed. 272.

Judgment note.—Where a judgment note is given by a debtor to a surety on a bond to secure the payment of claims arising on a government contract, and a transfer by execution subsequently ensues to such surety, in part payment of a sum advanced by the surety under the bond, such transfer was a preference and as it was not subsequently vacated or discharged, it constituted an act of bankruptcy within § 3-a(3) of the act. *United Surety Co. v. Iowa Mfg. Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 726, 179 Fed. 55.

²²⁵ *In re Ferguson* (D. C., N. Y.), 2 Am. B. R. 586, 95 Fed. 429.

²²⁶ *In re Anderson*, 2 N. B. N. Rep. 1000. Compare also on the general subject, *In re Chapman* (D. C., Ga.), 3 Am. B. R. 607, 99 Fed. 395, and *Parmenter Mfg. Co. v. Stoeber* (C. C. A., 1st Cir.), 3 Am. B. R. 220, 97 Fed. 330.

²²⁷ *Owen v. Brown* (C. C. A., 8th Cir.),

9 Am. B. R. 717, 120 Fed. 812, 57 C. C. A. 180.

²²⁸ Compare *Jones v. Sleeper*, Fed. Cas. 7,496.

²²⁹ Compare *Globe Ins. Co. v. Cleveland Ins. Co.*, Fed. Cas. 5,486; *Platt v. Preston*, Fed. Cas. 11,219; *In re Kasson*, Fed. Cas. 7,617; *In re Mendelsohn*, Fed. Cas. 9,420; *MacDonald v. Moore*, Fed. Cas. 8,763.

²³⁰ Bankr. Act, § 3-a(1).

²³¹ *In re Gutwillig* (C. C. A., 2d Cir.), 1 Am. B. R. 388, 92 Fed. 337; *In re Gray*, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, 62 N. Y. Supp. 618.

²³² *West Co. v. Lea Bros.*, 174 U. S. 594, 2 Am. B. R. 463, 43 L. Ed. 1098; *Day v. Beck, etc., Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 175, 114 Fed. 834.

Intent of the assignment is immaterial.—The assignment itself is a constructive fraud upon the Bankruptcy Act and constitutes an act of bankruptcy. *Whittlesey v. Becker & Co.*, 25 Am. B. R. 672, 142 N. Y. App. Div. 313, 126 N. Y. Supp. 1046. See also *Gill v. Farmers & Manufacturers Bank* (Mo. Ct. of App.), 189 Mo. Ct. of App. 401, 35 Am. B. R. 91, 176 S. W. 1111; *Hill v. Western Electric Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 332, 214 Fed. 243; *Utz & Dunn Co. v. Regulator Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 167, 213 Fed. 315.

bankruptcy ajar to such creditors as may choose to enter.²³³ Fraud is not imputed by the mere act of making a general assignment; the purpose of the debtor may be laudable, and under certain circumstances will be allowed to stand, so that the debtor's estate may be administered outside of a court of bankruptcy, to the mutual advantage of all concerned.²³⁴

(2) WHAT CONSTITUTES A GENERAL ASSIGNMENT.—A general assignment to constitute an act of bankruptcy under this subsection must be for the benefit "of creditors." A direct transfer to creditors after the intervention of a trustee duly appointed, is not such an assignment.²³⁵ A general assignment for the benefit of creditors is one which transfers all or substantially all of the debtor's property to another person in trust to collect the amounts owing to the assignor, with power to sell and convey the property, to distribute the proceeds among the creditors of the assignor, and to return the surplus, if any, to the debtor.²³⁶ A formal deed of assignment is not required.²³⁷ A debtor may have prepared a deed of assignment with intent to execute it, but so long as he has left it unexecuted or in escrow, the general assignment con-

233. Assignments not unlawful.—In the case of *In re Chase* (C. C. A., 1st Cir.), 10 Am. B. R. 677, 124 Fed. 753, 59 C. C. A. 629, it was held that a general common-law assignment for the benefit of creditors, directing an equal distribution among them, without any attempt to defraud or embarrass persons to whom the assignor is under liability, is not contrary to the policy of the bankruptcy law. See also *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, holding that an assignment for the benefit of creditors cannot be taken to have been prohibited by the bankruptcy law absolutely in every event. *Summers v. Abbott* (C. C. A., 8th Cir.), 10 Am. B. R. 254, 122 Fed. 36; *In re Fish Bros. Wagon Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 149, 164 Fed. 553; *Matter of Creech Bros. Lumber Co.* (C. C. A., 9th Cir.), 39 Am. B. R. 487, 240 Fed. 8.

Accounting by assignee, on commission of new act of bankruptcy.—Where an assignment for benefit of creditors is made under a State law, recognized by the highest court of the State as valid and subsisting, and is assented to by all of the existing creditors, and no petition in bankruptcy is filed within the four months' limit of the Bankruptcy Act, the assignment cannot be set aside and the assignee compelled to account for all the property transferred by the deed of assignment, under a petition for adjudication by a consenting creditor predicated upon new credits and a new act of bankruptcy. *Matter of Bridge* (D. C., Wash.), 37 Am. B. R. 53, 250 Fed. 174.

234. Assignment does not result in bankruptcy.—In the case of *Summers v. Abbott* (C. C. A., 8th Cir.), 10 Am. B. R. 254, 122 Fed. 366, the court said "The bankrupt act declares the making of a general assignment for the benefit of creditors shall constitute an act of bankruptcy, but it nowhere declares that when the debtor has committed an act of bankruptcy he shall go into the bankrupt court and have himself adjudged a bankrupt. Many debtors who commit acts

of bankruptcy struggle on and finally pay all the debts they owe, which is more than would have been done had they gone into the bankrupt court and had themselves adjudged bankrupts. It is open to the creditors of one who has committed an act of bankruptcy to proceed to have him adjudged a bankrupt, but it is optional and not obligatory upon his creditors to do this. As a matter of fact, thousands of debtors commit acts of bankruptcy who are never adjudged bankrupts; their creditors preferring to let their debtor administer his own estate, rather than turn it over to a bankruptcy court."

Avoiding attachments.—The Bankruptcy Act recognizes the right of the bankrupt to make a voluntary assignment of his property, with the purpose of avoiding attachments, and thereby securing an equal distribution of his property among all his creditors, and it cannot be predicated of such proceeding that its purpose is to defraud the attaching creditors. *Bell v. Blessing* (C. C. A., 9th Cir.), 35 Am. B. R. 672, 225 Fed. 750.

235. Anniston Iron & Supply Co. v. Anniston Rolling Mills Co. (D. C., Ala.), 11 Am. B. R. 200, 125 Fed. 974.

236. Matter of McCrum (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207. See also *Doty v. Mason* (D. C., Fla.), 40 Am. B. R. 58, 244 Fed. 587.

237. In re Federal Lumber Co. (D. C., Mass.), 26 Am. B. R. 438, 185 Fed. 926.

Formal instrument not required.—The term general assignment, within the meaning of the Bankruptcy Act, is to be taken in its generic sense, and embraces any conveyance at common law or by statute by which one intends an absolute and unconditional appropriation of all his property to pay his creditors, share and share alike. The assignment need not be formal, and it is not necessary that it should be valid for all purposes, but an absolute transfer by the debtor of both the legal and equitable titles is indispensable. *Matter of Matthews & Co.* (D. C., N. J.), 36 Am. B. R. 501, 229 Fed. 309.

templated has not been made.²³⁸ But it is not essential that all the creditors accept the terms imposed by the instrument, if it appears on its face to have been a disposition of all the property of the assignor for the benefit of his creditors.²³⁹ As already indicated the insolvency of the debtor is not an essential fact.²⁴⁰ Whatever may be the form of the conveyance in trust of the debtor's property, if it cover all his property and be for the payment of

238. *In re Federal Lumber Co.* (D. C., Mass.), 26 Am. B. R. 438, 185 Fed. 926.

Delivery of deed of assignment.—Where a deed of assignment for the benefit of creditors has not been delivered, the fact that the assignee acquires possession of a very small part of the property under a misapprehension as to his rights, does not constitute an act of bankruptcy. A general assignment for the benefit of creditors has not been made within the purview of the Bankruptcy Act where the deed of assignment is left in escrow under the condition that it is not to be delivered until all of the creditors agree to the assignment. *Carpenter & Co. v. Lybrand* (C. C. A., 4th Cir.), 36 Am. B. R. 12, 230 Fed. 84.

239. Acceptance of assignment by creditors.—In the case of *In re Courtenay Mercantile Co.* (D. C., N. Dak.), 26 Am. B. R. 365, 186 Fed. 352, it appeared that a corporation made a deed of assignment for the benefit of "those of its creditors who shall become parties thereto;" the assignee accepted the trust, and took possession of the property; some of the creditors did not assent to the terms of the deed. It was held that as to the assignor the assignment was valid and that it therefore constituted a general assignment under the Bankruptcy Act, notwithstanding its invalidity as to dissenting creditors. The court said: "On the face of the instrument here involved, it was a disposition of all the property of the assignor for the benefit of his creditors. All the creditors had a right to accept its benefits. The assignor could in no way control this discretion. Their right to do this would continue until the estate had been distributed. The character of the instrument should be judged as of the time of its execution and delivery. Otherwise the whole estate could be converted into cash, and administered under the deed, without its being possible to ascertain whether it was an assignment for the benefit of creditors, or a security for a part of the creditors. Such a construction of the instrument would make it possible for any creditor to escape the provisions of the Federal Bankruptcy Act by the mere phrasing of a general assignment of his property. When a debtor assigns all his property in trust for the benefit of his creditors, provided they elect to accept the terms of the deed, he makes a general assignment for the benefit of creditors, within the meaning of section 3 of the Bankruptcy Act. It is not necessary that the assignment be valid as to the dissenting creditors. *Griffin v. Dut-*

ton (C. C. A., 1st Cir.), 21 Am. B. R. 449, 165 Fed. 626, 91 C. C. A. 614; *Canner v. Webster-Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 168 Fed. 519, 93 C. C. A. 541. If it is binding upon the assignor, and has the characteristics mentioned, it subjects the person or corporation making it to an involuntary proceeding under the Federal Bankruptcy Act."

240. Solvency no defense.—In the case of *West Co. v. Lea*, 2 Am. B. R. 463, 174 U. S. 594, the court said: "Our conclusion, then, is that, as a deed of general assignment for the benefit of creditors is made by the Bankruptcy Act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, that the denial of insolvency by way of defense to a petition based upon the making of a general assignment is not warranted by the bankruptcy law." See also *Green River Deposit Bank v. Craig Bros.* (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137; *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102; *Canner v. Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 168 Fed. 519; *In re Farthing* (D. C., N. Car.), 29 Am. B. R. 732, 202 Fed. 557, *Corbett v. Riddle* (C. C. A., 4th Cir.), 31 Am. B. R. 330, 209 Fed. 811; *Moody etc. v. Clinton, etc., Co.* (C. C. A., 5th Cir.), 40 Am. B. R. 441, 246 Fed. 653. An assignment for the benefit of creditors is itself an act of bankruptcy, without regard to whether actual fraud was intended by the debtor, or whether he is solvent or insolvent. *Gill v. Farmers' & Manufacturers' Bank* (Mo. [Kan. City] Ct. of App.), 189 Mo. Ct. of App. 401, 35 Am. B. R. 91, 176 S. W. 1111. See Am. B. R. Digest, §§ 157, 184.

Insolvency as element.—The attempt of a debtor through the operation of a general assignment for the benefit of creditors to place his property out of the reach of his creditors, even for the laudable purpose of assuring to them the ultimate payment of their claims, constitutes in itself an act of bankruptcy, irrespective of the question of insolvency. *Matter of Utley* (D. C., Pa.), 37 Am. B. R. 670, 235 Fed. 905.

A general assignment for the benefit of creditors is an act of bankruptcy to which there can be no possible defense, except a denial of the fact. If it is followed by a petition in bankruptcy the bankruptcy court obtains exclusive jurisdiction entirely irrespective of the question of solvency or insolvency. *Matter of Federal Mail & Express Co.* (D. C., N. Y.), 37 Am. B. R. 240, 233 Fed. 691.

his debts, it operates in law as a general assignment for the benefit of creditors.²⁴¹ For instance a confession of judgment by a debtor to a trustee for the benefit of his creditors,²⁴² and any general assignment for the benefit of creditors under a statute regulating this common-law right,²⁴³ have been held to be general assignments within the bankruptcy act. A general assignment for the benefit of creditors may be made by a corporation, by the proper resolution being adopted by directors and stockholders,²⁴⁴ but the act is not consummated so as to constitute an act of bankruptcy, if the proposed plan was never carried into effect.²⁴⁵ An assignment may be invalid as to other

^{241.} *In re Salmon* (D. C., Mo.), 16 Am. B. R. 122, 143 Fed. 395; *In re Hersey* (D. C., Iowa), 22 Am. B. R. 856, 171 Fed. 998; *In re Tomlinson Co.* (C. C. A., 8th Cir.), 18 Am. B. R. 691, 154 Fed. 834, holding that "a general assignment" contemplated by the Act is to be taken in its generic sense and embraces any conveyance at common law or by statute by which the parties intend to make an absolute and unconditional appropriation of the property conveyed to raise funds to pay the debts of the vendor, share and share alike; *Lennox v. Allen Lane Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 648, 167 Fed. 114; *Moody, etc. v. Clinton, etc., Co.* (C. C. A., 5th Cir.), 40 Am. B. R. 441, 246 Fed. 653.

All the property of the debtor must be assigned in trust for distribution among all his creditors. *Missouri Elec. Co. v. Hamilton, etc. Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 270, 165 Fed. 283; an instrument which transfers neither the legal or equitable title is insufficient; *Matter of Matthews & Co.* (D. C., N. J.), 36 Am. B. R. 501, 229 Fed. 309.

The elements of an insolvency law are insolvency, surrender of property, its administration by a receiver or trustee, distribution of the assets among creditors, and a provision for priorities or other matters not permissible in the absence of such a statute; and a provision for the discharge of the debtor from the unpaid balance of his debts is not essential. *In re Weedman Stave Co.* (D. C., Ark.), 29 Am. B. R. 460, 199 Fed. 948; *Matter of Heleker Brothers Co.* (D. C., Kan.), 33 Am. B. R. 503, 216 Fed. 963, quoting text with approval.

A special deposit by a debtor, three days before the institution of bankruptcy proceedings against her, of all her assets with a bank which was one of her creditors, with directions to pay all creditors their pro rata share, constitutes an assignment for the benefit of creditors within the meaning of the Bankruptcy Act, and is void as against the trustee in bankruptcy. *Gill v. Farmers' & Manufacturers' Bank* (Mo. (Kan. City) Ct. of App.), 189 Mo. Ct. of App. 401, 35 Am. B. R. 91, 176 S. W. 1111.

What constitutes general assignment.—The term "general assignment for the benefit of creditors," as used in section 3a (4) of the Bankruptcy Act, does not concern itself merely with such acts of a debtor as would constitute an assignment for the benefit of creditors under the laws of the State in which

it is made or, merely with the form of the written instrument employed to effectuate such purpose; on the contrary, the Act does concern itself with, and does contemplate, all acts of a debtor, regardless of the manner or form of their accomplishment, by which he parts with the title and possession of all his property of every kind and nature for the benefit of his creditors, to be disposed of by any means his trustee or assignee by him selected and named may employ, independent of the Bankruptcy Act. Hence where the effect of an instrument having a defeasance clause and claimed to be mortgage was to pass the legal title to all the property of the bankrupt to trustees named by it, and under which they took actual possession of its property, with full power of disposition and distribution of the proceeds to the creditors, the writing and the entire transaction thereunder constituted a general assignment for the benefit of creditors as contemplated by the Bankruptcy Act, and, hence, was an act of bankruptcy. *Matter of Heleker Brothers Co.* (D. C., Kan.), 33 Am. B. R. 503 216 Fed. 963.

Omissions of valueless property.—The fact that certain property of no value is omitted from an instrument purporting to be a general assignment does not deprive it of its character as such. *Matter of Dashiell* (C. C. A., 6th Cir.), 40 Am. B. R. 649, 246 Fed. 366.

^{242.} *In re Green & Rogers* (D. C., Pa.), 5 Am. B. R. 848, 106 Fed. 313.

^{243.} *In re Gutwillig* (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 425; *In re Sievers* (D. Mo.), 1 Am. B. R. 117, 91 Fed. 366, both of which cases were later affirmed.

^{244.} *Clark v. American Mfg. & Enameling Co.* (C. C. A., 4th Cir.), 4 Am. B. R. 351, 101 Fed. 962.

The action of the stockholders of a corporation at a regular meeting in the adoption of a resolution authorizing its board of directors to appoint a committee to advertise and sell, at public auction, the property of the corporation, valued at \$25,000, for not less than \$22,500, does not constitute a "general assignment for the benefit of creditors." *In re Hartwell Oil Mills* (D. C., Ga.), 21 Am. B. R. 586, 165 Fed. 555.

^{245.} In the case of *In re Federal Lumber Co.* (D. C., Mass.), 26 Am. B. R. 438, 185 Fed. 928, it was held that while a corporation may commit an act of bankruptcy by making an assignment for creditors without a formal deed, and while an assignment, invalid for some purposes, may be sufficient to constitute such an act of bankruptcy, nevertheless the adoption of resolutions instructing the corporation's treasurer to reduce its

members of a firm, being executed only by one of them.²⁴⁶ But a voluntary assignment by one partner of all the assets of a firm for the benefit of firm creditors constitutes an act of bankruptcy for which the firm may be adjudged bankrupt, although the other partner did not participate therein.²⁴⁷ An assignment constitutes an act of bankruptcy, although it be not valid for all purposes, for instance, because of a want of the assent of creditors.²⁴⁸ Neither a bill of sale nor a mortgage is usually a general assignment.²⁴⁹

(3) APPOINTMENT OF RECEIVER OR TRUSTEE.—(I) *In general*.—After *In re Empire Metallic Bedstead Co.*,²⁵⁰ it was long thought to be settled that the voluntary application of an insolvent corporation for a receivership under State laws is not a general assignment, and, therefore, not an act of bankruptcy under § 3-a (4),²⁵¹ though there is now persuasive authority that it is under § 3-a (1). It followed that a suit by one partner against the other for an accounting of their insolvent partnership, resulting in the appointment of a receiver, was not an act of bankruptcy under this subsection.²⁵² Now, a copartnership or a corporation²⁵³ which is insolvent and applies for or, because of insolvency,²⁵⁴ has been put in charge of a receiver or trustee, under the laws of a State, or of a territory, or of the United States, thereby commits an act of bankruptcy. This amendment was intended to place all copartnerships and such corporations as may be adjudged involuntary bankrupts²⁵⁵ on the same footing as individual insolvents who attempt an equivalent fraud on the act.²⁵⁶

assets to cash and deposit it with a certain trust company for the benefit of creditors, will not amount to an act of bankruptcy within § 3-a(4), where the plan was never carried out owing to the failure of creditors to file claims with the trust company as contemplated.

246. *Chemical Nat. Bank v. Meyer* (D. C., N. Y.), 1 Am. B. R. 565, 98 Fed. 976, *affd.* 3 Am. B. R. 559, 98 Fed. 976.

247. *Youngbluth v. Slipper* (C. C. A., 9th Cir.), 26 Am. B. R. 265, 185 Fed. 773.

248. *Griffin v. Dutton* (C. C. A., 1st Cir.), 21 Am. B. R. 449, 165 Fed. 626; *Canner v. Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 168 Fed. 519; *In re Federal Lumber Co.* (D. C., Mass.), 26 Am. B. R. 438, 185 Fed. 926, holding that if a grantor makes what purports to be and is intended by him to be a general assignment, and is accepted as such by the assignee named, it will constitute an act of bankruptcy though invalid for some purposes; *In re Courtenay Mercantile Co.* (D. C., N. Dak.), 26 Am. B. R. 365, 186 Fed. 352.

249. It may be doubted, however, whether *Rumsey v. Novelty, etc., Co.* (D. C., Mo.), 3 Am. B. R. 704 and footnote, 99 Fed. 699, is safe authority in holding that the deed of trust there given was not a general assignment.

A sale of property by a bankrupt to one of his creditors for the avowed purpose of preserving the property for the creditors and not for the purpose of division is not an assignment for the benefit of creditors. *Matter of Elinstein* (D. C., N. Y.), 40 Am. B. R. 507, 245 Fed. 189.

250. (D. C., Or.), 3 Am. B. R. 575, 98 Fed. 981.

251. Compare *In re Baker-Ricketson Co.* (D. C., Mass.), 4 Am. B. R. 605, 97 Fed. 489; *Vaccaro v. The Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; *Davis v. Stevens* (D. C., S. Dak.), 4 Am. B. R. 763, 104 Fed. 275; *In re Gilbert* (D. C., Or.), 8 Am. B. R. 101, 112 Fed.

951. But see also, as suggesting the doctrine of equivalence, *In re Harper* (D. C., N. Y.), 3 Am. B. R. 804, 100 Fed. 266; *In re Macon Sash, etc., Co.* (D. C., Ga.), 7 Am. B. R. 66, 112 Fed. 323, this case, however, reversed as *Carling v. Seymour Lumber Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; *Scheuer v. Smith* (C. C. A., 5th Cir.), 7 Am. B. R. 384, 112 Fed. 407; *In re Empire Metallic Bedstead Co.* (C. C. A., 2d Cir.), 3 Am. B. R. 575, 98 Fed. 581.

252. But see *Mather v. Coe* (D. C., Ohio), 1 Am. B. R. 504, 92 Fed. 333. Compare also *In re Storm* (D. C., N. Y.), 4 Am. B. R. 601, 103 Fed. 618, and *In re Storck Lumber Co.* (D. C., Md.), 8 Am. B. R. 86, 114 Fed. 860.

253. See § 1 (9).

254. As to necessity of insolvency, see *In re Douglas Coal, etc., Co.* (D. C., Tenn.), 12 Am. B. R. 539, 131 Fed. 769; *Zugalla v. International Merc. Agency* (C. C. A., 3d Cir.), 16 Am. B. R. 67, 142 Fed. 927, *revd.* 13 Am. B. R. 725. See also under this subsection "(4) Insolvency essential," *post*.

255. Bankr. Act, § 4-b. See *Lowenstein v. McShane Mfg. Co.* (D. C., Md.), 12 Am. B. R. 601, 130 Fed. 1007.

256. Some of the reasons for the change have been stated thus:

(1) It is one of the general purposes of the bankruptcy law to provide a uniform national law by which insolvent traders can make a *pro rata* distribution of their assets among creditors, and there is no reason apparent why trading corporations as well as trading copartnerships should not be permitted to avail themselves of this statute.

(2) In the more important commercial

The amendment of 1903 is not retroactive, and a petition filed after such amendment took effect alleging the appointment of a receiver for an insolvent corporation within the four months' period, but prior to the passage of the amendment, must be dismissed; the fact that the receivership continues after the taking effect of the amendment, is not of itself sufficient to create an act of bankruptcy.²⁵⁷

(II) *Exercise of bankruptcy jurisdiction.*—The law does not necessarily deprive a State court of jurisdiction conferred upon a State court to dissolve a local corporation, even though the reason for exercising such jurisdiction be the insolvency of such corporation.²⁵⁸ The same rule applies to dissolution proceedings as in the case of a general assignment for the benefit of creditors.²⁵⁹ As in the case of a general assignment, proceedings for the dissolution of a corporation and the appointment of a receiver are voidable only in case bankruptcy proceedings are brought seasonably,²⁶⁰ that is within four months after the appointment of a receiver. In case of failure to act within such period, the jurisdiction of the State court, if rightfully acquired, becomes fixed and not subject to interference.²⁶¹

(III) *Application for receivership.*—This clause makes the application for a receiver or trustee by a bankrupt who is insolvent an act of bankruptcy; if such an application is relied upon it must be alleged that the application was made by the debtor.²⁶² Mere consent alone is not sufficient.^{262a} The receivership may be on account of a corporation,

States, small corporations, with their limited liability, have practically superseded partnerships. As the law now stands, short of the commission of an act of bankruptcy, these corporations must wind up their affairs under the procedure of the State which created them, a procedure which is everywhere less favorable to creditors.

(3) Owing to the lack of comity between the States, a receiver of an insolvent corporation in one State is rarely recognized in another, with the result that the creditors in that other State, by garnishee process or otherwise, may, unless the corporation commits an act of bankruptcy, secure preferences.

(4) If a corporation seeks to wind up its affairs and distribute its assets by means of a receivership, such a proceeding does not constitute an act of bankruptcy, and, consequently, creditors are entirely deprived of the valuable rights and safeguards provided by the bankruptcy law.

(5) As the law now stands, a corporation which wishes to be administered in bankruptcy is compelled to go through the motions of committing an act of bankruptcy that involuntary bankruptcy may be alleged against it, and it be brought into court apparently against its will. This circumlocution is bad in principle and worse in practice. (Report of Ex. Com. of Nat. Ass'n of Referees in Bankruptcy, of March, 1900.)

²⁵⁷ *Seaboard Steel Casting Co. v. Trigg Co.* (D. C., Va.), 10 Am. B. R. 594, 124 Fed. 75.

²⁵⁸ *Murphy v. Penniman*, 105 Md. 452, 66 Atl. 282; *Singer v. Nat. Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 11 Am. B. R. 276, 55 Atl. 868.

²⁵⁹ See under "d (1) *In general*," *ante*.

²⁶⁰ *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. Ed. 1165.

²⁶¹ *Lyon v. Russell* (Dist. Col., Ct. of App.), 41 App. D. C. 554, 32 Am. B. R. 101, 42 Wash. L. Rep. 110, citing *In re Heckman* (C. C. A., 9th Cir.), 15 Am. B. R. 500, 140 Fed. 859; *In re Knight* (D. C., Ky.), 11 Am. B. R. 1, 125 Fed. 35.

²⁶² *Application by debtor corporation.*—In the case of *Matter of Spaulding* (C. C. A., 2d Cir.), 14 Am. B. R. 129, 139 Fed. 244, revg. 13 Am. B. R. 223 the court said: "Giving subdivision a (4) the construction which its language demands, we are of the opinion that it does not make a receivership an act of bankruptcy unless it was procured upon the application of the insolvent himself and while insolvent, and does not make the putting a receiver in charge of the property of the insolvent an act of bankruptcy, unless this was done because of insolvency; and if the latter provision applies to any case where the trustee has not been put in charge, pursuant to some statute of the State, or a receiver put in charge by court, acting under statutory authority, it certainly applies only when this has been done because of insolvency."

In the case of *Exploration Mercantile Co. v. Pacific, etc., Co.* (C. C. A., 9th Cir.), 24 Am. B. R. 216, 177 Fed. 825, it was held that an application for a receiver by one of the three stockholders, constituting a corporation, was sufficient as an application for a receiver by the corporation; this ruling was based upon proof that the stockholders had conspired to hinder, delay and defraud creditors by securing the appointment of one of them as a receiver. *Matter of Rankin* (D. C.,

or a partnership.²⁶³ If the application for receivership was made by officers, placed in full charge of the affairs of the corporation, and thus clothed in fact with sufficient power to actually accomplish a legally effective receivership, it constitutes an act of bankruptcy, although as against the stockholders, such officers had no legal right to make the application.²⁶⁴ If the application for a receiver or trustee is made by any other person than the bankrupt, it must be alleged and shown that the application was based upon the insolvency of the bankrupt.²⁶⁵ If the proceeding in the State court as a result of which a receiver was appointed, was participated in and encouraged by creditors, they

Ohio), 32 Am. B. R. 45, 210 Fed. 529 (quoting text).

262a. *Matter of Big Pines Lime & Transportation Co.* (D. C., Cal.), 43 Am. B. R. 289, 257 Fed. 141.

263. *Maple Croft Mills v. Childs* (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415; *In re Beatty* (C. C. A., 1st Cir.), 17 Am. B. R. 738, 150 Fed. 293; although under the law prior to the amendment of 1903, the obtaining of the appointment of a receiver of a partnership through dissolution proceedings in a state court was not an act of bankruptcy. *Matter of Burrell & Corr* (C. C. A., 2d Cir.), 9 Am. B. R. 625, 123 Fed. 414; *Davis v. Stevens* (D. C., So. Dak.), 4 Am. B. R. 764, 104 Fed. 242.

264. *James Supply Co. v. Dayton Coal Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 649, 223 Fed. 991, in which case it appeared that a receivership of a British corporation was applied for by officers having the entire control of the affairs of the corporation in this country, and the court said: "We are not impressed by the proposition that the application for a receiver by this corporation would not be an act of bankruptcy unless shown to have been expressly authorized by formal action of its board of directors or stockholders; and the district judge did not so decide. Not only is there nothing in the record to indicate that the managing director of this British corporation lacked authority to direct such action, but the testimony is inferentially to the contrary, and is specifically that he had complete control of the company's affairs. If Donaldson individually lacked full control, there was testimony that Watson & Company represented the stock control and, inferentially at least, had whatever control Donaldson lacked; and it is perhaps of some interest in this connection that the amended bill in the insolvency proceeding by implication treats the members of Watson & Company as Whitaker's principals. We think the record did not impugn the existence of full authority on the part of Donaldson and Watson & Company to direct the receivership, and thus the commission of an act of bankruptcy. *Exploration Mercantile Co. v. Pacific, etc., Co.* (C. C. A., 9th Cir.), 24 Am. B. R. 216, 177 Fed. 825, 839; *In re Maplecroft Mills* (D. C., S. Car.), 33 Am. B. R. 815, 218 Fed. 659, 673. Moreover, if those placed in full charge of the company's affairs were thus clothed in fact with sufficient power to actually accomplish a legally effective receivership, we cannot think the application therefor was any the less an act of bankruptcy because those responsible

therefor had no right, as against the stockholders, to so act. A somewhat contrary holding was had in *Matter of Butler Co.* (C. C. A., 1st Cir.), 30 Am. B. R. 502, 207 Fed. 705, 713. How far that decision may have been affected by the law under which the corporation was organized does not appear."

Application by officers.—Where the persons who filed a petition in a State court for the appointment of receivers for a corporation were officers and the majority stockholders of the corporation, and the stockholders never objected to the proceedings, and the answer to a petition in bankruptcy subsequently filed against the corporation was verified by the same person who verified the petition in the State court, the filing of the petition for the appointment of receivers will be deemed to have been the act of the corporation. *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.* (D. C., Ark.), 30 Am. B. R. 604, 206 Fed. 813. As to acts of agents and officers of corporation, see *Butler & Co. v. Palmenberg* (C. C. A., 1st Cir.), 30 Am. B. R. 502, 207 Fed. 705.

Application by stockholders.—An application for a receiver, made by stockholders of a corporation all of whom are creditors, pursuant to the statute of Rhode Island, is not an application by the corporation so as to constitute an act of bankruptcy. *Hansen v. Uniform Seamless Wire Co.* (C. C. A., 1st Cir.), 39 Am. B. R. 627, 243 Fed. 177.

265. *In re Douglas Coal & Coke Co.* (D. C., Tenn.), 12 Am. B. R. 545, 131 Fed. 769. As to the necessity of showing insolvency, see *post*, under (4) *Insolvency essential*, and the cases cited thereunder.

Application for appointment of receiver.—It is only when a receiver of a corporation has been appointed in another court because of insolvency, as that term is defined in the Bankruptcy Act, or where the corporation on its own initiative has applied for the appointment of a receiver or custodian of its property, that an act of bankruptcy under § 3-a (4), has been committed. *In re Edward Ellsworth Co.* (D. C., N. Y.), 23 Am. B. R. 284, 173 Fed. 699; *Matter of Rankin* (D. C., Ohio), 32 Am. B. R. 45, 210 Fed. 529, (quoting the text).

Corporation permitting appointment of receiver.—An involuntary petition against a corporation, filed by an individual stockholder thereof, alleging that it had permitted a receiver of its property to be appointed by a State court because of insolvency, may be deemed sufficient if sustained, although the Bankruptcy Act describes no such act of bankruptcy. Its language is the appointment of a receiver under the laws of a State "because of insolvency." It appeared that the proceeding in the State court was by an officer and stockholder of the corporation and

may not insist subsequently that the receivership was an act of bankruptcy for the purpose of transferring the administration of the corporate property to the bankruptcy court.²⁶⁶ Where the application for the appointment of the receiver in the State court was made on the ground of insolvency, the fact that the State court may have been without jurisdiction or that the appointment was improvidently made, does not deprive the appointment from being an act of bankruptcy.^{266a}

(IV) *What constitutes appointment.*—An agreement to wind up the affairs of a corporation and make an assignment of all its property to its directors as trustees to close up its business is an act of bankruptcy.²⁶⁷ It is not essential to constitute an act of bankruptcy under this clause of the section, that the appointment of a receiver was made by a State court under a State statute. The fact that a receiver has been put in charge of the debtor's property by a State court acting under its general equity power will be sufficient to constitute the appointment of a receiver "under the laws of the State," within the meaning of this clause.²⁶⁸ The appointment of a receiver of an insolvent corporation by a State court, by consent of the parties, under a statute providing therefor, is an act of bankruptcy.²⁶⁹ Since the passage of the amendment a State court cannot, by appointing a receiver of an insolvent debtor, obtain priority of jurisdiction to administer the assets of such debtor.²⁷⁰ It is immaterial however, that a proceeding for the dissolution of a corporation was instituted prior to the taking effect of the amendment, if the application for an order appointing a permanent receiver in such proceedings was made subsequent to such amendment.²⁷¹ The application by an administrator of a deceased partner for a receiver to wind up the affairs of an insolvent firm, in which the surviving partner joined, is not an act of bankruptcy.²⁷² The appointment of a special commissioner in a decree of the State court does not constitute an act of bankruptcy, where such commissioner is in effect only a substitute for the sheriff.^{272a}

(4) *INSOLVENCY ESSENTIAL.*—(I) *Insolvency as sole ground.*—The application for the appointment of a receiver or trustee, in order to constitute an act of bankruptcy under this subsection, must be based upon insolvency. If insolvency was one of the substantial reasons for the appointment of a receiver or trustee the case would come within the construction of the statute.²⁷³ Where a statute under which proceedings are taken against an insolvent corporation, authorizes the appointment of a receiver thereof, only after a judicial determination of the insolvency of the corporation, the appointment of a temporary receiver upon the *ex parte* application of a stockholder to restrain the corporation from exercising any of its franchises or privileges, is not an act of bankruptcy.²⁷⁴ An appointment of a receiver *pendente lite* to take possession

no answer was filed. The proof was held insufficient to establish that the receivership was because of insolvency. *Matter of Valentine Bohl Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 856, 224 Fed. 686.

²⁶⁶ *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 223 Fed. 607.

^{266a} *Matter of Sedalia Farmers' Co-operative Pa. king, etc. Co.* (D. C., Mo.), 45 Am. B. R. 287, — Fed.

²⁶⁷ *In re Bennett Shoe Co.* (D. C., Ct.), 15 Am. B. R. 497, 140 Fed. 687; *In re Hercules Athin Co., Limited* (D. C., Pa.), 15 Am. B. R. 369, 133 Fed. 813; *In re Lisk Mfg. Co.* (D. C., N. Y.), 21 Am. B. R. 674, 167 Fed. 411; *In re Electric Supply Co.* (D. C., Ga.), 23 Am. B. R. 647, 175 Fed. 612.

Bank in hands of State officers.—So also as to a private bank conducted by a partnership

placed in the hands of a special agent under a State law, the partnership being insolvent. *In re Salmon* (D. C., Mo.), 16 Am. B. R. 122, 143 Fed. 395.

²⁶⁸ *In re Kennedy Tailoring Co.* (D. C., Tenn.), 23 Am. B. R. 656, 175 Fed. 871, citing *Loweinstein v. McShane Mfg. Co.* (D. C., Md.), 12 Am. B. R. 601, 130 Fed. 1007; *Hooks v. Aldridge* (C. C. A., 5th Cir.), 16 Am. B. R. 658, 145 Fed. 965; *In re Beatty* (C. C. A., 1st Cir.), 17 Am. B. R. 738, 150 Fed. 293.

²⁶⁹ *In re Pickens Mfg. Co.* (D. C., Ga.), 20 Am. B. R. 202, 158 Fed. 894; *In re Wenatchee Heights Orchard Co.* (D. C., Wash.), 30 Am. B. R. 401, 204 Fed. 674.

²⁷⁰ *In re Knight* (D. C., Ky.), 11 Am. B. R. 1, 125 Fed. 35; *In re Hecox* (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 823.

of the company's property, in order to prevent mismanagement of its affairs by the majority of its directors, is not an appointment upon the grounds of insolvency and does not constitute an act of bankruptcy.²⁷⁶ If in such a case a permanent receiver be appointed, the receivership is "because of insolvency" of the corporation, and constitutes an act of bankruptcy.²⁷⁸

(II) *Actual insolvency.*—The rule is that the receivership must have been procured because of the actual insolvency of the debtor.²⁷⁷ If the application is made under a State statute on account of a fear that insolvency will ensue, it does not constitute an act of bankruptcy, since the statute requires the existence of actual insolvency as a cause for the application.²⁷⁹ But it has been held that if the receivership was obtained on the ground of insolvency, it is not material that the corporation was not in fact insolvent; the adjudication of insolvency by the State court will give rise to a presumption that the receivership was based on the grounds of insolvency.²⁷⁹

(III) *Allegations as to other grounds where insolvency existed.*—It must appear upon the face of the complaint in the State court that the corporation was insolvent when it was filed; the fact that the corporation deemed it necessary to apply for a receiver to secure temporary relief will not be used to its prejudice in a court of bankruptcy, unless insolvency is alleged at such time.²⁸⁰ Petitioning creditors, relying on this act of bankruptcy, must allege and prove insolvency when the application for a receiver or trustee was made, and if the receivership or trusteeship was secured upon the application of any other person, it must be shown that such receivership or trusteeship was obtained because of insolvency.²⁸¹ There is some confusion as to this question.

271. *Matter of Milbury Co.* (Ref., N. Y.), 11 Am. B. R. 523.

272. *Moss Nat. Bank v. Arend* (C. C. A., 6th Cir.), 16 Am. B. R. 867, 146 Fed. 351.

272a. *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442.

273. *In re Beatty* (C. C. A., 1st Cir.), 17 Am. B. R. 738, 150 Fed. 293.

274. *Zugalla v. International Mere. Agency* (C. C. A., 2d Cir.), 16 Am. B. R. 67, 142 Fed. 927, revg. 13 Am. B. R. 725; *In re Hudson River Elec. Power Co.* (D. C., N. Y.), 23 Am. B. R. 101, 173 Fed. 934, in which case it was held that the appointment of a temporary receiver by a Federal circuit court, on allegations of insolvency, mismanagement, etc., which are denied and not yet tried, does not constitute an act of bankruptcy.

275. *In re Boston, etc., Mining Co.* (D. C., Mass.), 24 Am. B. R. 923, 181 Fed. 422; *Shannon v. Shepard Mfg. Co.* (Mass. Sup. Jud. Ct.), 42 Am. B. R. 12, 119 N. E. 768.

276. *Hooks v. Aldridge* (C. C. A., 5th Cir.), 16 Am. B. R. 658, 145 Fed. 865.

277. *Matter of Spalding* (C. C. A., 2d Cir.), 14 Am. B. R. 129, 139 Fed. 244, holding that the appointment of a receiver in a creditor's action on the ground that the debtor had disposed, and was threatening to dispose of his property with intent to defraud his creditors, is not sufficient to constitute an act of bankruptcy under this subsection. See *In re Butler & Co.* (C. C. A., 1st Cir.), 207 Fed. 705; *Blackstone v. Everybody's Store* (C. C. A., 1st Cir.), 30 Am. B. R. 497, 207 Fed. 752. *In re Columbia Real Estate Co.* (D. C., N. J.), 30 Am. B. R. 471, 205 Fed. 980; *Matter of Conn. Brass & Mfg. Corp.* (D. C., Conn.), 43 Am. B. R. 376, 257 Fed. 445.

Where an order of a State court appointing a receiver for a corporation and the petition upon which such order was made clearly shows that the appointment was made on the ground of insolvency, the creditors of the corporation may

insist that its assets be administered by the bankruptcy court. *Doyle-Kidd Co. v. Sadler-Luck Co.* (D. C., Ark.), 30 Am. B. R. 602, 206 Fed. 813; *Butler & Co. v. Palmenberg* (C. C. A., 1st Cir.), 30 Am. B. R. 502, 207 Fed. 705.

278. *Maplecroft Mills v. Childs* (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415, holding that it was not the intention of Congress to have the same apply when the facts upon which a receiver was appointed by the State court only show that its assets would not bring enough to pay its debts at a forced sale, or where there was imminent danger of insolvency; revg. 33 Am. B. R. 815, 218 Fed. 619.

279. *In re Pickens Mfg. Co.* (D. C., Ga.), 29 Am. B. R. 202, 158 Fed. 894; *Matter of Sedalia Farmers' Co-operative Packing, etc., Co.* (D. C., Mo.), 45 Am. B. R. 287, — Fed. —.

280. *Appointment of receiver of corporation by State court.*—The fact that a corporation deemed it necessary to apply to the State court for the appointment of a receiver in order to enable it to secure temporary relief should not be used to its prejudice in a court of bankruptcy, unless it clearly appears upon the face of the complaint filed in the State court that the corporation was insolvent within the meaning of the Bankruptcy Act at the date of the filing of the same. *Maplecroft Mills v. Childs et al.* (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415.

281. *In re Edward Ellsworth Co.* (D. C., N. Y.), 23 Am. B. R. 284, 173 Fed. 699, in which the court said: "The bankruptcy act has not superseded the right and power of a court of equity to take charge of the property of an insolvent corporation for

The district court in the *Maplecroft Mills* case argued ably that if the real cause of the receivership was the insolvency of the corporation at the time the application for a receiver was made, the allegation of other grounds in such application ought not to control the character of the act.²⁸² And it has been held that if the receivership was at the instance of an insolvent corporation, it is immaterial that the receivership was ordered for a cause other than insolvency, it appearing that the corporation was actually insolvent at the time the application was made.²⁸³ But if it appear upon an application made for a receivership under State laws authorizing such receivership upon the invitation of outside parties, it must appear that insolvency was the cause of the application; if it appear in such a case, from the pleading and the evidence adduced, that the appointment is made for some other cause than the insolvency of the debtor, it is not an act of bankruptcy under this subsection, although it may appear that the debtor was in fact insolvent when the receiver was appointed.²⁸⁴

the protection of stockholders and creditors, marshal the same, recognize and enforce valid liens and priorities and equitably distribute the surplus proceeds among its creditors. It is only where a receiver has been appointed in another court because of insolvency, as that term is defined in the bankruptcy law, or where the corporation on its own initiative has applied for the appointment of a receiver or custodian of its property, that an act of bankruptcy under § 3-a (4) has been committed."

Evidence of insolvency.—The appointment of a receiver of a corporation by the State court of Washington "for the reason that said corporation is utterly insolvent and unable to meet or pay its obligations," in the absence of testimony, is not conclusive of the insolvency of the corporation, within the meaning of section 1 (15) of the Bankruptcy Act. Unpaid stock subscriptions of a corporation are assets which must be considered in determining whether or not the corporation is insolvent, within the meaning of the Bankruptcy Act. *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 226 Fed. 415.

283. Where real ground of appointment is insolvency.—If the effect of the action of the State court in the taking possession of the assets of the corporation be in result to subtract from the operation of the Bankruptcy Act that which would be subject to it, the so wording of the order that the State court's action may be placed on another ground would not be effective to prevent the operation of the Bankruptcy Act. In other words, where the real and substantial result of the State court's order was that a receiver was appointed because of the insolvency of the corporation, and the effect of the proceedings in the State court should logically be to wind up and liquidate the assets of the corporation and distribute them as the assets of an insolvent corporation the operation of the Bankruptcy Act cannot be defeated because in the proceedings or plead-

ings or orders or decrees of the State court its action may be based upon no ground at all, or upon any other ground than insolvency. To hold otherwise would be to allow, in any case where for the purpose of effecting such results pretensive grounds were alleged for appealing to the State court, the whole distribution and liquidation of the assets of an insolvent and bankrupt corporation to be taken away, and creditors to be deprived of that which by paramount statute is intended for their benefit under a general and uniform system of administration of insolvent corporations. *Matter of Maplecroft Mills* (D. C., S. Car.), 33 Am. B. R. 815, 218 Fed. 659, revd. 35 Am. B. R. 311, 226 Fed. 415.

283. James Supply Co. v. Dayton Coal Co. (C. C. A., 6th Cir.), 34 Am. B. R. 649, 223 Fed. 991; *Hill v. Electric Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 332, 214 Fed. 243.

284. In re Douglas Coal & Coke Co. (D. C., Tenn.), 12 Am. B. R. 539, 131 Fed. 769; *In re Spalding* (C. C. A., 2d Cir.), 14 Am. B. R. 129, 139 Fed. 245; *Matter of Conn. Brass & Mfg. Corp.* (D. C., Conn.), 43 Am. B. R. 376, 257 Fed. 445; *In re Edward Ellsworth Co.* (D. C., N. Y.), 23 Am. B. R. 284, 173 Fed. 699, citing this work, and holding that the court is precluded from considering evidence *alunde* to contradict the decree or judgment of another court appointing receivers and setting forth the basis of such appointment.

Imminent danger of insolvency, as alleged in a bill by a stockholder for the appointment of a receiver, and the subsequent appointment based thereon, is insufficient. *In re Perry Aldrich Co.* (D. C., Mass.), 21 Am. B. R. 244, 165 Fed. 249.

Winding up affairs of partnership.—In the case of *Moss National Bank v. Arend* (C. C. A., 6th Cir.), 16 Am. B. R. 867, 146 Fed. 351, an application was made for the appointment of a receiver by the administrator of a deceased partner under the provisions of the Ohio statute. The court said: "It is conceded that this was not a case where, 'because of insolvency a receiver has

(IV) *Proof of insolvency.*—The burden is upon the petitioning creditors to show insolvency.²³⁵ The record of the court appointing the receiver may be used to prove the fact that the receivership was obtained because of the insolvency of the debtor, and if the grounds are stated in the record extrinsic evidence is not admissible to vary the terms thereof.²³⁶ It is not sufficient to show that the receiver was appointed under a State statute which authorized a receivership where the directors assert that the corporation is unable to meet its obligations as they mature; this on the assumption that the corporation

been put in charge of property,' because clearly the receiver was not appointed because of insolvency, but because of the death of a partner and to wind up the partnership. But it is submitted that, since the firm and the surviving partner were insolvent, and the latter joined in the application, he 'being insolvent, applied for a receiver or trustee for his property' and therefore committed an act of bankruptcy. But, as held by the court below, the surviving partner never really applied for a receiver. He had no power under the Ohio statute to apply for a receiver. He had the option of taking the interest of the deceased partner at an appraisal. He had thirty days in which to exercise this option. He did not want the interest at the appraisal, so he waived the thirty days and immediately declared his intention of not exercising the option. When he had done this, he had exhausted the power conferred upon him by the statute. It then became the positive duty of the administrator to apply for the appointment of a receiver to wind up the business. This duty was discharged and the receiver was appointed on the application of the administrator and for the purpose of winding up the partnership."

Under these circumstances it was held that the surviving partner did not commit an act of bankruptcy by joining in the application for the appointment of a receiver.

235. *Butler & Co. v. Palmenberg* (C. C. A., 1st Cir.), 30 Am. B. R. 502, 207 Fed. 705; *Maplecroft Mills v. Childs* (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415.

236. *Record of proceedings in State court.*—Where the State court makes an express finding as to insolvency the petitioning creditors in a bankruptcy proceeding against the corporation are not required to prove otherwise than by record in the State court that the corporation was insolvent and that because of insolvency a receiver was put in charge of the bankrupt's by the State court. *Greenwood Gum Co. v. Zimmerman* (C. C. A., 6th Cir.), 39 Am. B. R. 198, 240 Fed. 637. In the case of *Blue Mountain Iron & Supply Co. v. Portner* (C. C. A., 4th Cir.), 12 Am. B. R. 559, 131 Fed. 57, the court said: "The essential element in the alleged act of bankruptcy is insolvency. As stated the petitioning creditors have alleged and the jury found by the verdict that the defendant corporation was insolvent on the day the receivers were appointed and on the day the petition in bankruptcy was filed. The jury found as a fact, that it was 'because of insolvency' the receivers were put in charge of the company's property." And as stated in another place in its opinion: "At all events the issue was made and submitted in the bankrupt court and the best evidence of the appointment of the receivers was the record of the proceedings in equity in the court

which made the appointment. It was the basis of the issue, and could have been proved in no other way. The record was obtained for this purpose, and no authority is cited holding that the best evidence of a proceeding in a court of equity is not the record of the proceeding. The record of the proceeding in court was the best evidence and there was no error in admitting it." See also *In re Spalding* (C. C. A., 2d Cir.), 14 Am. B. R. 129, 139 Fed. 244, in which case it was held that the court could base its determination as to the commission of an act of bankruptcy by the debtor upon the record of the court appointing a receiver and the order of appointment which recited the grounds for the appointment as being a threatened disposition of the debtor's property in fraud of creditors.

In *Matter of Maplecroft Mills* (D. C., S. Car.), 33 Am. B. R. 815, 218 Fed. 659 (reversed on other grounds, 35 Am. B. R. 311, 226 Fed. 415), the court said: "It will be seen by the language of the Bankruptcy Act that under this last clause insolvency itself is not made one of the substantial issues to be tried as an issue of fact in the bankrupt court except in so far as the appointment of a receiver or trustee has been because of insolvency. In other words, if the action of the court appointing a receiver was based upon insolvency, that is the only question for determination, and in itself would appear to determine the question of insolvency as adjudicated in the order making the appointment. It is not necessary under this subdivision that, in addition to evidence showing the appointment of a receiver by the court appointing the receiver because of insolvency, evidence should be additionally produced outside of the action of the court to show that the alleged bankrupt was in fact insolvent. In other words, it is not necessary, upon an application for involuntary bankruptcy under this last clause, to prove both that the alleged bankrupt had had a receiver appointed because of insolvency, and in addition and wholly *dehors* of this order of appointment the alleged bankrupt was actually insolvent, but to establish only that the receiver was appointed by the court appointing him because of insolvency, which involves and establishes the existence of insolvency. This question is to be determined principally by the inspection of the record of the court appointing the receiver."

might be solvent though temporarily unable to meet maturing obligations.²⁸⁷ If the records and findings of the court below show that a receiver of a corporation was appointed because of insolvency it is sufficient although the statutes under which the proceeding for the appointment of a receiver was instituted did not provide that insolvency was the cause of the receivership.²⁸⁸ It has been held, however, that where a petition is filed against a corporation because of the appointment of a receiver in a State court, it is entitled to a hearing on the question of insolvency and is not concluded by the finding of the State court on that issue.²⁸⁹

(5) MEANING OF WORDS.—“Insolvent” has the same meaning here as elsewhere in the statute.²⁹⁰ The amendment thus makes insolvency an essential element of proof in receivership cases.²⁹¹ The insolvency referred to is that which falls within the definition of the term as used in the act; it will not suffice to allege insolvency in the terms of a State statute, as for instance, in the sense of the inability of the alleged bankrupt to meet its current obligations.²⁹² “Applied for” manifestly means the voluntary application of the copartnership or of a corporation under resolution of its board of directors or other governing body, as regulated or prescribed by the State law of which the corporation is the creature.²⁹³ “Been put in charge of” clearly indicates every other means of securing the appointment of a receiver, as when the

287. *Schumert & Warfield, Ltd. v. Security Brewing Co.* (D. C., La.), 28 Am. B. R. 676, 199 Fed. 358, which arose under a Louisiana statute authorizing a receivership for certain enumerated causes, one of which is when the board of directors have declared by resolution that the corporation is unable to meet its obligations as they mature, but the statute does not provide for the appointment of a receiver at the instance of a creditor on the grounds of insolvency, unless he has a final and executory judgment. It was held, that conceding that the State court had jurisdiction to appoint a receiver on the ground of insolvency, in the proceedings then before it, it could not be presumed that the receivers were appointed because of insolvency, since the corporation might have been solvent, although unable to meet its debts as they matured.

288. *In re Belfast Mesh Underwear Co.* (D. C., Ct.), 18 Am. B. R. 620, 153 Fed. 224, in which case the court said: “It seems to me that upon this record alone it must be apparent to any reasonable mind that the facts found by the court show that it was ‘because of insolvency’ that the receiver was appointed. The record certainly does not show conclusively that insolvency was not the cause or one of the causes which led to the appointment. It may be said to exhibit a *prima facie* showing of insolvency of sufficient force to put the respondent corporation in this court upon its proofs. If such ruling be adopted no harm can come to any one hereafter. If applications shall be made to the state courts for receivers in

cases where, beyond question, the corporation is solvent, the record in the state court will undoubtedly proclaim the fact in a convincing way.”

289. *In re Pickens Mfg. Co.* (D. C., Ga.), 20 Am. B. R. 202, 158 Fed. 894. Compare *Greenwood Gum Co. v. Zimmerman* (C. C. A., 6th Cir.), 39 Am. B. R. 198, 240 Fed. 637.

If the record shows facts which do not constitute insolvency under the bankruptcy act, the appointment of a receiver based thereon would not be an act of bankruptcy. *In re Golden Malt Cream Co.* (C. C. A., 7th Cir.), 21 Am. B. R. 36, 164 Fed. 326.

290. See § 1 (15). *Butler & Co. v. Palmenberg* (C. C. A., 1st Cir.), 30 Am. B. R. 502, 307 Fed. 705.

291. As to burden of proof, see “Solvency where Act of Bankruptcy is a Receivership,” *post*, in this Section of this work.

292. *Insolvency as defined under State statute.*—A receivership is not an act of bankruptcy, unless created “because of insolvency,” as insolvency is defined by the Bankruptcy Act. A complaint in a suit in a State court for the appointment of a receiver of a corporation, alleging that the defendant is without money or credit, and “is now and for a considerable time last past has been wholly insolvent and unable to pay its just debts and obligations as they mature and fall due in the regular course of business,” and an order finding all the allegations to be true and appointing a receiver, are insufficient to establish that the receiver was appointed because of insolvency, within the meaning of section 3a (4) of the Bankruptcy Act. *Matter of Butte Duluth Mining Co.* (D. C., Mont.), 36 Am. B. R. 101, 227 Fed. 334; *Matter of Sedalia Farmers’ Co-operative Packing, etc. Co.* (D. C., Mo.), 45 Am. B. R. 287, — Fed. —.

293. Text cited with approval in *In re Gold Run Mining & Tunnel Co.* (D. C., Col.), 29 Am. B. R. 563, 200 Fed. 162.

State or a creditor proceeds against the corporation for its dissolution.²⁹⁴ "Trustee," of course, means much the same as "receiver;" the nomenclature being different in different States. The intention of the amendment of 1903 being clear, there would appear little doubt that any act, procedure, or process for the winding up of insolvent corporations or copartnerships, which substantially abridges or deprives creditors of the right to a trustee of their own choosing, or of the greater right to compel prorating between all creditors of the same class, or any other right given them by the bankruptcy law, will, provided the alleged bankrupt is insolvent at the time of the commission of the act complained of and that act be within the four months' period, amount to an act of bankruptcy. The importance of this change cannot be overestimated.²⁹⁵

(6) PRECEDENTS UNDER FORMER LAW.—The law of 1867 applied to "all moneyed, business, or commercial corporations and joint-stock companies." This section also provided that "upon the petition of any creditor of such corporation or company, the like proceedings shall be had and taken as are provided in the case of debtors." But the corresponding acts of bankruptcy under the former law,²⁹⁶ are not sufficiently analogous to furnish reliable precedents; in each the element of intent was essential. A voluntary receivership of a corporation may, of course, amount to "a transfer of his (its) creditors;" so may it also be "a transfer of money or other property," or "the procuring of its property to be taken on legal process," each with intent to prefer; or "with the intent by such disposition of his (its) property to defeat or delay the operation of the act." But now, not even the result, much less the intent, is the essential test. The mere fact of the appointment of a receiver or trustee, nay, even a mere application for such an appointment coupled with insolvency, is enough. However, it was held under the law of 1867, that the appointment by a State court of a receiver of a corporation is "a taking on legal process;"²⁹⁷ and the fact that the corporation was extinct, it having been dissolved by the State law, was held not a bar to the proceeding in bankruptcy, or to oust the Federal court of jurisdiction.²⁹⁸

(7) REFERENCE TO OTHER SECTIONS.—Useful references to other sections will be found in the foot-note.²⁹⁹

e. Fifth act of bankruptcy; a confession of bankruptcy.—(1) IN GENERAL.—A person commits an act of bankruptcy by having "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground." The importance of this act of bankruptcy rests mainly upon its application to a corporation. It is not to be expected that in his correspondence a debtor who is a natural person will, for the purpose of getting into bankruptcy, both confess inability to pay his debts and willingness to be adjudged a bankrupt; the filing of a voluntary petition is more direct. But many corporations are restricted under the act from becoming voluntary

²⁹⁴. In re Spalding (C. C. A., 2d Cir.), 14 Am. B. R. 129, 132, 139 Fed. 243.

²⁹⁵. The text is quoted with approval by Judge Speer in In re Electric Supply Co. (D. C., Ga.), 23 Am. B. R. 647, 653, 175 Fed. 612.

²⁹⁶. Act of 1867, § 39, R. S., § 5,021.

²⁹⁷. In re Merchants' Ins. Co., Fed. Cas. 9,441.

²⁹⁸. Thornhill v. Bank of Louisiana, Fed. Cas. 13,992, aff. s. c. Fed. Cas. 13,990.

²⁹⁹. For estoppel where the creditors have assented to the assignment and later seek to petition the assignor into bankruptcy, see § 59-b. For stays on assignment proceedings in the State courts, see §§ 2(15) and 11-a. For jurisdiction of the court of bankruptcy over the assigned estate, both before and after adjudication, see §§ 2(3), (15), 3-e, 23, and 69-a. For effect of adjudication on title transferred by a general assignment, see § 70-a.

bankrupts except as they confess their inability to pay their debts and their willingness to be adjudged bankrupt under this statute, in which event involuntary proceedings may be instituted against them. Indeed the value of this act of bankruptcy did not appear until the determination that corporations might through it become in effect voluntary bankrupts was generally recognized.³⁰⁰ The amendment of § 4 by the amendatory act of 1910, permitting any business or mercantile corporation except a municipal, railroad, insurance or banking corporation to become a bankrupt has materially lessened the force and effect of this clause of the section.³⁰¹ The filing of a voluntary petition is itself treated as an act of bankruptcy.³⁰²

(2) ESSENTIAL ELEMENTS.—(I) *In general*.—Three things seem to be necessary to constitute this act: (1) a writing signed by the debtor or some officer or agent duly authorized; (2) a distinct admission therein of his inability to pay his debts; and (3) an unqualified expression of willingness to be adjudged a bankrupt on that ground.^{302a} Thus, where the officer of a corporation was deputized to execute such a writing, provided a petition should be filed against it, it is not an act of bankruptcy.³⁰³ If the writing is sufficient, the fact that the debtor requested certain creditors to file a petition against him does not affect the character of the act.³⁰⁴ When this act of bankruptcy is alleged, the question of insolvency is immaterial,³⁰⁵ but, nevertheless, a contesting creditor has the right to raise the issue as to whether or not the alleged bankrupt made such an admission and to stay the attempted adjudication until the petitioners fairly bear the burden of proving that he made the admission.^{305a}

(II) *Acts of directors of corporation*.—It is sufficient in legal effect if

³⁰⁰. In re Marine Machine Co. (D. C., N. Y.), 1 Am. B. R. 421, 100 Fed. 439; In re Kelly Dry Goods Co. (D. C., Wis.), 4 Am. B. R. 523, 102 Fed. 747. *Contra*: In re Bates Machine Co. (D. C., Mass.), 1 Am. B. R. 129, 91 Fed. 625. In the case of In re Moench (C. C. A., 2d Cir.), 12 Am. B. R. 240, 243, 130 Fed. 665, the court stated: "When all commit either the fourth or fifth act of bankruptcy, when three creditors stand ready at once to take advantage of it by filing a petition, the corporation may achieve the object which the act forbids it to secure by its own voluntary petition."

³⁰¹. See Bankrupt Act, § 4, and discussion thereunder, sub-title "*Voluntary Bankruptcy*."

³⁰². *Riggs v. Price* (Mo. Sup. Ct.), 43 Am. B. R. 413, 210 S. W. 420; In re Forbes (D. C., Mass.), 11 Am. B. R. 787, 791, 128 Fed. 187, in which case it was held that a voluntary petition filed by one partner was an act of bankruptcy. In the case of *Hanover National Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1, 10, 46 L. Ed. 1113, the court said: "The schedules must be verified and the petition must state that 'bankrupt owes debts which he is unable to pay in full,' and 'that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law.' This establishes these facts, so far as the degree of bankruptcy is concerned, and he has committed an act of bankruptcy in filing the petition."

^{302a}. Where a petition alleged that the bankrupt had admitted in writing its inability to pay its debts, and its willingness to be adjudged a bankrupt, the adjudication should not be disturbed, although it does not appear from the record whether such admission had been at that time actually executed, where the bankrupt by its written answer consented to the adjudication and admitted all of the allegations of the petition. *Matter of Veles* (C. C. A., 6th Cir.), 41 Am. B. R. 736, 249 Fed. 633.

³⁰³. In re Baker-Ricketson Co. (D. C., Mass.), 4 Am. B. R. 605, 97 Fed. 439. See also *Matter of Standard Shipyard Co.* (D. C., Me.), 45 Am. B. R. 67, 262 Fed. 522, quoting *Collier on Bankruptcy* (11th ed.), 127.

³⁰⁴. *Matter of Duplex Radiator Co.* (D. C., N. Y.), 15 Am. B. R. 324, 142 Fed. 906.

³⁰⁵. In re Duplex Radiator Co. (D. C., N. Y.), 15 Am. B. R. 324, 142 Fed. 906; *Matter of Gibney Tire & Rubber Co.* (D. C., Pa.), 39 Am. B. R. 355, 241 Fed. 879; *Matter of Wellesley* (D. C. Cal.), 40 Am. B. R. 597, 252 Fed. 854; *Matter of Dressler Producing Corp.* (C. C. A., 2d Cir.), 44 Am. B. R. 457, 262 Fed. 267.

Insolvency unnecessary.—Where the act of bankruptcy charged is that a corporation has admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, the question of actual insolvency is immaterial. In re *McNally Co.* (Ref., N. Y.), 29 Am. B. R. 772; *Matter of United Grocery Co.* (D. C., Fla.), 39 Am. B. R. 501, 239 Fed. 1016.

Admission of insolvency and consent to adjudication.—Although the question solvency or insolvency is immaterial where the act of bankruptcy is the written admission referred to in the act, the opposing creditors may set up that the proceedings are the result of fraud and collusion between the bankrupt and the petitioners. Such an answer examined and held to be insufficient. *Matter of Cohn* (C. C. A., 3d Cir.), 35 Am. B. R. 735, 227 Fed. 843.

Solvency is no defense to a petition charging an act of bankruptcy under section 3a(5) of the bankruptcy act, consisting of an admission in writing of the bankrupt's inability to pay its debts and its willingness to be adjudicated a bankrupt on that ground. *Matter of Russell Wheel & Foundry Co.* (D. C., Mich.), 35 Am. B. R. 66, 222 Fed. 569.

^{305a}. *Alberg Commission Co. v. Richter* (C. C. A., 8th Cir.), 42 Am. B. R. 155, 254 Fed. 1006.

the board of directors of a corporation who were charged with the conduct of its business, declare the inability of the corporation to pay its debts, and its willingness to be adjudged a bankrupt, in accordance with the legal requirements specified.³⁰⁶ Of course the power of a board of directors to bind the corporation in this respect will be governed by State statutes and the decisions of the State courts thereunder.³⁰⁷ A State statute limiting the power of a corporation to dispose of its assets without the consent of its stockholders would not prevent directors admitting its insolvency and its willingness to be adjudged a bankrupt.³⁰⁸ Directors holding over because of a failure to elect their successors may, at a legally convened meeting, execute the necessary instru-

^{306.} *Matter of Hargadine-McKittrick, etc., Co.* (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155; *Matter of United Grocery Co.* (D. C., Fla.), 39 Am. B. R. 501, 239 Fed. 1016; *In re Moench & Sons Co.* (D. C., N. Y.), 10 Am. B. R. 656, 123 Fed. 965, in which case it was also held that petitioning creditors are not estopped from alleging a resolution adopted by a board of directors as an act of bankruptcy, on the ground of collusion, charged by an answering creditor, who would obtain a preference by attachment if the petition were dismissed. This case was affirmed in 12 Am. B. R. 240, 130 Fed. 685.

Directors may admit insolvency and willingness although proceedings have been instituted to sell franchises and property of the corporation and distribute the proceeds thereof. *Cresson, etc., Coal & Coke Co. v. Stauffer* (C. C. A., 3d Cir.), 17 Am. B. R. 573, 43 Fed. 981. See also *In re Mutual Mercantile Agency* (D. C., N. Y.), 6 Am. B. R. 607, 111 Fed. 152; *In re Peter Paul Book Co.* (D. C., N. Y.), 5 Am. B. R. 105, 104 Fed. 798; *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 523, 102 Fed. 747; *In re Marine Machine & Conveyor Co.* (D. C., N. Y.), 1 Am. B. R. 421, 91 Fed. 630.

Unqualified admission of insolvency.—A resolution of the board of directors of a corporation by which an attorney was authorized to represent it generally in any suit or suits or bankruptcy proceedings then pending or that might be brought, and to agree on behalf of the corporation to the appointment of a receiver, is not the unqualified written admission by the corporation of its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, required to constitute an act of bankruptcy within the meaning of the statute. *In re Southern Steel Co.* (D. C., Ala.), 22 Am. B. R. 476, 169 Fed. 702. The adoption of a resolution by a board of directors admitting inability to pay debts and expressing a willingness to be adjudged a bankrupt is sufficient to warrant adjudication, although some of the directors received no notice of the meeting, when it appeared that no action had been taken by them to set aside the proceedings based upon such resolution. *In re Lisk Mfg. Co.* (D. C., N. Y.), 21 Am. B. R. 674, 167 Fed. 411.

Validity of resolution admitting insolvency.—Where five of the eight members of the board of directors of a corporation were present and unanimously adopted a resolution admitting the corporation's inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground, the fact that two of the directors voting, whose presence was necessary to constitute a quorum, were creditors and at the time intended to file a petition against the corporation, does not vitiate the resolution which was otherwise valid. *Home Powder Co. v. Gels* (C. C. A., 8th Cir.), 29 Am. B. R. 580, 204 Fed. 568.

^{307.} *In Oregon*, the board of directors of a private corporation, in the absence of authority specifically conferred by the stockholders, may not commit an act of bankruptcy for the corporation, by adopting a resolution admitting the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt. *In re Quartz Gold Mining Co.* (D. C., Or.), 19 Am. B. R. 667, 157 Fed. 243.

In Massachusetts.—In the case of *In re Bates Machine Co.* (D. C., Mass.), 1 Am. B. R. 129, 91 Fed. 624, which arose under the Massachusetts statute, it was held that, where by the laws of the State under which the corporation is formed, the powers of its officers and directors are defined and limited, a written admission by the directors of the corporation, which is in excess of their authority, is not sufficient to base an involuntary petition in bankruptcy against the bankrupt.

Under the law of Arizona, which does not prohibit such action, the board of directors of a corporation may, without the consent of the stockholders, make an admission that the corporation is unable to pay its debts, and declare its willingness to be adjudged a bankrupt on that ground. *Home Power Co. v. Gels* (C. C. A., 8th Cir.), 29 Am. B. R. 580, 204 Fed. 568.

Admission by board of directors of Michigan corporation.—Since the board of directors of a Michigan corporation may make or authorize the making of a common-law assignment they may commit an act of bankruptcy, binding on the corporation, by admitting in writing the inability of the corporation to pay its debts and its willingness to be adjudicated a bankrupt on that ground. *Matter of Russell Wheel & Foundry Co.* (D. C., Mich.), 35 Am. B. R. 66, 223 Fed. 569.

A Maine corporation has no power to commit the fifth act of bankruptcy except by a vote of its stockholders, and such act can be authorized only by such vote at a meeting duly called for that purpose. *Matter of Standard Shipyard Co.* (D. C., Me.), 45 Am. B. R. 67, 262 Fed. 522.

^{308.} Statute preventing transfer.—Authority given by the board of directors of a corporation, one of whom owned nearly all the capital stock, for the making of a voluntary petition in bankruptcy, is sufficient, notwithstanding a State statute prohibiting any sale, assignment, or transfer of the franchise and property of a corporation without the consent of the stockholders holding at least two-thirds of the capital stock. *Bell v. Blessing* (C. C. A., 9th Cir.), 35 Am. B. R. 673, 225 Fed. 750.

ment.³⁰⁹ If a board is enjoined from commencing or prosecuting any proceeding "involving in any way the property or property rights" of the corporation, the adoption of a resolution confessing the inability of the corporation to pay its debts, and signifying its willingness to be adjudged a bankrupt is unauthorized and does not constitute an act of bankruptcy.³¹⁰ While a writing in the exact words of the statute, if authoritatively signed,³¹¹ is surely sufficient; yet it would seem that any writing³¹² which substantially covers the three essentials just stated will be enough.³¹³

(III) *Officers of corporation.*—The treasurer of a corporation cannot admit inability to pay debts and signify the willingness of the corporation to be adjudged a bankrupt;³¹⁴ unless, of course, he is authorized to do so by a resolution passed at a meeting of the stockholders, or of the directors; in such a case the right is not affected by the appointment of a receiver in a State court.³¹⁵

(IV) *Admission by partners.*—A written admission of one member of a firm, purporting to be made on behalf of himself and the other members to the effect that they are unable to pay their debts and are willing to be adjudicated bankrupts, is binding upon the firm,³¹⁶ unless repudiated by the partners when opportunity is offered.^{316a}

III. WHEN AND AGAINST WHOM PETITION MAY BE FILED.

a. Against person who is insolvent and has committed act of bankruptcy.—

Subsection *b* of this section authorizes the filing of a petition against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. The word "person" as here used includes a corporation,³¹⁷ officers, partnerships, and women,³¹⁸ but does not include wage-earners or a person engaged chiefly in farming or the tillage of the soil.³¹⁹ An act of bankruptcy may be committed by an officer or agent of a corporation or by a member of a partnership, while acting in behalf of the corporation or partnership and within the scope of his authority.³²⁰ If the

309. *Matter of Riley, Talbot & Hunt* (Ref., Mich.), 15 Am. B. R. 159.

310. *In re Hudson River Elec. Power Co.* (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934.

311. *In re Mutual Mercantile Agency* (D. C., N. Y.), 6 Am. B. R. 607, 111 Fed. 152.

312. *Conway v. German* (C. C. A., 4th Cir.), 21 Am. B. R. 577, 166 Fed. 67, holding that the petition must allege that the admission of insolvency and expression of willingness was in writing.

313. In the case of *Brinkley v. Smithwick* (D. C., N. C.), 11 Am. B. R. 500, 126 Fed. 686, it was held that an insolvent debtor's willingness to be adjudged bankrupt on the ground of insolvency may be inferred from the admission of insolvency in his answer to an involuntary petition.

A resolution of the board of directors of a corporation, authorizing the cashier, treasurer, and bookkeeper to prosecute in the name of the corporation a petition in bankruptcy to final discharge, is sufficient to authorize a voluntary proceeding, and it is unnecessary that the resolution authorize, in strict conformity with section 3a (5) of the bankruptcy

act, an admission in writing on the part of the corporation of its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground. *Bell v. Blessing* (C. C. A., 9th Cir.), 35 Am. B. R. 672, 225 Fed. 750.

314. *In re Burbank Co.* (D. C., N. H.), 21 Am. B. R. 838, 168 Fed. 719. An officer of a corporation may not write a letter in the name of the corporation committing it to an act of bankruptcy unless expressly authorized so to do. *In re Southern Steel Co.* (J. C., Ala.), 22 Am. B. R. 476, 169 Fed. 702.

315. *In re McNally Co.* (D. C., N. Y. Ref.), 29 Am. B. R. 772.

316. *In re Kersten* (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929.

316a. *Matter of Wellensley* (D. C., Cal.), 40 Am. B. R. 597, 252 Fed. 854.

317. But only those indicated in Bankr. Act, § 4-b.

318. See Bankr. Act, § 1(19).

319. See Bankr. Act, § 4-b. For persons by whom a creditor's petition may be filed, see under § 59.

320. *Richmond Spike & Iron Co. v. Allen* (C. C. A., 4th Cir.), 17 Am. B. R. 583, 590, 148 Fed. 657; *In re Perley & Hays* (D. C., Mo.), 15 Am. B. R. 54, 138 Fed. 927.

act complained of is that of one partner acting individually the partnership cannot be charged with the effect thereof.³²¹ "Insolvent," means what it always does in this statute. Here, also, it means something more, i. e., insolvency at the time of the filing of the petition, and, if the act of bankruptcy is one which can be committed only by an insolvent, at the time of the commission of such act. In most cases, insolvency at both times must, therefore, be distinctly alleged.³²²

b. Time within which petition must be filed.—(1) **WITHIN FOUR MONTHS AFTER THE COMMISSION OF THE ACT.**—The petition must be filed within four months after the commission of the act of bankruptcy.^{323a} In making the computation the day of filing is excluded and the last day included.³²³ If the last day is a Sunday or a "holiday,"³²⁴ the time does not expire until the next day;³²⁵ and days will not be split into hours.³²⁶ The meaning of "within four months," when applied to transactions other than acts of bankruptcy, is further considered in the discussion under §§ 60, 67 and 70.

(2) **NECESSITY FOR RECORD OR POSSESSION TO START TIME RUNNING.**—A fair statement of its meaning is: a petition cannot be filed more than four months after the recording of the instrument constituting the alleged act of bankruptcy where recording is required or permitted,^{326a} or, where it is not, more than the same statutory period after the beneficiary takes notorious, exclusive, and continuous possession of the property transferred; provided always that prior actual notice shall set the time running in either case.³²⁷ The last four lines, i. e., after the word "required," of the subsection do not recur in the like sentence added to § 60-b by the amendatory act of 1903,³²⁸ doubtless the common rule as to actual notice should be read into it. Their purpose here is clear. Further they seem to make necessary the substitution of "and" for "or" in the phrase "notorious, exclusive, or continuous,"³²⁹ for, if with notice, every possession must be "notorious," and if that alone, and not also a possession that is "exclusive and continuous," were enough to start the time running, the clause as to actual notice would become tautological. If the act of bankruptcy consists of a fraudulent or preferential transfer, the time

³²¹ *Hartman v. Peters* (D. C., Pa.), 17 Am. B. R. 61, 146 Fed. 82; *In re Wing Yick* (D. C., Hawaii), 13 Am. B. R. 755, 2 U. S. D. C. Hawaii 263; *In re Schultz* (D. C., N. Y.), 6 Am. B. R. 91, 109 Fed. 264; *In re Gillette* (D. C., N. Y.), 5 Am. B. R. 119, 104 Fed. 769; *Davis v. Stevens* (D. C., S. Dak.), 4 Am. B. R. 763, 104 Fed. 235. In the case of *In re Redmond*, Fed. Cas. 11,632, it was held that a conveyance by one partner of his individual property although an act of bankruptcy as against him, will not sustain a proceeding in bankruptcy as against the firm, even though such conveyance was made with intent to hinder, delay or defraud firm creditors, or with a view of giving preference to a firm creditor.

³²² See under § 1, *ante*, p. 12.

^{323a} *Matter of Bloomberg* (D. C., Mass.), 42 Am. B. R. 115, 263 Fed. 94; *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442.

³²³ See Bankr. Act, § 31, *post*; *In re Dupree*, 97 Fed. 28; *Whitley Grocery Co. v. Roach* (Sup. Ct., Ga.), 115 Ga. 918, 8 Am. B. R. 505, 42 S. E. 232, and foot-note; *In re Warner* (D. C., Ct.), 16 Am. B. R. 519, 144 Fed. 987.

³²⁴ Bankr. Act, § 1 (14).

³²⁵ *Dutcher v. Wright*, 94 U. S. 533, 24

L. Ed. 130; *In re Stevenson* (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 111; *In re Edelstein*, 1 N. B. N. 168; *Parmenter Mfg. Co. v. Stoevers* (C. C. A., 5th Cir.), 3 Am. B. R. 220, 97 Fed. 330.

³²⁶ *In re Tonawanda St. Planing Mill Co.* (D. C., N. Y. Ref.), 6 Am. B. R. 38; *Jones v. Stevens* (Sup. Ct., Me.), 94 Me. 582, 5 Am. B. R. 571, 48 Atl. 170; *In re Warner* (D. C., Conn.), 16 Am. B. R. 519, 144 Fed. 987.

^{326a} *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442.

³²⁷ *Little v. Holley Brooks Hardware Co.* (C. C. A., 5th Cir.), 13 Am. B. R. 422, 133 Fed. 874.

³²⁸ For reason for the amendment, see *In re Mersman* (Ref., N. Y.), 7 Am. B. R. 46, and § 60-b as amended by Act of 1903.

³²⁹ For the meaning of "notorious, exclusive, or continuous possession," see *In re Woodward* (D. C., Tex.), 2 Am. B. R. 233, 95 Fed. 260, though this case construes § 3-b as though it were a part of § 60-b before the amendments of 1903. See also *In re Mingo Valley Creamery Assn.* (D. C., Pa.), 4 Am. B. R. 67, 100 Fed. 282.

will begin to run ordinarily from the day when the "beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment." If the transfer or assignment must be recorded or registered to be effectual the time begins to run from the day of the recording or registering. This is the evident purpose of the act. It will sometimes be difficult to determine what constitutes "notorious, exclusive or continuous possession" of the property. If such possession pertains to intangible forms of personal property it must be construed to mean such possession as the property is susceptible of and such as is usual and ordinary, unaccompanied by acts or conduct tending to conceal its ownership.³³⁰ Where the requisite notoriety of the transferee's possession is shown, it must appear that the petition has been filed within four months of such possession, actual knowledge on the part of the petitioning creditors being unnecessary.³³¹ Possession is not required in every case to be actual; it may be constructive, as where goods were stored in a warehouse or where in the custody of a transportation company, in which cases the delivery of a warehouse receipt or bill of lading would indicate the change in the possession of the property.³³² Where a verbal pledge, followed by manual delivery of the property, is subsequently confirmed by a written instrument, the four months' period begins to run from the date of the verbal pledge, and if the property was transferred more than four months before the petition was filed, such pledge does not constitute an act of bankruptcy.³³³ Where the transaction consists of deeds of real property which

330. In re Bogen (D. C., Ohio), 13 Am. B. R. 529, 134 Fed. 1019; Jones v. Coates (C. C. A., 8th Cir.), 28 Am. B. R. 249, 196 Fed. 860.

331. Jones v. Coates (C. C. A., 8th Cir.), 28 Am. B. R. 249, 196 Fed. 860.

To be "notorious" the possession need not be advertised to the public. All that the statute requires is that there shall be no attempt at concealment of the possession, no effort to prevent its becoming known. In re Woodward (D. C., Tex.), 2 Am. B. R. 233, 95 Fed. 260.

332. In re Bird (D. C., Minn.), 24 Am. B. R. 24, 180 Fed. 229, in which case it was held that the assignment of an equity in personal property which had been pledged to a bank to secure the payment of a debt, with notice to the bank, operated as a constructive delivery and possession of the property pledged within the meaning of § 3-b.

Change in possession.—In the case of Ozark Cooperage and Lumber Co. (C. C. A., 8th Cir.), 24 Am. B. R. 835, 180 Fed. 105, it appeared that a written contract had been made between the bankrupt and a certain lumber company, whereby the company was to purchase lumber at a stipulated price, which was to be sawed and piled at the mills of the bankrupt and as so piled was to be estimated and branded with the petitioner's initials; it was held that such acts constituted a delivery of the possession of the lumber. The court said: "Some kinds of personal property may be readily delivered from hand to hand, and interested persons

may rightfully expect that method to be observed. In other cases the character of the property and the circumstances of its situation preclude such a delivery; and other *indicia* or a change of ownership, such as signs, brands and marks, are generally accepted as sufficient. Each case, however, as it arises, should be determined by its own peculiar facts and circumstances. The contract here contemplated that the newly made lumber should remain for a time at "mills, stacked in a particular way for curing and seasoning before shipment. That was perhaps necessary, at any rate it was entirely proper and it cannot be said that while so situated it was not lawfully the subject of barter and sale."

Constructive knowledge of transfer.—Under section 3-b of the bankruptcy act, providing that the petitioning creditor in involuntary proceedings must file his petition within four months after the beneficiary takes notorious, exclusive, or continuous possession of the property transferred, unless he has received actual knowledge of the transfer before then, where the requisite notoriety of the transferee's possession is shown, in order to sustain an involuntary proceeding, it must appear that the petition has been filed within four months of such possession, actual knowledge on the part of the petitioning creditor being unnecessary. Jones v. Coates, (C. C. A., 8th Cir.), 28 Am. B. R. 249, 196 Fed. 860.

333. Jones v. Coates (C. C. A., 8th Cir.), 28 Am. B. R. 249, 196 Fed. 860.

under the State statute are either required or permitted to be recorded, the date of the transfer as an act of bankruptcy will be the date of recording the deeds.³³⁴ The interpretation placed upon the language of § 60-a, should also be applied to similar language used in § 3-b; so that if the recording of a deed or other instrument is required for any purpose whatever, it must be admitted to be required within the meaning of both of these sections.³³⁵ The second sentence of this subsection relates to the time when the four months' period will begin to run. It has as yet had comparatively little attention from the courts. The manifest purpose of the subsection is to prevent the escape of alleged bankrupts who have committed or concealed acts of bankruptcy more than four months old.³³⁶

IV. SOLVENCY AS A DEFENSE.

a. When insolvency need not be shown.—As has already been indicated, if a debtor makes a general assignment for the benefit of his creditors,³³⁷ or if he admits in writing his inability to pay his debts and his willingness to be adjudged a bankrupt,³³⁸ the question of insolvency is immaterial. If the act of bankruptcy consists of a transfer with intent to hinder, delay or defraud creditors, the petitioner need not prove insolvency of the debtor,³³⁹ but the debtor himself may allege his solvency as a defense. We have already considered the necessity of proving solvency in a case where a receiver or trustee has been appointed to take charge of the debtor's property.³⁴⁰ Subsections c and d of § 3 do not apply to this act of bankruptcy. The burden of proving the insolvency of the debtor would, therefore, seem to remain where it usually is, upon the creditor who asserts the insolvency. The reason for this is, perhaps, because the existence of a receivership usually implies insolvency, or perhaps because the papers on which it is granted were thought equivalent of the books and examination called for by § 3-d. In any event to establish this act of bankruptcy it must appear that the receiver or trustee was appointed "because of insolvency." The fact of insolvency will usually appear from the record of the proceedings in which the appointment was made. It would seem necessary for petitioning creditors relying on this act of bankruptcy to allege and prove insolvency, both at the time of the filing and of the commission of the act relied on.³⁴¹ It is not necessary in this place to discuss generally what constitutes insolvency. We have already considered it under § 1 (15) where the term is defined and we will hereafter consider it under § 60 under the subject of "preferences." The rules relating to the proof of the fact of insolvency are similar in all cases.

b. Solvency and the first act of bankruptcy.—It is conceivable that a debtor may have been insolvent at the time of the act of bankruptcy, but not when

334. *Ragan v. Donovan* (D. C., Ohio), 26 Am. B. R. 311, 189 Fed. 138, holding that where a State statute provides that deeds, not recorded, although good as between the parties, are void as to *bona fide* purchasers for value without knowledge, the recording of a deed is "required" within the meaning of § 3-b.

335. *In re Beckhaus* (C. C. A., 7th Cir.), 24 Am. B. R. 880, 177 Fed. 141; *Loeser v. Bank & Trust Co.* (C. C. A., 6th Cir.), 17 Am. B. R. 628, 148 Fed. 975, holding that the State statute which requires the conveyance or transfer to be recorded in order to be effectual against any

class of persons, is a law by which recording is required, within the meaning of § 3-b.

336. *Citizens' Bank v. DePauw Co.* (C. C., 7th Cir.), 5 Am. B. R. 345, 105 Fed. 928.

Continuing concealment.—The concealment of property constituting an act of bankruptcy may be a continuing concealment and the four months period may run from date of discovery. *Matter of Havens* (C. C. A., 2d Cir.), 42 Am. B. R. 734, 255 Fed. 478.

337. See *ante*, p. 116.

338. See *ante*, p. 127.

339. See *ante*, p. 97.

340. See *ante*, p. 121.

341. Text quoted with approval in *In re Pickens Mfg. Co.* (D. C., Ga.), 20 Am. B. R. 202, 204, 158 Fed. 894.

the petition is filed. Insolvency, other than as evidence of intent, being unimportant where the act of bankruptcy consists of hindering, delaying, or defrauding creditors, it was both proper and scientific to insert this subsection.³⁴² It seems, therefore, that, where this act of bankruptcy is relied on, it is not necessary that the petitioning creditors either allege or prove insolvency at either period.³⁴³ Where the act of bankruptcy consists of a transfer with intent to hinder, delay or defraud creditors the debtor may allege and prove that he was not insolvent at the time of filing the petition against him. If his insolvency at such date is proved by the alleged bankrupt the proceedings are to be dismissed. Where solvency is alleged as a defense in such a case the burden of proving solvency is on the alleged bankrupt.^{343a} On the other hand, it is clear that proof of solvency of the debtor at the time the petition is filed is a complete defense.³⁴⁴ If a solvent person disposes of any of his property with the intent to hinder, delay or defraud his creditors, he commits an act of bankruptcy; and if within the ensuing four months he becomes insolvent, a petition may be filed against him and he may be adjudicated a bankrupt, unless it appears upon proof adduced by the debtor that he was solvent at the time the petition was filed.³⁴⁵ Solvency may be pleaded by a responding creditor as well as by the alleged bankrupt.³⁴⁶ If solvency is relied on by a creditor who opposes the bankruptcy of the debtor, the burden is upon the creditor.³⁴⁷

c. Solvency and the second and third acts of bankruptcy.—(1) **PROOF OF INSOLVENCY.**—Section 3-d has reference to the second and third acts of bankruptcy only. Both of these acts are constructive or legal fraud, but insolvency is an essential element and must be proved before adjudication. The burden of proving insolvency would, therefore, seem to be upon the petitioning creditors.³⁴⁸ Insolvency in both of these cases must be shown to have existed when the acts were committed; solvency or insolvency at the

³⁴² In re Pease (D. C., Mich.), 12 Am. B. R. 66, 129 Fed. 446.

³⁴³ In re West (D. C., Va.), 1 Am. B. R. 261; s. c., West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098; In re Steinger (C. C. A., 5th Cir.), 6 Am. B. R. 68, 108 Fed. 591; In re Pease (D. C., Mich.), 12 Am. B. R. 66, 129 Fed. 446.

^{343a} Matter of Wellesley (D. C., Cal.), 42 Am. B. R. 412 252 Fed. 854, citing Collier on Bankruptcy (10th ed.), 84.

³⁴⁴ Elliott v. Teoppner, 9 Am. B. R. 50, 187 U. S. 327.

Solvency when the petition was filed, is important only as a defense to an act of bankruptcy under clause 1 of § 3-a, and the burden of proving this is on the alleged bankrupt. Acme Food Co. v. Meier (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74, citing West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098.

³⁴⁵ **Insolvency after transfer.**—In the case of In re Larkin (D. C., N. Y.), 21 Am. B. R. 711, 168 Fed. 100, the court said: "The person is not permitted to convey, transfer, conceal or remove any part of his property, with intent to hinder, delay or defraud his creditors and, on becoming insolvent within four months thereafter, escape the bankruptcy law by showing that he was solvent when he so conveyed, transferred, con-

cealed or removed his property." In the case of In re Hughes (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872, it was held that a conveyance made with intent to hinder and delay creditors, although no fraudulent intention was shown or suspected, was *prima facie* a fraudulent transfer constituting an act of bankruptcy, under the first clause of the section, and that the alleged bankrupt must submit to bankruptcy in the absence of proof that he was solvent when the petition was filed.

³⁴⁶ In re West (D. C., Va.), 1 Am. B. R. 261.

³⁴⁷ In re West (C. C. A., 2d Cir.), 5 Am. B. R. 734, 108 Fed. 940.

³⁴⁸ Knittel v. McGowan (D. C., Pa.), 14 Am. B. R. 209, 134 Fed. 498; *revd.* on other grounds in McGowan v. Knittel (C. C. A., 3d Cir.), 15 Am. B. R. 1, 134 Fed. 498; Matter of Electron Chemical Co. (D. C., N. Y.), 31 Am. B. R. 471, 208 Fed. 954. As to uncorroborated testimony of bankrupt proving insolvency, see Collett v. Bronx National Bank (D. C., N. Y.), 29 Am. B. R. 454, 211 Fed. 111.

As to proof of insolvency, see cases cited in Am. B. R. Dig., §§ 262-265.

time of the filing of the petition can only have a reflex importance, if any.³⁴⁹ In shady failures, it results in the alleged bankrupt being silent on the question of insolvency, thus eliminating it from the case at the outset. When the bankrupt does put solvency at issue and appears and gives testimony, the burden shifts again to the petitioning creditors.³⁵⁰

(2) **PRODUCTION OF BOOKS, PAPERS AND ACCOUNTS.**—Under this subsection the alleged bankrupt must appear with his books, papers and accounts and submit to an examination as to all matters tending to establish solvency or insolvency; if he fails so to do the burden is on him.³⁵¹ It is no excuse that a debtor engaged in business kept no books, or that he has lost them; if he does not keep them and know where they are, the burden will rest on him to show that he is solvent.³⁵² The statute does not require that the failure to produce books and papers be wilful or contumacious, in order to throw upon the bankrupt the burden of proving his solvency; the failure to produce, and the absence of a satisfactory explanation is sufficient.³⁵³ The books, papers, and accounts referred to are those material in determining an alleged bankrupt's financial condition.³⁵⁴ The books of the alleged bankrupt are competent, but not conclusive evidence on the question of insolvency.³⁵⁵ The earlier cases where the meaning of this subsection has been in question are cited in the note.³⁵⁶

349. *Acme Food Co. v. Meier* (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74; *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812. This distinction is also discussed in considering the essential elements of the second and third acts of bankruptcy. See *ante*, pp. 98, 106.

In the case of *Matter of McCartney* (D. C., Pa.), 26 Am. B. R. 548, 188 Fed. 815, the evidence was held sufficient to sustain a finding that the alleged bankrupt was insolvent at a time when he permitted his wife and another creditor to secure judgments against him and to levy upon his property.

350. *Bogen & Trummell v. Protter* (C. C. A., 3d Cir.), 12 Am. B. R. 288, 129 Fed. 533; *McGowan v. Knittel* (C. C. A., 3d Cir.), 15 Am. B. R. 1, 137 Fed. 1015, revg. 14 Am. B. R. 209, 137 Fed. 453.

351. See *In re Taylor* (C. C. A., 7th Cir.), 4 Am. B. R. 515, 102 Fed. 728; *In re Codrington* (D. C., Pa.), 9 Am. B. R. 243, 123 Fed. 891; *Bogen & Trummell v. Protter* (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533; *Matter of Rosenblatt* (D. C., Pa.), 16 Am. B. R. 306, 143 Fed. 663.

Failure to produce books and papers.—Where the alleged bankrupt fails to produce certain accounts and notes material on the question of solvency, and stated several times during the trial that he would do so, without at any time making an apparent effort to procure them, the burden of proving his solvency rests upon the bankrupt. *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507.

352. *Bogen & Trummell v. Protter* (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533.

353. **Books required in business; explanation.**—In the case of *Bogen & Trummell v.*

Protter (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533, it was held that under § 3-d, a merchant is required to produce such books, invoices, etc., as should properly be kept in his business and which are necessary to show the amount of his assets and liabilities, and that his failure to do so, without satisfactory explanation, casts upon him the burden of proving his solvency. In the case of *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507, the court said: "The evidence in this case does not indicate that there was any intentional refusal on the part of the respondent to produce the papers and accounts relating to the item in question, nor that his failure to do so was contumacious. But the statute does not require that failure be wilful or contumacious, in order to throw upon the bankrupt the burden, which is not a drastic one, of proving his solvency. The failure to make such production must be satisfactorily explained; under the facts stated, the failure was not satisfactorily explained, and it follows that the burden of proof of solvency was, by the statute, thrown upon the alleged bankrupt." The burden is not shifted to the petitioning creditors merely by reason of the fact that the books, etc., are in the possession of the marshal under an order to seize and hold. *In re Deeba & Willfong* (D. C., Hawaii), 30 Am. B. R. 130.

354. *Bogen & Trummell v. Protter* (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533.

355. *In re Docker-Foster Co.* (D. C., Pa.), 10 Am. B. R. 584, 123 Fed. 190.

356. The following will be found of some value: *Lea Bros. v. West Co.* (D. C., Pa.),

V. BOND ON TAKING POSSESSION OF BANKRUPT'S PROPERTY BEFORE ADJUDICATION.

a. Requirement as to bond.—Section 3-e requires a petitioner or applicant to give bond where it is sought to take charge of and hold property of the alleged bankrupt prior to the adjudication and pending a hearing on the petition. This requirement fits into remedies either granted by or implied from § 2.³⁵⁷ It differs from § 69-a, in that there the authority to issue the warrant should rest upon a showing of neglect by the bankrupt of his property. Here, this subsection has to do only with the bond and the remedies thereunder, and limits the power of seizure that flows from § 2 (3) and (15), by requiring the giving by the petitioning creditors of a bond against the possible dismissal of their proceedings.³⁵⁸ The order appointing a receiver of the alleged bankrupt's property should require the petitioners to give the bond before the receiver takes possession.³⁵⁹ Under the general statutes, a bond by a single surety company will be sufficient.³⁶⁰ It should be noted also that, unlike § 69-a, there is here no provision for releasing property seized, on the filing of another bond by the alleged bankrupt. It is presumable, however, that the court, under the broad powers conferred by § 2 (15), could withdraw its officer on receipt of a satisfactory bond or cash indemnity.

b. Remedies under bond; costs.—The purpose of the bond is to indemnify the alleged bankrupt against "all costs, expenses, and damages occasioned by such seizure, taking, and detention," if it should prove upon final trial that the debtor was not a bankrupt and that his custody of the property should not have been disturbed.³⁶¹ The section does not apply to any other kind of a bond, so that the remedy is not applicable in an action upon a bond given to restrain an execution sale of the bankrupt's property.³⁶² Under this subdivision counsel fees, expenses and damages provided for the seizing and holding of the property of an alleged bankrupt are for special services or damages occasioned by reason of the wrongful taking of the property of another.³⁶³ Costs, as in a suit in equity, are also authorized in all involuntary cases by General Order XXXIV. By the last paragraph of the subsection, if the petition is dismissed or withdrawn, the respondent must be "allowed" such "costs." By the last sentence, the same "shall be fixed and allowed by the court." Stripped of surplusage, these words undoubtedly mean that the court, in dismissing or on the withdrawal of the petition, may tax counsel fees, costs, expenses, and damages, and thus liquidate the amount of the liability of the obligors.³⁶⁴ Counsel fees expended and damages provided by

1 Am. B. R. 261, 91 Fed. 237; *s. c.* on appeal, *supra*; *Bray v. Cobb* (D. C., N. Y.), 1 Am. B. R. 153, 91 Fed. 102; *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 766, 99 Fed. 137.

³⁵⁷ See Bankr. Act, § 2 (3), and (15), *ante*.

³⁵⁸ For forms, see Forms Nos. 8, 9 and 10.

³⁵⁹ *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 354, 135 Fed. 742, 68 C. C. A. 340, in which the order was vacated because of the petitioner's failure to give the bond.

Waiver of bond.—If an alleged bankrupt consents to the appointment of a receiver without bond, he cannot object, if the petition be dismissed, to the payment of neces-

sary disbursements out of the funds in the receiver's custody. *Matter of Independent Mach., etc. Corp.* (C. C. A., 2d Cir.), 41 Am. B. R. 517, 251 Fed. 484.

³⁶⁰ See discussion under Section Fifty of this work, *post*. As to sufficiency of a surety company bond not joined in by the applicants, see discussion of Referee Hotchkiss in *Matter of Sears* (D. C., N. Y.), 10 Am. B. R. 389, 117 Fed. 294.

³⁶¹ *Matter of McKenzie* (D. C., Wash.), 34 Am. B. R. 111, 219 Fed. 630.

³⁶² *In re Hines* (D. C., Or.), 16 Am. B. R. 538, 144 Fed. 147.

³⁶³ *Matter of Wise* (D. C., Wash.), 32 Am. B. R. 510, 212 Fed. 567.

³⁶⁴ *In re Nixon* (D. C., Mont.), 6 Am. B. R. 693, 110 Fed. 633; *Matter of Sears*,

this subdivision are not taxable in the bankruptcy proceeding, but are to be recovered in an independent suit upon the bond provided.³⁶⁵ The language of the statute creates a new right which is not dependent upon the existence of either malice or lack of probable cause in instituting the proceedings; damages, costs, counsel fees and expenses, must be allowed by the bankruptcy court alone, upon the dismissal or withdrawal of the petition.³⁶⁶ The only counsel fees allowable are those for services performed in proper efforts to secure the discharge of the property from the writ of seizure.³⁶⁷ Only the costs, expenses and damages resulting from the seizure and detention of the alleged bankrupt's property, may be taxed;³⁶⁸ the law cannot be invoked to recover costs and expenses occasioned in making a successful defense to the charge of bankruptcy.^{369a} And the costs should only be allowed against the person upon whose

Humbert & Co. (D. C., N. Y.), 10 Am. B. R. 389, 128 Fed. 275; *In re H. Williams (D. C., Ark.)*, 9 Am. B. R. 736, 120 Fed. 34; *Matter of Weissbord (D. C., N. J.)*, 39 Am. B. R. 243, 241 Fed. 516; *Matter of Terusaki (D. C., Wash.)*, 39 Am. B. R. 256, 238 Fed. 934.

Counsel Fees.—Special counsel fees incurred because of the seizure may be allowed. *In re Ghiglione (D. C., N. Y.)*, 1 Am. B. R. 590, 93 Fed. 386; *In re Hines (D. C., Or.)*, 16 Am. B. R. 538, 541, 144 Fed. 147. If there has been no seizure, counsel fees are not to be awarded and the fact that a temporary injunction was granted restraining certain creditors of the alleged bankrupt from paying over money to him, does not make it a seizure so as to authorize such an allowance. *In re Williams (D. C., Ark.)*, 9 Am. B. R. 736, 120 Fed. 34.

^{365.} *Matter of Wise (D. C., Wash.)*, 39 Am. B. R. 510, 212 Fed. 567.

^{366.} **Right to damages; where suit to be brought.**—In the case of *Hill Co. v. Contractors' Supply & Equipment Co. (App. Ct., Ill.)*, 156 Ill. App. 270, 24 Am. B. R. 84, the court said: "A new right is created by section 3 (e). Without this provision no damages could be recovered on the dismissal of the petition unless malice and lack of probable cause appeared. The statutory right, however, is not dependent upon the existence of either malice or lack of probable cause. But the statute creating the right also provides a specific remedy; indeed it creates no right distinct from and independent of the remedy. The language is not that the plaintiff shall be entitled to damages which may be allowed by the court, but that he shall be allowed his damages and that these shall be fixed and allowed by the court. This clearly does not mean by any court, but by the bankruptcy court. In other words, the new right is not to sue for damages, but to have damages allowed in the bankruptcy proceedings by the bankruptcy court."

^{367.} *In re Smith (D. C., Ga.)*, 8 Am. B. R. 55, 113 Fed. 993.

Counsel fees of an alleged bankrupt in a

proceeding to ascertain damages occasioned through the seizure of his property by the receiver in bankruptcy, were occasioned by the seizure, and are, therefore, allowable. *Matter of Weissbord (D. C., N. J.)*, 39 Am. B. R. 243, 241 Fed. 516.

^{368.} *Matter of Weissbord (D. C., N. J.)*, 39 Am. B. R. 243, 241 Fed. 516.

Allowances for seizure.—In the case of *In re Smith (D. C., Okl.)*, 16 Am. B. R. 478, 146 Fed. 923, it was held that the alleged bankrupt, on a dismissal of the petition, cannot be allowed for (1) counsel fees for services rendered in opposing the petition and securing its dismissal, (2) loss of credit claimed to have been occasioned by the seizure of his goods and closing up his business, where by his conduct before the proceedings in bankruptcy, he had destroyed and materially impaired his credit, (3) the costs and expenses allowed to the receiver in bankruptcy for care and sale of the goods taken under the order of seizure, but therefrom should be deducted taxes assessed against the bankrupt, but paid by the receiver. *Selkregg v. Hamilton (D. C., Pa.)*, 16 Am. B. R. 474, 144 Fed. 557, awarding damages caused by the freezing and bursting of pipes in the factory while the marshal was in possession.

Expenses of receivership.—A bond given by petitioning creditors upon the appointment of a receiver conditioned to pay their costs and damages does not cover a claim for the expenses of the receivership. *Matter of El Sevilla Restaurant (D. C., Fla.)*, 41 Am. B. R. 608, 253 Fed. 410.

The expense of the appointment of a receiver should be imposed upon the petitioning creditors in the first instance, but the receiver who is acting as an officer of the court should not be charged with expenses necessarily incurred in the performance of his duties. *Matter of Independent Mach. etc. Corp., Inc. (C. C. A., 2d Cir.)*, 41 Am. B. R. 517, 251 Fed. 484.

^{369a.} *Matter of Ohio Motor Car Co. (C. C. A., 6th Cir.)*, 39 Am. B. R. 218, 241 Fed.

application the property was seized and detained,³⁶⁹ and should not be in excess of the aggregate of the bonds executed by the petitioning creditors.^{369a} There is no liability except for the usual costs, unless it appears that the petitioners acted without probable cause and maliciously.³⁷⁰ And if it appears that the estate suffered no loss by the seizure, but, on the contrary, resulted in actual gain, none of the costs and expenses incident to the receivership should be charged against the applicant.³⁷¹ Where judgment is awarded against the petitioning creditors and their bondsmen for counsel fees, costs, disbursements and expenses incurred in the proceeding a petition for a claim for damages under § 69-a for a wrongful seizure of the alleged bankrupt's property, will not be sustained.³⁷² A judgment recovered by a petitioning creditor against the alleged bankrupt subsequent to the dismissal of the petition may be set-off against any damages awarded to the alleged bankrupt.^{372a} The only liability upon a bond given under this subsection is to those who were respondents when the bond was given; if a subsequent respondent wishes protection he must move for a new bond.³⁷³ The alleged bankrupt should file his bill of costs with the clerk, and give notice to the creditors.³⁷⁴ It has been thought that the court may also enter judgment on the bond. This is doubtful. The obligors are not parties to the proceeding. Besides, a comparison of this paragraph with that of the Henderson bill³⁷⁵ shows that a specific grant of power to that end was dropped out before the bill was passed.

330; *Matter of Terusaki* (D. C., Wash.), 39 Am. B. R. 256, 238 Fed. 934; *Matter of Weissford* (D. C., N. J.), 39 Am. B. R. 243, 241 Fed. 516.

Possession not taken by receiver.—Where the property of an alleged bankrupt was not taken possession of by the receiver in bankruptcy, but remained in possession of a sheriff under foreclosure proceedings until after the trial of the issue in bankruptcy, the bankrupt cannot recoup any damages from the petitioner's bondsmen. *Matter of Terusaki*, 39 Am. B. R. 256, 238 Fed. 934.

369. *In re Ward* (D. C., N. J.), 29 Am. B. R. 547, 203 Fed. 769.

369a. *Matter of Weissford* (D. C., N. J.), 39 Am. B. R. 243, 241 Fed. 516.

370. *Matter of Moehs* (D. C., N. Y.), 23 Am. B. R. 286, 174 Fed. 165.

Action for malicious prosecution.—Even if the damages allowed in the bankruptcy pro-

ceedings were inadequate the alleged bankrupt cannot afterwards sue in a State court for a malicious prosecution to recover the same damages. *Kennedy v. National Jeweler's Board of Trade* (Sup. Ct., N. Y.), 39 Am. B. R. 85, 175 App. Div. 735.

371. *In re Ward* (D. C., N. J.), 29 Am. B. R. 547, 203 Fed. 769.

372. *Nixon v. Fidelity & Deposit Co.* (C. C. A., 9th Cir.), 18 Am. B. R. 174, 150 Fed. 574. See also *Kennedy v. Nat. Jeweler's Board of Trade* (N. Y. Sup. Ct.), 39 Am. B. R. 85, 175 App. Div. (N. Y.) 735.

372a. *Matter of Weissford* (D. C., N. J.), 39 Am. B. R. 243, 241 Fed. 516.

373. *In re Spalding* (C. C. A., 2d Cir.), 17 Am. B. R. 667, 150 Fed. 120.

374. *In re Haessler-Kohlhoff Carbon Co.* (D. C., Pa.), 14 Am. B. R. 381, 135 Fed. 867.

375. Cong. Rec., 55th Cong., 2d Sess., Vol. 31, p. 2039, § 2.

SECTION FOUR.

WHO MAY BECOME BANKRUPTS.

§ 4. Who may become bankrupts.—*a* Any person, except a *municipal, railroad, insurance or banking** corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any *moneyed, business, or commercial corporation, except a municipal, railroad, insurance or banking corporation** owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.

Analogous provisions: In U. S.: As to voluntary bankruptcy, Act of 1867, §§ 11, 36, 37; R. S., §§ 5014, 5121, 5122; Act of 1841, §§ 1, 14. As to involuntary bankruptcy, Act of 1867, § 39 (as amended by Act of July 27, 1868); R. S., § 5021 (as amended by Acts of June 22, 1874, and July 26, 1876), § 5122; Act of 1841, §§ 1, 14; Act of 1800, §§ 1, 2.

In Eng.: Act of 1883, §§ 4 (1), 115.

In Can.: Act of 1919, §§ 4, 8, 9.

Cross-references: To the law: Generally to §§ 1 (6) (19), 2 (1) 3, 5, 6, 7, 18, 19 and 59.

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I. WHO MAY BECOME BANKRUPTS.

a. *History and comparative legislation.*—Originally, bankruptcy was available to traders only. In most of the Latin countries, it is still limited to

those who are "habitually occupied in commercial transactions."¹ This continued to be the law of England until the act of 1861, though prior to that time a remedy somewhat equivalent was granted to non-traders through numerous insolvent debtor acts. To-day, any English "debtor" may be adjudged a bankrupt.² The Canadian act applies to all debtors except that wage earners and farmers may not be adjudged involuntary bankrupts. It includes partnerships and corporations.^{2a} Our first law, being purely involuntary, applied only to "merchants . . . actually using the trade of merchandise, . . . or as a banker, broker, factor, underwriter, or marine insurer"³—the latter clause a somewhat unscientific extension of the meaning of "trader." The voluntary features of the law of 1841 were available to "all persons owing debts,"⁴ and in this it was the exact equivalent of the present law; while the involuntary features were confined to the same persons as the previous statute. Under the act of 1867, any person "owing debts provable in bankruptcy exceeding \$300"⁵ might file a voluntary petition or be thrown into involuntary bankruptcy, the distinction as to traders having, as in England, by this time entirely vanished. Partnerships are, in England, amenable to bankruptcy,⁶ but corporations are not. Our first bankruptcy law seems to have been silent as to both commercial entities. The law of 1841 provided for partnership bankruptcies, but not for those of corporations. Our statute of 1867 put partnerships on the same footing as individuals; and as to corporations was much broader than the present law, as it existed prior to the amendments of 1910.⁷

b. Amendatory act of 1903.—The change as to the bankruptcy of corporations is discussed later in this section.⁸ The Ray amendatory bill added mining corporations to those liable to involuntary bankruptcy, and permitted those classes of corporations which might be petitioned against, to ask for voluntary bankruptcy, provided their stockholders took certain preliminary steps. Corporations are now more general than partnerships, and, even in the smaller communities, are increasing in number and importance; many of them, not being strictly either "trading" or "mercantile" associations, were, without apparent reason, exempted from the operation of this uniform national law. But the Senate amendments struck out even the provisions of the House bill making the voluntary bankruptcy of purely business corporations possible. Thus the only substantial change was the insertion of the word "mining," considered later.

c. Amendatory act of 1910.—The amendatory act of 1910 carried into the bankruptcy law, provisions which were sought to be incorporated by the Ray amendatory bill, introduced in the House in 1903, permitting the voluntary bankruptcy of purely business corporations. The amendment of 1910 has gone farther than this, by making the bankruptcy act applicable in all respects, as regards both involuntary and voluntary bankruptcies, to all business or commercial corporations except "municipal, railroad, insurance or banking corporations." The amendment omitted from clause b, the words "corporations engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits," and inserted in place thereof the provision authorizing the involuntary bankruptcy of any

1. See Dunscomb on "Bankruptcy; a Study in Comparative Legislation."

2. English Bankruptcy Act of 1863, § 4(1).

2a. Canadian Bankruptcy Act of 1919, § 8.

3. Act of 1800, § 1.

4. Act of 1841, § 1.

5. Act of 1867, § 11; R. S., § 5014, *post*.

6. English Bankruptcy Act of 1863, § 115.

7. See further under heading "Involuntary Bankruptcy."

8. See also under § 3.

"moneyed, business or commercial corporation, except a municipal, railroad, insurance or banking corporation." Except as to the corporations specified, any corporation may become a voluntary bankrupt, or may be adjudged an involuntary bankrupt. In the law as amended the character of the corporation is not material in determining whether such corporation is subject to bankruptcy. If the corporation does not fall within the exception, it may become or be adjudged a bankrupt. The great number of cases which have been decided, involving the question as to the application of the act to certain corporations, are no longer in point. These cases are not germane to the subject except to show the development of the bankruptcy law, or except as to a proceeding now pending which was instituted prior to June 25, 1910, the date of the taking effect of the amendatory act. This amendment may not be given a retroactive effect.⁹

II. VOLUNTARY BANKRUPTCY.

a. Persons who may file petition; debts.—(1) IN GENERAL.—Any person who owes debts in any amount, no matter how small, may file a voluntary petition. Such filing is not an act of bankruptcy, as under the law of 1867 and the present English law, but is an *ex parte* application that gives jurisdiction to the court to decree it. A voluntary petitioner may even be solvent.¹⁰ There is nothing in the act which requires the person to be insolvent, and there seems to be no reason why, if a solvent person cares to have his property distributed among his creditors in bankruptcy, he should not be allowed to do so. It will not be necessary to allege insolvency in the petition, nor prove it, to procure an adjudication.¹¹ A creditor may not intervene to oppose the petition.¹²

(2) JURISDICTIONAL FACTS.—The court is bound to ascertain whether the required jurisdictional facts exist; it must be alleged in the petition, that the debtor is within the jurisdiction of the court, that he owes debts and

9. Matter of U. S. Restaurant & Realty Co. (C. C. A., 2d Cir.), 25 Am. B. R. 915, 187 Fed. 118. Matter of New Amsterdam Motor Co. (D. C., N. Y.), 24 Am. B. R. 757, 180 Fed. 943; in this case the court calls attention to § 72 of the original act which expressly provided against the retroactive effect of the act generally, and that it might be argued that the subsequent amendments, which had no such clause, were on that account intended to be retroactive. The court concludes, however, that such section should be construed as a limited retroactive clause, and that the omission of a similar provision in an amendment of the act, is no ground for the inference that such amendment was meant to have a retroactive effect.

10. Matter of Hargadine-McKittrick, etc., Co. (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155; Matter of Pyatt (D. C., Nev.), 42 Am. B. R. 462, 257 Fed. 362, citing Collier on Bankruptcy (11th ed.), 141. Compare *In re Fowler*, Fed. Cns. 4,998. The purpose of a voluntary proceeding in bankruptcy is in consideration that the bankrupt promptly surrender all of his non-exempt property to the bankruptcy court, to the end that all of his creditors, without preference or priority, may take share and share alike in percentage of the property thus

surrendered; then the bankrupt is given an acquittance of such percentages of his debts not thus paid and may commence his business life anew. *Baylor v. Rawlings* (C. C. A., 8th Cir.), 28 Am. B. R. 773, 200 Fed. 131; *Matter of Foster Paint & Varnish Co.* (D. C., Pa.), 31 Am. B. R. 548, 210 Fed. 652; *In re Chappell* (D. C., Va.), 7 Am. B. R. 608, 113 Fed. 545.

11. Text cited in *In re Chappell* (D. C., Va.), 7 Am. B. R. 608, 612, 113 Fed. 545. The act does not make it obligatory on an insolvent debtor to take the benefit of the act. *Summers v. Abbott* (C. C. A., 8th Cir.), 10 Am. B. R. 254, 122 Fed. 36, 58 C. C. A. 352; *Richmond, etc., Co. v. Allen* (C. C. A., 4th Cir.), 17 Am. B. R. 583, 148 Fed. 657.

12. *In re Carleton* (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246; *Hanover Nat'l Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1, 10, 46 L. Ed. 1113; *In re Ives* (C. C. A., 6th Cir.), 7 Am. B. R. 682, 113 Fed. 911; *In re Jehu* (D. C., Ia.), 2 Am. B. R. 498, 94 Fed. 638, in which the court said: "I know of no provision of the bankruptcy act which authorizes creditors to file answers to a voluntary petition in bankruptcy, such as were filed in this case." See also *Matter of United Grocery Co.* (D. C., Fla.), 39 Am. B. R. 501, 239 Fed. 1016.

Stockholders of a corporation which has filed a voluntary petition will not be allowed to intervene to resist the petition. *Matter of Hargadine-McKittrick, etc., Co.* (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155.

that other essential requirements have been complied with.¹³ Only on these grounds can a creditor vacate the adjudication.¹⁴ "Debts" means debts, demands, or claims provable in bankruptcy.¹⁵ Debts not discharged, unless provable, are thus not debts for the purpose here discussed. A debtor owing but one provable debt may be adjudged a voluntary bankrupt.¹⁶ If the single debt is not dischargeable, because based on fraud or deceit, the proceeding will not lie.¹⁷ It will be noticed that the amendment of 1910 has omitted the words, "owing debts." There seems no good reason for eliminating these words. It is probable that the change was inadvertent and should be considered as an error. It will not materially affect the operation of the act, for it is obvious that there can be no bankruptcy without the existence of debts. It must still be held that a person must owe a debt or debts in order to be qualified to become a voluntary bankrupt. A farmer or wage-earner may be adjudged a voluntary bankrupt, although he is exempt from involuntary bankruptcy.¹⁸

(3) CORPORATIONS MAY BECOME VOLUNTARY BANKRUPTS.—It was the intent of the amendment of 1910 to permit voluntary bankruptcy by all corporations except those specified. The amendment is broad enough to include corporations of every kind except those specified, regardless of their purposes or the laws under which they were incorporated.¹⁹ The exception does not include a corporation operating a plant to generate and sell electricity or gas,^{19a} nor a local electric street railway.^{19b} Under the law prior to the amendment a corporation was not entitled to the benefits of the act as a voluntary bankrupt. It could only by indirection be thrown into bankruptcy by its own act, by admitting in writing its inability to pay its

13. In re Carbone (Ref., Wash.), 13 Am. B. R. 55. See also discussion under Section Fifty of this work.

14. In re Gromme, 1 Fed. 464; In re Goodfellow, Fed. Cas. 5536; In re Atlantic Mut. Life Ins. Co., Fed. Cas. 628; In re Carbone (Ref., Wash.), 13 Am. B. R. 55.

15. In re Yates (D. C., Cal.), 8 Am. B. R. 69, 114 Fed. 365. Compare §§ 1(11), 63-a.

16. Single provable debt.—In the case of In re Schwaninger (D. C., Wis.), 16 Am. B. R. 427, 144 Fed. 555, it appeared from the schedules of the bankrupt that he had but one debt, which was in the form of a judgment. The creditor raised the point that § 4 requires that a person must have "debts," clearly indicating that it was the purpose of the act to apply only to such debtors as have a plurality of debts. The court applied subdivision 29 of § 1, which provides that "words importing the plural number may be applied to and mean only a single person or thing," and it was held that this provision made § 4 applicable to a debtor who owed a single debt. The court said: "It is difficult to understand why a debtor owing a single obligation should not fall within the merciful policy of the act. It is an accidental circumstance that the indebtedness was not distributed among two or more creditors. His case is clearly within the spirit of the act, and no good reason has been suggested why he should not be within its scope and operation. It is my belief that Congress had not in mind any purpose to discriminate against an unfortunate debtor who is oppressed by a single obligation, and that the will of Congress will be effectuated by making the definition above recited, applicable to section 4, and treating the term 'debt' where it occurs in such section as equivalent to 'debts.'" See In re Yates (D. C., Cal.), 8 Am. B. R. 69, 114 Fed. 365; In re Maples (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 922.

17. Where the only claim has been adjudicated by a State court to be based upon deceit and false representations by the bankrupt inducing the sale of a farm, the court should dismiss the petition. Matter of Sheperdson (D. C., Vt.), 34 Am. B. R. 284, 220 Fed. 186; Re Maples (D. C., Vt.), 5 Am. B. R. 426, 105 Fed. 919; Re Yates (D. C., Cal.), 8 Am. B. R. 69, 114 Fed. 365; Re Colaluca (D. C., Mass.), 13 Am. B. R. 292, 133 Fed. 255.

18. Olive v. Armour & Co. (C. C. A., 5th Cir.), 21 Am. B. R. 901, 167 Fed. 517.

19. Matter of S. & S. Mfg. & Sales Co. (D. C., Ohio.), 39 Am. B. R. 786, 246 Fed. 1005, citing Collier on Bankruptcy (10th ed.), 123.

Necessity for assets.—In order that a corporation may be entitled to be adjudged a bankrupt, it is not essential that it should own property, or, if it does own property, that such property should be subject to administration in bankruptcy. Matter of Hargadine-McKittrick, etc., Co. (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155.

Estoppel.—The fact that a corporation appears as a defendant in a State court and contests matters pertinent to its financial condition and maintains its solvency does not estop it from thereafter filing a petition in bankruptcy. Matter of Hargadine-McKittrick, etc., Co. (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155.

Benevolent orders.—A local lodge of the Independent Order of Odd Fellows, incorporated under the Benevolent Orders Law of the State of New York, is a corporation within the meaning and intent of the Bankruptcy Act entitled to file a voluntary petition in bankruptcy. Matter of Carthage Lodge, I. O. O. F. (D. C., N. Y.), 36 Am. B. R. 873, 230 Fed. 694. In this case Judge Ray discusses at length the laws relating to corporations and concludes that any corporation however incorporated may avail

debts and its willingness to be adjudged a bankrupt on that ground.²⁰ The amendment does not specify the action to be taken by a corporation to obtain voluntary bankruptcy. In this respect it differs from the act of 1867. This act permitted voluntary bankruptcy by a corporation and prescribed conditions under which it might be obtained.²¹ In the absence of special provisions in the Bankruptcy Act, reference must be made to the State statutes, controlling the authority of officers and directors of corporations to dispose of the property of the corporation for the benefit of its creditors.²² A State statute which prohibits a sale, assignment or transfer of the franchise and property of a corporation without the consent of the stockholders holding at least two-thirds of the capital stock, does not prohibit filing a voluntary petition by the board of directors of a corporation.²³ Under the New York statute a board of directors alone has power to determine whether a general assignment for the benefit of creditors shall be made.²⁴ Under such a statute the president of a corporation has no such power unless authority is conferred upon him by the board of directors.²⁵ Where a petition of a corporation to be adjudged a voluntary bankrupt does not show that corporate action had been taken, authorizing the president of the corporation to execute and file the petition, the court has no jurisdiction to adjudge the corporation a voluntary bankrupt.²⁶ It seems to have been recognized under the original act that a board of directors of a corporation, who are charged with the conduct of its business, may declare the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt in accordance with clause 5 of § 3-a.²⁷ In analogy to this principle a board of directors of a corporation, having general control of the affairs of the corporation, should be authorized to file a petition for the voluntary bankruptcy of the corporation, in the absence of some statutory provision limiting the powers of the board in this respect.²⁸

itself of the privilege of becoming a voluntary bankrupt.

19a. *Matter of Grafton Gas & Elec. Light Co.* (D. C., W. Va.), 42 Am. B. R. 567, 233 Fed. 668; *City of Holland v. Holland City Gas Co.* (C. C. A., 6th Cir.), 44 Am. B. R. 66, 257 Fed. 679, citing *Collier on Bankruptcy* (11th ed.), 142.

19b. *Matter of Grafton Gas & Elec. Light Co.* (D. C., W. Va.), 42 Am. B. R. 568, 233 Fed. 668.

20. See Bankruptcy Act, § 3-a (5) and discussion under "*Fifth act of bankruptcy; Confession of Bankruptcy*," *ante*, p. 126.

In the case of *Matter of New Amsterdam Motor Co.* (D. C., N. Y.), 24 Am. B. R. 757, 180 Fed. 943, it was held that where a corporation is within the classes which may be adjudicated a bankrupt and passes a resolution consenting to be adjudicated in involuntary proceedings, such proceedings, though in form involuntary, became voluntary.

21. The Bankruptcy Act of 1867, § 37, provides that "The provisions of this act shall apply to all moneyed, business or commercial corporations and joint stock companies, and that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators present, at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors."

22. *Matter of Hargadine-McKittick, etc., Co.* (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155; *Dodge v. Kenwood Ice Co.* (C. C. A., 8th Cir.), 29 Am. B. R. 586, 204 Fed. 577, affg. 26 Am. B. R. 499, 189 Fed. 525; *Matter of Foster Paint and*

Varnish Co. (D. C., Pa.), 31 Am. B. R. 548, 210 Fed. 652, quoting text; *Matter of S. & S. Mfg. & Sales Co.* (D. C., Ohio), 39 Am. B. R. 786, 246 Fed. 1005.

23. *Bell v. Blessing* (C. C. A., 9th Cir.), 35 Am. B. R. 672, 225 Fed. 750.

24. N. Y. General Corp. Law, § 34.

25. *Schaefer v. Scott*, 40 N. Y. App. Div. 438, 57 N. Y. Supp. 1085.

26. *In re Jefferson Casket Co.* (D. C., N. Y.), 182 Fed. 689, in which case it was held that the president of a New York corporation, who has not been designated by the board of directors to perform the duty, has no power to sign and verify a petition of the corporation to be adjudged a voluntary bankrupt.

27. See cases cited under § 3-a (5), subtitle "*Fifth act of bankruptcy; Confession of bankruptcy*," p. 126.

28. *Power of board of directors to petition.*—*In re Jefferson Casket Co.* (D. C., N. Y.), 25 Am. B. R. 663, 182 Fed. 689; *In re Guanacevi Tunnel Co.* (C. C. A., 2d Cir.), 29 Am. B. R. 230, 201 Fed. 316; *Matter of United Grocery Co.* (D. C., Fla.), 39 Am. B. R. 501, 239 Fed. 1016; *Matter of S. & S. Mfg. & Sales Co.* (D. C., Ohio), 39 Am. B. R. 786, 246 Fed. 1005; *Matter of Kenwood Ice Co.* (D. C., Minn.), 26 Am. B. R. 499, 189 Fed. 525, in which case the court had under consideration the powers of a board of directors of a Minnesota

(4) **INFANTS.**—Infants, being persons, it was held under the law of 1841 that they were entitled to the benefits of the act.²⁹ On the other hand, under the next law, it appears that they were not.³⁰ This seems to be the rule under the present act.³¹ It also seems to be the law in England.³² An infant, either petitioning or petitioned against, must appear to have capacity to owe. It is yet a mooted question, however, whether an infant who has either held himself out and traded as an adult, or who alleges only debts for necessities, cannot be adjudged bankrupt on his own petition. The better opinion seems to be that he can.³³ If an infant is liable for the debts which he contracts under the common law, as for necessities, or under a State statute, as for contracts made by him while engaged in business as an adult, there seems no good reason to hold that he is not entitled to the privileges of the act, and that he may not become a voluntary bankrupt.³⁴ Infants with

corporation to petition for the voluntary bankruptcy of the corporation. The court said: "A board of directors ought to have power to put the company into bankruptcy. They have care of the general business of the corporation. They are the persons who know whether the corporation is able to go on or not. It might very well happen, that under the articles and by-laws of the corporation, it would be impossible to hold a meeting of the stockholders for months. Under these circumstances the bankruptcy of the corporation might be delayed so long that in many cases the purpose of the bankrupt law would be defeated and preferences given. I am satisfied that a board of directors at a duly called meeting, has the power to put the corporation into bankruptcy." *Affid.* 29 Am. B. R. 586.

The directors of a Pennsylvania corporation may authorize the filing of a voluntary petition in bankruptcy by the president and secretary. *Matter of Foster Paint and Varnish Co.* (D. C., Pa.), 31 Am. B. R. 548, 210 Fed. 652.

Sufficiency of resolution.—A resolution of the board of directors of a corporation, authorizing the cashier, treasurer, and book-keeper to prosecute in the name of the corporation a petition in bankruptcy to final discharge, is sufficient to authorize a voluntary proceeding, and it is unnecessary that the resolution authorize, in strict conformity with section 3a (5) of the Bankruptcy Act, an admission in writing on the part of the corporation of its inability to pay its debts, and its willingness to be adjudged a bankrupt. *Bell v. Blessing* (C. C. A., 9th Cir.), 35 Am. B. R. 672, 225 Fed. 750.

Meeting of directors.—Two of the three directors of a corporation met and adopted a resolution that the corporation go into bankruptcy, without notice to the third director who had quarreled with his associates, had absented himself from all meetings for ten months, had brought suit to rescind his purchase of stock, thus making himself ineligible to be elected a director under the Minnesota law, and had announced his refusal to act as an officer and stockholder.

It appeared that the law of Minnesota provided that the business of the corporation should be managed by a board of at least three directors, elected by the stockholders and that a majority should constitute a quorum for the transaction of business, but there was no special provision for filling vacancies either by directors or stockholders. *Held*, that when the two directors met they constituted a board which had authority to adopt a resolution that the corporation should go into bankruptcy. *Dodge v. Kenwood Ice Co.* (C. C. A., 8th Cir.), 29 Am. B. R. 586, 204 Fed. 577, *affg.* 26 Am. B. R. 499, 189 Fed. 525.

²⁹ In re Book, Fed. Cas. 1,637.

³⁰ In re Derby, Fed. Cas. 3,815.

³¹ In re Duguid (D. C., N. C.), 3 Am. B. R. 794, 100 Fed. 274; In re Eidemiller (D. C., Ill.), 5 Am. B. R. 570, 105 Fed. 595.

³² *Ex parte Jones*, 18 Ch. D. (Eng.) 109; *Rex v. Cole*, 1 Ld. Raym. (Eng.) 443. An infant who, upon becoming of age, affirms his acts of bankruptcy, may become a bankrupt. *Ex parte Barrow*, 3 Ves. Jr. (Eng.) 554; *Ex parte Barwis*, 6 Ves. Jr. (Eng.) 601; *Ex parte Henderson*, 4 Ves. Jr. (Eng.).

³³ Compare *Ex parte Watson*, 16 Ves. 265, and *Ex parte Margett Re Soltyskoff* (1891), 1 Q. B. 413, with *In re Brice* (D. C., Iowa), 2 Am. B. R. 197, 93 Fed. 942. See also *In re Penzanaky* (Ref., Mass.), 8 Am. B. R. 99.

³⁴ In re Bryce (D. C., Iowa), 2 Am. B. R. 197, 93 Fed. 942, in which case it was held that under the laws of Iowa, providing that if a minor engages in business as an adult, and the party giving him credit has good reason to believe him to be of full age, the minor cannot, upon becoming of age, disaffirm his contracts made while an infant. Such infant may be adjudged a bankrupt upon his own petition.

When infants may petition.—The bankruptcy act nowhere excepts infants from its provisions or benefits, and there is no ground of public policy for excluding them where they owe debts which can be enforced against them and their property, such as

no liabilities, except such as require their ratification on coming of age, are not entitled to the benefits of the act; and this, not so much because they are infants, as because they do not owe debts which they are bound to pay.³⁵ Since general contracts of an infant have no force or validity if disaffirmed by the infant on coming of age, it would be a frivolous act for courts to permit the institution and prosecution of proceedings which might afterward be practically annulled by such disaffirmance.³⁶ Where an involuntary petition is filed against an infant and he alleges infancy as a defense thereto he may be adjudicated a bankrupt if, after becoming of age he ratifies his debts.³⁷ It seems settled that when a partnership adjudication is sought and the only defense is that one partner is an infant, the firm and the solvent partner should be declared bankrupts, but the proceeding dismissed as to the infant.³⁸ Another problem which has arisen in this connection is whether an adjudication can be granted on a copartnership made up of an adult and an infant, without notice to the infant. It seems that no notice is necessary.³⁹

(5) LUNATICS.—A lunatic may not, save in a lucid interval, file a voluntary petition.⁴⁰ The English law and practice seem to provide for intervention by the lunatic's committee, as well as the appointment of a committee *ad litem*; such officer having power to do for the lunatic any act, permitted or required by the bankruptcy law, which the lunatic could have done if sane.⁴¹ This is probably not the law in this country.⁴² In voluntary cases it must, therefore, appear that, both at the time of the verification of the petition and of its filing, the petitioner was *compos mentis*. But it is still doubtful in England, and more doubtful here, whether under any circumstances a person actually insane can be adjudged a bankrupt.⁴³ If the proceeding be involuntary, it must at least appear that he was sane at the time of the commission of the act of bankruptcy.⁴⁴ The insanity of a bankrupt after his adjudication does not, however, abate the proceeding; the bankruptcy court

a judgment in an action for negligence. In *re Walrath* (D. C., N. Y.), 24 Am. B. R. 541, 175 Fed. 243.

The test whether an infant may be the subject of a petition in bankruptcy, seems to be whether the debts from which he seeks to be discharged are based upon contracts or obligations which he can disaffirm upon coming of age, or upon such as render him absolutely liable. In *re Penzansky* (D. C., Mass.), 8 Am. B. R. 99; In *re Eidemiller* (D. C., Ill.), 5 Am. B. R. 570, 105 Fed. 595.

35. In *re Walrath* (D. C., N. Y.), 24 Am. B. R. 541, 175 Fed. 243.

36. See note of In *re Dunnigan Bros.*, 2 Am. B. R. 628, 95 Fed. 428.

37. *Matter of Mandel* (Ref., N. Y.), 33 Am. B. R. 42.

38. In *re Dunnigan Bros.* (D. C., Mass.), 2 Am. B. R. 628, 95 Fed. 428; In *re Duguid* (D. C., N. C.), 3 Am. B. R. 794, 100 Fed. 274.

39. In *re Duguid* (D. C., N. Y.), 3 Am. B. R. 794, 100 Fed. 274. This case follows the analogy of *Lovell v. Beauchamp*, 1 *Mansons*, 467, a leading English case. See also *Belton v. Hodges*, 2 M. & Scott, 496; *Ex parte Monte* 14 Ves. 602; *Ex parte Adam*, 1 Ves. & B. 494.

40. *Rhodes v. Rhodes*, 44 Ch. D. 94; In

re Marvin, Fed. Cas. 9,178; In *re Weitzel*, Fed. Cas. 17,365. See In *re Stein* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547.

41. See In *re Farnham* (1895), 2 Ch. D. 779.

42. In *re Eisenberg* (D. C., N. Y.), 8 Am. B. R. 551, 117 Fed. 786.

43. In *re Murphy*, Fed. Cas. 9,946; In *re Funk* (D. C., Iowa), 4 Am. B. R. 96, 101 Fed. 244. *Contra*: In *re Weitzel*, Fed. Cas. 17,365; In *re Pratt*, Fed. Cas. 11,371, holding that an insane person may be made an involuntary bankrupt for acts of bankruptcy committed while sane.

44. In *re Funk* (D. C., Iowa), 4 Am. B. R. 96, 101 Fed. 244, holding that a person judicially declared insane or incapable of managing his affairs cannot commit an act of bankruptcy; In *re Marvin*, Fed. Cas. 9,178. Compare In *re Stein & Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547; In *re Burka* (D. C., Tenn.), 5 Am. B. R. 843, 104 Fed. 331.

The insanity of an alleged bankrupt at the time of the commission of the alleged act of bankruptcy is a defense to an involuntary petition in bankruptcy. In *re Ward* (D. C., N. J.), 20 Am. B. R. 482, 161 Fed. 755.

may administer his estate where its jurisdiction is based upon acts of bankruptcy alleged to have been committed while he was sane.⁴⁵

(6) **MARRIED WOMEN.**—They may become bankrupt in all States where they can contract debts.⁴⁶ Where a married woman is liable only in case her separate estate is charged, it must clearly appear that her debts were so charged.⁴⁷ Where a coverture defeats the debt a married woman cannot avail herself of the act.⁴⁸ Disability to contract has been removed by statute in nearly, if not quite, all the States.

(7) **ALIENS.**—Our former acts limited the operation of the law to persons residing within the jurisdiction of the United States.⁴⁹ There is no such limitation in the present law.⁵⁰ But, if not domiciled or with their principal place of business within the United States, they must have property here.⁵¹ The change made in the former laws by the present act is, therefore, of little practical importance.

(8) **INDIANS.**—Whether an Indian may become a bankrupt depends on his "owing debts." Until he becomes a citizen, he is subject to certain statutory disabilities in respect to the making of contracts.⁵² But, aside from this limitation, it seems that he may become either a voluntary or be adjudged an involuntary bankrupt.⁵³

(9) **ESTATES OF DECEDENTS.**—By section 125 of the English act of 1883, the estates of deceased insolvent debtors may be administered in bankruptcy.

45. Act of bankruptcy committed while sane.—In re Kehler (D. C., N. Y.), 18 Am. B. R. 596, 153 Fed. 235. This case was affirmed in 19 Am. B. R. 513, 159 Fed. 55, in which the court said: "If he, (Kehler) committed the acts of bankruptcy alleged in the petition while insane, the adjudication is wrong which, irrespective of technical objections to the pleadings and proceedings of his committee, should be righted. If, on the other hand, these acts were committed while sane, there was no error in continuing the case, even though the bankrupt subsequently became insane. Section 8 of the bankruptcy act provides that the insanity of the bankrupt shall not abate the proceedings, and section 1 provides that the word 'bankrupt' shall include a person against whom an involuntary petition has been filed. It is manifest therefore, that if Kehler committed an act of bankruptcy while sane, and by reason of such act the court obtained jurisdiction, it can continue the proceedings notwithstanding the subsequent insanity of the bankrupt. The district judge correctly states the proposition as follows: 'True, an insane person cannot commit an act of bankruptcy, but if Kohler was *compos mentis* at the time the acts were committed, the petition by creditors being filed before he was adjudged insane, I think the court acquired jurisdiction of the proceedings.'"

46. Compare In re Collins, Fed. Cas. 3,006; In re Lyons, Fed. Cas. 8,649; In re Kinkead, Fed. Cas. 7,824; In re O'Brien, Fed. Cas. 10,397. See McDonald v. Tefft-Weller Co. (C. C. A., 5th Cir.), 11 Am. B. R. 800, 128 Fed. 381, holding that since the

laws of Florida permit a married woman to have a separate estate and to engage in business on her own account, she may be adjudged an involuntary bankrupt.

47. In re Howland, Fed. Cas. 6,791; In re Goodman, Fed. Cas. 5,540.

In England a married woman cannot be made a bankrupt for non-compliance with a bankruptcy notice founded upon a judgment obtained against her in the name of a trading firm which she is carrying on separately from her husband. In re Handford, 6 Mason, 131, 1 Q. B. 566.

48. In re Slichter, Fed. Cas. 12,943.

49. Compare In re Goodfellow, Fed. Cas. 5,536.

50. In re Clisdell (Ref., N. Y.), 2 Am. B. R. 424.

51. **Alien bankrupt.**—A bankruptcy court has jurisdiction of an alleged bankrupt, although he is an alien living in a foreign country, provided there is "property" within the jurisdiction. Where an alien residing abroad and having a deposit with a bank in New York City made a general assignment in England, and a petition in bankruptcy was filed against him in the district, including New York City, within four months after the assignment, the bankruptcy court has jurisdiction. It seems that a bankruptcy court may decline jurisdiction if the creditors as well as the alleged bankrupt are all aliens residing abroad. Mater of Berthoud (D. C., N. Y.), 36 Am. B. R. 555, 231 Fed. 529.

52. R. S., § 2105.

53. In re Rennie (Ref., Ind. Ter.), 2 Am. B. R. 182; In re Ruasie (D. C., Or.), 3 Am. B. R. 6, 96 Fed. 608.

The proceeding is analogous to that of a living debtor, save that the decedent's personal representative stands in his stead. The practice is assimilated to that in chancery on the administration of solvent estates. An executor who, as such, has carried on a business and incurred debts pursuant to the will of his testator, may also be adjudged a bankrupt.⁵⁴ None of our bankruptcy laws have had similiar provisions.⁵⁵ It seems, however, that when a surviving partner applies, the partnership may be adjudged bankrupt, and the Federal court thereby acquires jurisdiction over the estate of the deceased partner in process of administration in a probate court.⁵⁶ There being no express power to administer the estates of deceased insolvents, resort must be had in such cases to the usual State tribunals. If, however, death occurs after the adjudication, the estate continues in bankruptcy.⁵⁷

(10) PARTNERSHIPS.—This is fully considered under Section Five.⁵⁸

III. INVOLUNTARY BANKRUPTCY.

a. Persons who may be adjudged involuntary bankrupts.—(1) IN GENERAL.—Subsection *b* of this section declares what persons and corporations may be adjudged involuntary bankrupts. In discussing the principles applicable to persons who may become voluntary bankrupts, we also considered the jurisdiction of the courts to adjudicate the involuntary bankruptcy of such persons; the rules applicable to the voluntary bankruptcy of infants, lunatics and other persons mentioned under the foregoing head, are applicable to the involuntary bankruptcy of such persons.⁵⁹ The debtor petitioned against must owe at least \$1,000. Two classes of persons cannot be petitioned against—wage-earners and farmers. The word “natural” is used to qualify the word “person,” except for which any corporation might be included, because of the definition of “person” as contained in § 1 (19). The subsection specifically states the classes of corporations which may be adjudged involuntary bankrupts. The words “unincorporated company” are considered later.⁶⁰

(2) STATUS OF ALLEGED BANKRUPT; TIME.—The question as to the status of the alleged bankrupt at a particular time so as to entitle him to exemption from an involuntary proceeding becomes important. When the debts from which the alleged bankrupt will be discharged were contracted, he may have been engaged in business and his occupation may have been changed subsequently to that of a wage-earner or farmer. Or on the other hand his occupation may have changed since the debts were contracted from that of a wage-earner or farmer to that of a business man. In a number of cases, some of them controlling in their respective jurisdictions, it has been ruled that the question whether an insolvent is exempt from involuntary adjudication will depend upon the occupation in which he is engaged at the time the acts of bankruptcy were committed.⁶¹ It is quite apparent that a man should not

⁵⁴ *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Madd. 90.

⁵⁵ *Graves v. Winter*, Fed. Cas. 5,710; *Matter of Fackelman* (D. C., Cal.), 41 Am. B. R. 14, 248 Fed. 565, citing *Collier on Bankruptcy* (11th ed.), 146.

⁵⁶ *In re Pierce* (D. C., Wash.), 4 Am. B. R. 489, 102 Fed. 977.

⁵⁷ Bankr. Act, § 8.

⁵⁸ As to the effect of the infancy of one partner, see p. 145, *ante*.

⁵⁹ For “infants,” “lunatics,” “married women,” “aliens,” “Indians,” “estates of

decedents,” and “partnerships,” see under this section, *ante*. For who may file involuntary petitions and the practice on the same, see §§ 18 and 59-a, *post*.

⁶⁰ See discussion in this section, *post*, under heading “Unincorporated Companies.”

⁶¹ *Virginia-Carolina Chemical Co. v. Shelhorse* (C. C. A., 4th Cir.), 35 Am. B. R. 720, 228 Fed. 493; *Counts v. Columbus Buggy Co.* (C. C. A., 4th Cir.), 81 Am. B. R. 312,

be permitted to evade bankruptcy by changing his occupation, in which his property was acquired and his debts contracted, to that in which under the statute he would be exempt from adjudication. For instance the property acquired as a merchant may not be exempt from administration in bankruptcy because the merchant becomes subsequently a wage-earner; so that in such a case it is eminently proper to govern the exemption by the status of the alleged bankrupt at the time the debts were contracted.⁶² A person who has acquired property and incurred debts as a merchant may not avoid bankruptcy by becoming a wage-earner, either before or after the act of bankruptcy; it is in such a case the occupation of the debtor at the time the debts were contracted and not at the time the act of bankruptcy was committed which will control.⁶³ But where a wage-earner or farmer becomes a merchant and thus amenable to bankruptcy, his status at the time the act of bankruptcy was committed may

210 Fed. 748; *Harris v. Tapp* (D. C., Ga.), 37 Am. B. R. 564, 235 Fed. 918; *Matter of Leland* (D. C., Mich.), 25 Am. B. R. 209, 185 Fed. 830; *Flickinger v. First National Bank* (O. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162, 76 C. C. A. 132.

Change of status before filing petition.—In the case of *In re Burgin* (D. C., Ala.), 22 Am. B. R. 574, 173 Fed. 726, it was held that a change of occupation to one of the exempt pursuits, between the commission of an act of bankruptcy and the filing of a petition against him, will not defeat the operation of the act, as the bankrupt's status is to be determined as of the period during which he contracted the debts and acquired or owned the assets scheduled.

Engaged in farming when act was committed.—In the case of *Matter of Leland* (D. C., Mich.), 25 Am. B. R. 209, 185 Fed. 830, the court said: "It is important to know at what time the exempt status must have existed in order to prevent the adjudication. The natural meaning of the words used by the statute would indicate that they referred to the time of filing the petition, but the necessities of the case have led to the conclusion that this meaning cannot be adopted. There is some authority for dating the question back to the time when the indebtedness was incurred; but this would many times give rise to great confusion: as if, for example, part of the indebtedness of the petitioning creditors had a favorable position under this ruling and part did not; it does not seem necessary in the ordinary case to go back so far. . . . It does not follow that the time when the debts accrued and the nature of the debts of the petitioning creditors, are wholly immaterial. They have accrued in large part or wholly out of business other than farming. This fact may be quite persuasive as indicating that the debtor was not chiefly engaged in farming." *Matter of Desney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294.

⁶² *Tiffany v. Condensed Milk Co.* (D. C., Pa.), 15 Am. B. R. 413, 141 Fed. 444; *In re Crenshaw* (D. C., Ala.), 19 Am. B. R. 502, 156 Fed. 638; *Flickinger v. First National*

Bank (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162, 76 C. C. A. 132; *In re Burgin* (D. C., Ala.), 22 Am. B. R. 574, 173 Fed. 726, holding that the status of the alleged bankrupt as to his occupation is to be determined as of the period when he contracted the debts to be proved and acquired the property to be administered; and when he was at that time engaged in mercantile pursuits he cannot defeat the operation of the law by thereafter engaging in an exempt occupation. See Am. B. R. Digest, § 122.

Application of rule.—The rule that the status of an alleged involuntary bankrupt is to be determined as of the date when his debts were contracted is not the general rule, and is only to be adopted when the equities of the case require such a construction, it being based on the equitable idea that the exemption from involuntary proceedings allowed by the statute was not intended as a means of escape for insolvents whose property was acquired and whose debts were incurred in a recent non-exempt occupation. *Harris v. Tapp* (D. C., Ga.), 37 Am. B. R. 564, 235 Fed. 918.

⁶³ *In re Wakefield*, 25 Am. B. R. 118, 182 Fed. 247. This case and those cited in the preceding note are opposed in the case of *In re Folkstad* (D. C., Mont.), 29 Am. B. R. 77, 199 Fed. 363, in which the court holds that an "act of bankruptcy" is such when the act is committed, or not at all; and if an act is committed by one who then is not of the class that the Bankruptcy Act says may be adjudicated an involuntary bankrupt, it is not an "act of bankruptcy," and furnishes no foundation for involuntary proceedings, the act taking color from the bona fide occupation of the actor at the time it is committed, and not from his occupation prior or subsequent thereto. Hence, one who incurs debts in a non-exempt occupation, changes to an exempt occupation, and thereafter commits an act that in a non-exempt occupation would be an "act of bankruptcy," is not subject to adjudication as an involuntary bankrupt because thereof, and of debts still existing, or at all.

well be deemed the controlling factor. In any event the circumstances existing in each particular case must be considered. In view of the fact that the main purpose of the Bankruptcy Act is to provide for the distribution of the assets of the bankrupt among his creditors having provable debts and the discharge of the bankrupt from such debts, it seems reasonable to assert that the exemption from bankruptcy should pertain exclusively to the occupation of the bankrupt when the debts were incurred. There is no question, however, that the occupation of the alleged bankrupt at the time the petition is filed is not controlling.⁶⁴ A change in occupation from business to farming since the act of bankruptcy will not avail the debtor.⁶⁵

(3) **WAGE-EARNERS.**—A wage-earner is defined in § 1 (27) as a person who "works for wages, salary, or hire, at a compensation not exceeding one thousand five hundred dollars per year." Under this subsection (§ 4-b) a wage-earner cannot be adjudged an involuntary bankrupt. It is not presumable that, were he not thus excepted, creditors would often resort to a court of bankruptcy against such a debtor.⁶⁶ The exemption of wage-earners from the operation of the act applies to those who are dependent for a living upon the result of their individual effort, without the aid of property or capital.^{66a} To bring a person within the exception it should appear that the earning of wages is his paramount occupation.⁶⁷ In considering the definition of "wage-earner" in § 1, cases were cited indicating what constitutes a wage-earner under the statute.⁶⁸

(4) **PERSONS ENGAGED CHIEFLY IN FARMING OR THE TILLAGE OF THE SOIL.**—

(I) *In general.*—No person answering this description can be adjudged an involuntary bankrupt. The phrase seems to be construed strictly. The words "the tillage of the soil" are not used as a definition of what constitutes farming; tillage is a part of farming but is not co-extensive with the whole of farming.⁶⁹ Whether a debtor answers this description is a question of fact to be determined in each case on its merits.^{69a} The affairs and occupation of men are of infinite complexity. It is not possible to lay down any precise rule which will in every case enable a court to say with certainty in what occupa-

64. In re Luckhardt, 4 Am. B. R. 307, 101 Fed. 807; In re Mackey (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355.

65. In re Luckhardt (D. C., Kan.), 4 Am. B. R. 307, 101 Fed. 807; In re Mackey (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355; Tiffany v. La Plume Condensed Milk Co. (D. C., Pa.), 15 Am. B. R. 413, 141 Fed. 444.

66. For valuable cases under the somewhat similar phrase "workmen, clerks, and servants," see under section sixty-four of this work; also discussion of the definition of "wage-earner" under section one.

Wage-earner.—A teamster working his team for day wages hauling logs and other similar services for different people is within the exception. In re Yoder (D. C., Pa.), 11 Am. B. R. 445, 127 Fed. 894; and so is a bookkeeper having no other business or occupation. In re Pilger (D. C., Wis.), 9 Am. B. R. 244, 118 Fed. 206; a music teacher giving lessons at so much an hour is not a "wage-earner." First Nat. Bank of Wilkesbarre v. Barnum (D. C., Pa.), 20 Am. B. R. 439, 160 Fed. 245.

66a. *Hermanos v. Fernandes* (D. C., Porto Rico), 39 Am. B. R. 345, 9 P. R. Fed. 439.

67. *Matter of Remaley* (Ref. Pa.), 23 Am. B. R. 29. The wage-earner is an employee who performs services for another, exclusive of

other occupation. *Virginia-Carolina Chemical Co. v. Shellhouse* (C. C. A., 4th Cir.), 35 Am. B. R. 720, 228 Fed. 493.

68. These cases may all be applied here.

69. In re Dwyer (C. C. A., 7th Cir.), 25 Am. B. R. 913, 184 Fed. 880.

The words "farming or the tillage of the soil" as used in section 4-b of the bankruptcy act, expresses the same thought, that is, the word "farming" and the words "tillage of the soil," mean the same thing. *Hart-Parr Co. v. Parkley* (C. C. A., 8th Cir.), 36 Am. B. R. 540, 231 Fed. 913.

Wage-earner distinguished from farmer.—A farmer is exempt from involuntary proceedings, whatever his other interests, if farming is his chief occupation; a wage-earner is exempt only when he actually pursues the calling which the term describes. The farmer works for himself; the wage-earner is an employee, and this implies service for another which is substantially exclusive. This characteristic difference between farmers and wage-earners is clearly recognized in the language of section 4b of the bankruptcy act. *Virginia-Carolina Chemical Co. v. Shellhouse* (C. C. A., 4th Cir.), 35 Am. B. R. 720, 228 Fed. 493.

69a. *Matter of Driver* (D. C., N. J.), 42 Am. B. R. 106, 252 Fed. 954.

tion a man has been chiefly engaged. It is not permissible to segregate certain facts or circumstances and say that their existence or non-existence settles the question. In answering it all his activities and pursuits must be considered as a whole.⁷⁰

(II) *Chief occupation.*—Farming or tillage of the soil must be the chief occupation. Mere physical exertions are not the determining factor; rather that occupation which the person deems of paramount importance to his welfare.⁷¹ The relative amount of time a man devotes to various lines of endeavor in which he is interested is doubtless one circumstance to be taken into account.⁷² He must be engaged "chiefly" in the business or occupation of farming and must derive therefrom his chief means of livelihood.⁷³ He may be engaged in other enterprises, in which he has invested money and which take considerable of his time, so long as farming constitutes his chief occupation.⁷⁴ When a debtor follows two pursuits the relative amount of his indebtedness contracted in one and the other may be taken into account as an aid in determining in which he was chiefly engaged.⁷⁵ It has been held that a man engaged both in the business of farming and at that of raising cattle on a large scale was, nevertheless, within this exception.⁷⁶ Likewise, perhaps, when the chief occupations is to raise cattle and hogs for the market, provided he raises them on the farm, or feeds them largely from crops raised thereon.⁷⁷ But a cattle buyer is not engaged in farming because he takes cattle, purchased by him for the market, to a farm for feeding.⁷⁸ Dairying is usually a mere

70. *Matter of Disney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294; *Matter of Brown* (C. C. A., 9th Cir.), 42 Am. B. R. 452, 253 Fed. 357, affg. 41 Am. B. R. 549, 251 Fed. 365.

Status of debtor engaged in several occupations.—Where an alleged bankrupt is engaged in several occupations at the same time, all his activities and pursuits must be considered as a whole, in passing upon the question of his status at the time the alleged act of bankruptcy was committed. *Harris v. Tapp* (D. C., Ga.), 37 Am. B. R. 564, 235 Fed. 918. See Am. B. R. Dig., § 125.

71. *Chief occupation.*—In the case of *In re Mackey* (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355, it was held that a "person engaged chiefly in farming," within the meaning of the act is one whose chief occupation or business is farming; and one's chief occupation or business is that which is of principal concern to him, or some permanency in its nature, which he deems of paramount importance to his welfare, and on which he chiefly relies for his livelihood or as the means of requiring wealth, great or small. *In re Drake* (D. C., S. C.), 8 Am. B. R. 187, 114 Fed. 229, affd. sub nom. *Wulbern v. Drake* (C. C. A., 4th Cir.), 9 Am. B. R. 695, 120 Fed. 493; *Matter of Disney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294.

72. *Matter of Disney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294; *Matter of Brown* (C. C. A., 9th Cir.), 42 Am. B. R. 452, 253 Fed. 357, affg. 41 Am. B. R. 549, 251 Fed. 365.

73. *Bank of Dearborn v. Matney* (D. C., Mo.), 12 Am. B. R. 483, 132 Fed. 75; *Matter of Spengler* (D. C., Iowa), 39 Am. B. R. 64, 238 Fed. 862; *Wulbern v. Drake* (C. C. A., 4th Cir.), 9 Am. B. R. 695, 120 Fed. 493, in which case the court said: "It does not matter if the person may have other business or other interests if his principal occupation is that of an agriculturist—if that is the business to which he devotes more largely his time and attention—which he relies upon as a source of income for the support of himself and family, or for the accumulation of wealth."

74. *Counts v. Columbus Buggy Co.* (C. C. A., 4th Cir.), 31 Am. B. R. 812, 210 Fed. 748; *In re Terry* (D. C., Pa.), 30 Am. B. R. 631, 208 Fed. 162; *Harris v. Tapp* (D. C., Ga.), 37 Am. B. R. 564, 235 Fed. 918.

75. *Matter of Disney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294; *Matter of Driver* (D. C., N. J.), 42 Am. B. R. 106, 252 Fed. 956; *Matter of Brown* (C. C. A., 9th Cir.), 42 Am. B. R. 452, 253 Fed. 357, affg. 41 Am. B. R. 549, 251 Fed. 365.

76. *In re Thompson* (D. C., Iowa), 4 Am. B. R. 340, 102 Fed. 287. See *Bank of Dearborn v. Matney* (D. C., Mo.), 12 Am. B. R. 482, 132 Fed. 75.

77. *In re Rugsdale*, Fed. Cas. 12,123.

Raising stock for the market.—In the case of *In re Dwyer* (C. C. A., 7th Cir.), 25 Am. B. R. 913, 184 Fed. 880, it appeared that the alleged bankrupt owned and dwelt upon a farm of 160 acres, upon which he raised corn and oats on 46 acres and grass for feeding purposes on the balance; upon this farm he fattened cattle and hogs for the market; he raised some of the stock upon the farm and purchased a considerable number which he brought to the farm; after the cattle and hogs were properly fattened, he sold them to drovers and sometimes shipped them in car-load lots to the market; it was necessary to purchase about four times as much grain as he raised upon his farm to feed the stock; he never bought cattle as a dealer in live stock buys them, with the expectation of speculating and taking advantage of market conditions. It was held that the alleged bankrupt was chiefly engaged in farming and was therefore within the exemption.

78. *In re Brown* (D. C., Iowa), 13 Am. B. R. 140, 132 Fed. 706.

Cattle dealer.—An alleged bankrupt, whose chief occupation was trading in cattle, using his lands as a mere feeding station, relying more upon purchased feed from the market for preparing the cattle for sale than on his own agricultural products, is not a "person

incident of farming, and a farmer who keeps a dairy is subject to the exemption.⁷⁹ One engaged chiefly in farming is within the exception although he at the same time conducts a small business as a private banker,⁸⁰ or is engaged in carrying on a law and collection business on a small scale,⁸¹ or runs a small store yielding a very small income, compared with that from the farm,⁸² or a partnership which conducts a commissary in connection with farming interests, and one member having an agency for fertilizers and plows.⁸³ It has been ruled that an individual farmer who loaned money to and became a member of a partnership composed of farmers which was promoting a canning factory, but who did not personally give much time or thought to the enterprise was not chiefly engaged in it, and, therefore, as an individual was not liable to adjudication.⁸⁴ An alleged bankrupt, although owning a farm, who is chiefly engaged in threshing for others for hire, is not chiefly engaged in "farming or the tillage of the soil."⁸⁵ A woman who owns a farm and permits her husband to run it and treat the products as his own is not a person engaged chiefly in farming, and, therefore, may be adjudicated a bankrupt.⁸⁶ A person engaged chiefly in farming is not subject to adjudication as an involuntary bankrupt, though he makes a general assignment for the benefit of creditors.⁸⁷ The exemption applies to a partnership as well as an individual.⁸⁸

(III) *Lease of farm.*—A resident owner who has leased his farm to another for a money rent is not within the exception,⁸⁹ but otherwise where he leases part of his farm and works the rest of it.⁹⁰ If the owner of a farm leases it upon shares, without himself carrying on the farming operations more than to see that the tenant was doing the work and dividing the proceeds as agreed, he is within the exception.⁹¹ — *even cited holds contrary*

(5) PRACTICE AND PLEADINGS.—The petition in involuntary cases should contain allegations to the effect that the alleged bankrupt was not either a wage-earner or a person chiefly engaged in farming or in tillage of the soil.⁹² But a failure to do so, unless raised by the answer, will be deemed waived.⁹³ It may be sufficient to make such averments as will exclude the idea of the alleged bankrupt being within the excepted classes;⁹⁴ but the better practice is to

chiefly engaged in farming." *Bank of Dearborn v. Matney* (D. C., Mo.), 12 Am. B. R. 482, 132 Fed. 75. See also *Hoffschlaeger Co. v. Young Nap* (D. C., Hawaii), 12 Am. B. R. 510, 2 U. S. D. C., Hawaii 90; *Matter of Brown* (C. C. A., 9th Cir.), 42 Am. B. R. 452, 253 Fed. 357, affg. 41 Am. B. R. 549, 251 Fed. 365.

^{79.} *Gregg v. Mitchell* (C. C. A., 6th Cir.), 21 Am. B. R. 659, 166 Fed. 725.

^{80.} *Couts v. Townsend* (D. C., Ky.), 11 Am. B. R. 126, 126 Fed. 249.

^{81.} *In re Hoy* (D. C., Iowa), 14 Am. B. R. 648, 137 Fed. 175.

^{82.} *Rise v. Bordner* (D. C., Pa.), 15 Am. B. R. 297, 140 Fed. 566; *In re Mackey* (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355; see *In re Duke & Son* (Ref., Ga.), 28 Am. B. R. 195.

^{83.} *Sutherland Medicine Co. v. Rich* (Ref., Ga.), 22 Am. B. R. 85.

^{84.} *Matter of Disney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294.

^{85.} *Hart-Parr Co. v. Barkley* (C. C. A., 8th Cir.), 36 Am. B. R. 540, 231 Fed. 913.

^{86.} *In re Johnson* (D. C., N. Y.), 18 Am. B. R. 74, 149 Fed. 864, in which cases it appeared that the wife had taken title to a farm formerly owned by the husband in order to keep it from his creditors, and it was

held that the fact of ownership was not material. Judge Ray in this case discusses at length and with care the question of what constitutes farming under the statute.

^{87.} *Olive v. Armour & Co.* (C. C. A., 5th Cir.), 21 Am. B. R. 901, 167 Fed. 517.

^{88.} *Still's Sons v. American National Bank* (C. C. A., 4th Cir.), 31 Am. B. R. 320, 209 Fed. 749.

^{89.} *In re Matson* (D. C., Pa.), 10 Am. B. R. 473, 123 Fed. 743.

^{90.} *Wulbern v. Drake* (C. C. A., 4th Cir.), 9 Am. B. R. 695, 120 Fed. 493.

^{91.} *Matter of Leland* (D. C., Mich.), 25 Am. B. R. 209, 185 Fed. 830. See also *Matter of Driver* (D. C., N. J.), 42 Am. B. R. 106, 252 Fed. 956.

^{92.} *Beach v. Macon Grocery Co.* (C. C. A., 5th Cir.), 9 Am. B. R. 762, 120 Fed. 736.

^{93.} *Green River Deposit Bank v. Craig Bros.* (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137; *In re Columbia Real Estate Co.* (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 965.

^{94.} *Matter of Livingston* (D. C., Hawaii), 13 Am. B. R. 357, 2 U. S. D. C. 254; *In re Brett* (D. C., N. J.), 12 Am. B. R. 492, 130 Fed. 951; *In re White* (D. C., Pa.), 14 Am. B. R. 241, 135 Fed. 199.

include express allegations negating the statutory exceptions. The allegation and proof should also show that the alleged bankrupt was not in one of these excepted classes at the time of the act of bankruptcy.⁹⁵ A defense based on an allegation that he was, may be raised by a responding creditor, and, when raised, goes to the jurisdiction, and, if not met by a replication, is conclusive.⁹⁶ If the petition is defective in that it does not contain allegations to the effect that the alleged bankrupt is not within either of the excepted classes, the defect may be cured by amendment.⁹⁷ Where a person has been adjudged insane at a certain date with lucid intervals until a certain date and without lucid intervals thereafter, a presumption of insanity arises from the date first mentioned, and the burden of proof is upon the petitioning creditors to show that the alleged act of bankruptcy was committed during a lucid interval.⁹⁸

b. Corporations which may be adjudged involuntary bankrupts.—(1) **IN GENERAL.**—The definition of "corporations" will be found in § 1 (6). It does not, of course, include municipal corporations, but it would seem to comprise membership corporations and religious, educational and eleemosynary corporations and the like. But because of the limitation to "moneyed, business or commercial corporations," membership corporations, incorporated for other than business or commercial purposes, may not be adjudicated bankrupts. Under the law of 1867 any business, moneyed or commercial corporation might be thrown into bankruptcy. As has already been seen the amendatory act of 1910 has practically conformed the present bankruptcy act to that of 1867, so far as the persons and corporations who may be adjudicated bankrupts are concerned.⁹⁹ If the act of bankruptcy was committed prior to the taking effect of the amendment of 1910, bankruptcy may not be decreed unless the corporation was one which might have been adjudicated a bankrupt under the laws which existed prior to the amendment.¹⁰⁰

(2) **EXCEPTIONS AS TO INSURANCE AND BANKING CORPORATIONS.**—The exception as to "municipal, railroad, insurance or banking corporations" is absolute. "Moneyed" corporations are usually regarded as including banking and insurance corporations, and are so defined in the laws of New York.¹⁰¹ The fact does not affect the construction or application of the exception, as it is obvious that it was the intent of Congress to exempt such corporations from the operation of the act. The exemption will be limited strictly to corporations which fall within the specified classes. It does not include a fraternal order which as an incident to its corporate existence provides aid for the beneficiaries of its deceased members.¹⁰² There are reasons of policy why banking corporations should be excluded. They are trustees of the people, whose debts are always

95. The burden of proof that an alleged bankrupt is not a person "engaged chiefly in farming" is upon the petitioning creditors. In re Burgin (D. C., Ala.), 22 Am. B. R. 574, 173 Fed. 726; Harris v. Tapp (D. C., Ga.), 37 Am. B. R. 664, 235 Fed. 918. See also *Hermanos v. Fernandez* (D. C., Porto Rico), 39 Am. B. R. 345, 9 P. E. Fed. 439. That burden is fully met when it is shown that practically all the indebtedness arose from ventures having no connection whatever with the farming industry. After such a showing the burden is shifted to the debtor to prove that he is within the exempted class. *Matter of Driver* (D. C., N. J.), 42 Am. B. R. 108, 252 Fed. 956.

As to status of bankrupt in respect to excepted classes, see discussion under preceding heading a(2) "Status of alleged bankrupt: time," *ante*.

96. In re Taylor (C. C. A., 7th Cir.), 4 Am. B.

R. 515, 102 Fed. 728; *Rise v. Bordner* (D. C., Pa.), 15 Am. B. R. 297, 140 Fed. 566.

97. In re Crenshaw (D. C., Ala.), 19 Am. B. R. 502, 156 Fed. 638.

98. In re Kehler (C. C. A., 2d Cir.), 19 Am. B. R. 513, 159 Fed. 55.

99. See discussion under "Voluntary Bankruptcy," *ante*, p. 141.

100. *Matter of U. S. Restaurant & Realty Co.* (C. C. A., 2d Cir.), 25 Am. B. R. 915, 187 Fed. 118.

101. See N. Y. General Corporation Law, § 3, subd. 4, which provides that "a 'moneyed corporation' is a corporation formed under or subject to the banking or insurance law."

102. Insurance corporation.—The Grand Lodge Ancient Order of United Workmen is not an "insurance corporation" within the meaning of section 4 of the bankruptcy act, and, hence, is not subject to adjudication.

due and whose credit is necessary to trade and industry. They are not only creatures of the State, organized under State statutes, but are supervised and inspected by the State at frequent intervals, thus making it difficult for them to commit preferences.¹⁰³ A national bank incorporated under the national banking act would not, for obvious reasons, be subject to involuntary bankruptcy, although not included within the expressed provisions of this exception.¹⁰⁴ It would seem that only those entities which are strictly banks and thus subject to official espionage, are excepted.¹⁰⁵ Banking corporations do not include private bankers, doing business under State supervision, and no special significance is attributed to the omission by the amendment of 1910 of the reference to private bankers in the original act.¹⁰⁶

(3) DISSOLUTION OF CORPORATION.—The attempted dissolution of a corporation having undistributed assets or unpaid debts under a State statute providing for the winding up of a corporation, does not deprive the bankruptcy court of its jurisdiction, when such corporation has committed an act of bankruptcy prior to such dissolution.¹⁰⁷ A corporation having committed an act of bankruptcy, the jurisdiction of a bankruptcy court may not be defeated by prior proceedings for dissolution;¹⁰⁸ or by the appointment of a receiver at the suit of creditors,^{109a} and this is true although in the suit appointing a receiver the court grants an injunction restraining the corporation, its officers,

This because its only obligation is to collect from such of its members as are willing to contribute funds with which to pay the beneficiaries of deceased members. *Matter of Grand Lodge Ancient Order of United Workmen*, 36 Am. B. R. 634, 232 Fed. 199.

103. *In re Oregon Trust & Savings Bank* (D. C., Or.), 19 Am. B. R. 484, 156 Fed. 319.

104. See under former law, *In re Manufacturers' Nat'l Bank*, Fed. Cas. 9,051.

105. Compare *Davis v. Stevens* (D. C., S. Dak.), 4 Am. B. R. 763, 104 Fed. 235. And see *In re Moench & Sons Co.* (C. C. A., 2d Cir.), 12 Am. B. R. 240, 130 Fed. 685, affg. 10 Am. B. R. 656, 123 Fed. 965; *In re White Mountain Paper Co.* (C. C. A., 1st Cir.), 11 Am. B. R. 491, 127 Fed. 180.

106. *In re Surety & Guarantee Trust Co.* (C. C. A., 7th Cir.), 9 Am. B. R. 129, 121 Fed. 73; *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

Jurisdiction over private bankers.—Since the bankruptcy act confers upon courts of bankruptcy jurisdiction to adjudge private bankers bankrupt and to administer their property, this jurisdiction is not only paramount, but is exclusive, and State laws assuming to confer upon State officers or courts authority to administer the property of such bank are superseded and must give way when the bankruptcy act is properly invoked. *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

107. *In re Merchants' Ins. Co.*, Fed. Cas. 9,441; *In re Independent Ins. Co.*, Fed. Cas. 7,018.

Effect of dissolution.—If a corporation suffers or permits some of its creditors to obtain preferences through legal proceedings, and its stockholders subsequently sue for and obtain a dissolution, the effect of which is

to permit the alleged preferences to stand, such corporation has committed an act of bankruptcy and petitioning creditors may have the corporation adjudged a bankrupt, notwithstanding a decree of dissolution in the State court and the appointment therein of a receiver. *Scheuer v. Smith & Montgomery Book Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 384, 112 Fed. 407. In this case it was argued that as a dissolution of the corporation had been adjudged and decreed in the State court prior to the hearing, although since the institution of the proceedings in the bankruptcy court, such proceedings abated and no adjudication in bankruptcy could be rendered, as the corporation is dead and no judgment can be rendered against a dead man. The court said: "As to this, we think it only necessary to refer to § 8 of the bankrupt act in relation to the death or insanity of the bankrupt and by analogy hold that the section applies to a corporation that seeks by suicide to defeat properly instituted proceedings in bankruptcy."

Tiffany v. Laplume Condensed Milk Co. (D. C., Pa.), 15 Am. B. R. 415, 141 Fed. 444; *In re Moench & Sons Co.* (C. C. A., 2d Cir.), 12 Am. B. R. 240, 130 Fed. 685, holding that the jurisdiction of the bankruptcy court to adjudicate a corporation bankrupt is not affected by the fact that on the day the petition in bankruptcy was filed, the property of the corporation was in the hands of a State court receiver.

108. *In re Sterlingworth Ry. Supply Co.* (D. C., Pa.), 21 Am. B. R. 341, 164 Fed. 591; *In re International Coal Mining Co.* (D. C., Pa.), 18 Am. B. R. 312, 143 Fed. 665, affd. 17 Am. B. R. 573, 148 Fed. 981; *In re Munger Vehicle Tire Co.* (C. C. A., 2d Cir.), 19 Am. B. R. 785, 159 Fed. 901.

109a. *Matter of Hargadine-McKittick, etc.* Co. (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155.

agents, or creditors from interfering in any way with the management of the corporation by the receiver, or from prosecuting any action or proceeding against it.¹⁰⁹ Likewise the fact that a corporation after committing an act of bankruptcy, forfeits its franchise, does not deprive the bankruptcy court of jurisdiction.¹¹⁰ If the alleged act of bankruptcy was committed prior to the beginning of proceedings against the corporation for dissolution, and within the four months' period, the corporation may be declared a bankrupt, although dissolution was effected in the State court prior to the beginning of bankruptcy proceedings.¹¹¹ The rule is that an insolvent corporation, having committed an act of bankruptcy, may not defeat the purpose of the bankruptcy act by dissolution proceedings in a State court, but its property must be administered under that act, for the benefit of its creditors, upon the institution of proper proceedings.¹¹²

(4) UNINCORPORATED COMPANIES.—Under this section an "unincorporated company" may be adjudged an involuntary bankrupt. This phrase was inserted while the bankruptcy act was in conference committee, and is not explained by any of the reports which contain the bill in its various stages. The rarity of failures of companies of this character, other than those organized for business purposes, will, however, prevent it from being either dangerous to such bodies or of much value to creditors. The phrase manifestly means all those private bodies which occupy the middle ground between partnerships and stock corporations, possessing some of the powers and privileges of both, and is generally so recognized by the courts.¹¹³ Such

The jurisdiction of the bankruptcy court attached or its right to act arose when the company being insolvent committed the acts of bankruptcy. Any other view of the matter would destroy the effect of the bankruptcy act entirely. This act is the paramount law for the administration of the estate of insolvents. Its provisions which seek to bring about equality among creditors of the same class cannot be avoided in this way. In *re Adams & Hoyt Co.* (D. C., Ga.), 21 Am. B. R. 161, 164 Fed. 489.

109. *Matter of Yaryan Naval Stores Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 269, 214 Fed. 563; *Matter of Hargadine-McKittrick, etc. Co.* (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155. Compare *Cavaknaw v. Indian Tire Co.* (N. J. Ct. of Ch.), 44 Am. B. R. 137, 107 Atl. 643.

110. *Matter of Double Star Brick Co.* (D. C., Calif.), 32 Am. B. R. 149, 210 Fed. 980.

111. *Effect of liquidation in State court.*—In *re Adams & Hoyt Co.* (D. C., Ga.), 21 Am. B. R. 161, 164 Fed. 489; In *re Storck Lumber Co.* (D. C., Md.), 8 Am. B. R. 86, 114 Fed. 860, in which the court said: "The act of 1898 superceded the state insolvent laws and now when commercial and manufacturing corporations are so numerous, and are sometimes used, as in this case, more as a cover from individual liability than for more legitimate uses, it can scarcely be supposed as the bankrupt act especially provides for proceedings against commercial corporations, that it was intended that such a corporation could commit acts of bankruptcy and escape the provisions of the law by applying to be wound up under the State statute, and thus defeat the operation of the bankrupt law." In *re International Coal Mining Co.* (D. C., Pa.), 16 Am. B. R. 312,

143 Fed. 665; *Bollinger v. Central National Bank* (C. C. A., 9th Cir.), 24 Am. B. R. 44, 177 Fed. 609, holding that a corporation which had wholly ceased its business and was engaged in winding up its affairs, may be proceeded against in bankruptcy for an act of bankruptcy committed by it in the course of liquidation. See also *State v. Superior Court of Kings County*, 20 Wash. 545, 2 Am. B. R. 92, 56 Pac. 35; In *re Lengert Wagon Co.* (D. C., N. Y.), 6 Am. B. R. 535, 110 Fed. 927.

112. In *re Standard Cordage Co.* (D. C., N. Y.), 30 Am. B. R. 449, 184 Fed. 156.

113. *Burkhart v. German-American Bank* (D. C., Ohio), 14 Am. B. R. 222, 137 Fed. 968.

The word "company" includes at least any unincorporated association or group of individuals whose object and purpose are either wholly or chiefly of the same kind as the object and purpose of a moneyed business or commercial corporation. The word "company" is broad enough in meaning to include a "business" company without a charter. *Matter of Order of Sparta* (C. C. A., 3d Cir.), 39 Am. B. R. 523, 242 Fed. 235.

Private bankers.—Unincorporated companies, engaged in business as private bankers under State statutes, are liable to be adjudicated bankrupts under section 4b of the bankruptcy act. *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

The meaning of term "unincorporated company."—In the case of *Matter of Associated Trust* (D. C., Mass.), 34 Am. B. R. 861, 222 Fed. 1012, the court said: "The words 'unincorporated company' are not found in any Massachusetts statute which has been considered in connection with these organizations. Their meaning in the bankruptcy act is by no means certain. The word 'unincorporated' is clear; the word 'company' in this connection is much less definite. It would seem to imply an association of individuals, not partners, carrying on business under a distinct name, and having common

companies include a fire Lloyds Association,¹¹⁴ or a joint-stock association organized under a State law limiting liability to the capital subscribed by the members,¹¹⁵ or a fraternal beneficial association,^{115a} or a business organization in the nature of a real estate trust where the capital is contributed by certificate holders, who select managers of the trust to represent them in transacting the business thereof, as is common in Massachusetts.¹¹⁶

(5) CASES UNDER ACT PRIOR TO AMENDMENT OF 1910.—This section as it existed prior to the amendatory act of 1910, provided that "any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits" might be adjudged an involuntary bankrupt. It was important under the law prior to the amendment of 1910 to determine whether a corporation was or was not engaged principally in the prescribed pursuits. Fine distinctions have been drawn in determining the question as to whether or not a certain business was manufacturing or trading. The amendment of 1910 has made many, if not all, of these cases of little practical importance. The principles declared and the cases cited in support thereof will not materially affect the disposition of cases arising under the amendment of 1910. Cases now pending which arose prior to June 25, 1910, will be decided under the law as it existed and was applied prior to that time. These principles and cases have also some historical value. It may be important, or at least interesting, to know the force and effect of the bankruptcy law during all its stages of existence. In view of the possible application of the principles and cases which arose under the former law to cases now pending which arose prior to the taking effect of the amendment, and the fact that such principles and cases may be of historical interest and importance, it has been deemed advisable to retain such principles and cases in this edition. We have therefore inserted them in much the same way as they appeared in former editions as an appendix to this section.

(6) PRACTICE AND PLEADINGS.—If the petition be against the corporation it must distinctly allege that it comes within one or more of the permitted classes.¹¹⁷ The amendment of 1910, extending the law to practically all business and commercial corporations, has not modified the application of this rule. It should still be clearly alleged in the petition that the corporation is a moneyed, business or a commercial corporation, although this is not essential to the sufficiency of the pleading.¹¹⁸ Under the former law it

rights *inter se*, but having no individual ownership in the joint property, no individual control over the business in which their joint capital is embarked, and no direct individual liability for the company's debts. Its use in connection with the word 'unincorporated' would seem to imply that the organization should have some of the attributes usually found in corporations."

114. *Matter of Seaboard Fire Underwriters* (D. C., N. Y.), 13 Am. B. R. 722, 137 Fed. 987.

115. *In re Hercules Atkins Co.* (D. C., Pa.), 13 Am. B. R. 369, 133 Fed. 813.

115a. *Matter of Order of Sparta* (C. C. A., 3d Cir.), 39 Am. B. R. 523, 242 Fed. 235.

116. *Matter of Associated Trust* (D. C., Mass.), 34 Am. B. R. 851, 222 Fed. 1012.

117. *In re Elmira Steel Co.* (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456.

118. See discussion under heading of "*Cor-*

porations which may be adjudged involuntary bankrupt," *ante*, p. 152. As to form of petition against corporation see Hagan & Alexander Bankr. Forms, p. 43, and Supplementary Form, No. 118, *post*.

Sufficiency of petition.—A petition which negatives the exceptions set forth in section 4b of the bankruptcy act and alleges that the alleged bankrupt company was engaged in the "general retail merchandise business," is sufficient although it does not allege that the corporation sought to be adjudged a bankrupt was a "moneyed, business, or commercial" corporation. It seems, however, that it is better practice to set forth, in the phraseology of the bankruptcy act, the character of the business of the alleged bankrupt. *Sabin v. Blake-McFall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501.

was held that if the petition did not contain such an allegation it was demurrable and an assertion of the contrary fact in an answer, if not replied to, was conclusive.¹¹⁹ It was also held that an order of adjudication, showing a like omission, could not be impeached collaterally.¹²⁰ Aside from the allegation as to the character of the corporation the petition and the practice are the same as where petitions are filed against individuals. Under the law as amended controversy will seldom arise as to the sufficiency of the petition and of the proof to show that the alleged bankrupt corporation was either a moneyed, business or commercial corporation. There will not be much difficulty in determining the class in which the corporation is to be placed. If any question does arise in respect to this matter, the rule will doubtless be, as it was under the former law, that the burden of proof is upon the petitioners to show that the alleged bankrupt corporation was in the class specified in this section.¹²¹ Where the issue is raised, evidence is not admissible to show that prior to the incorporation of the company its predecessor in interest had sold merchandise.¹²² Pending the determination of the question as to the character of the corporation, a court of bankruptcy may assume jurisdiction, and appoint receivers to take custody of the property.¹²³ Where proceedings are brought against a corporation and it appears that another corporation was under the same management and the property of the two intermingled, a receiver may be appointed for both corporations. But upon it subsequently appearing that the allied corporation was solvent, its assets should be separated, and claims arising from credit given to such corporation should be paid in full from such assets.¹²⁴

c. Effect of bankruptcy of corporations.—(1) **IN GENERAL.**—A corporation being defined in §. 1 (19) as a person, can apply for and be given a discharge. This seems to have been doubted,¹²⁵ but that corporations may be discharged may now be considered settled. An adjudication in bankruptcy does not of itself dissolve a corporation or terminate its existence.¹²⁶ The reason for their existence being terminated by their insolvency, it is not supposed that many bankrupt corporations will apply.

119. See *In re Taylor* (C. C. A., 7th Cir.), 4 Am. B. R. 515, 102 Fed. 728; *In re Callison* (D. C., Fla.), 12 Am. B. R. 344, 130 Fed. 978; *Beech v. Macon Grocery Co.* (C. C. A., 5th Cir.), 9 Am. B. R. 762, 120 Fed. 736, 57 C. C. A. 150; *In re Mero* (D. C., Conn.), 12 Am. B. R. 171, 128 Fed. 630.

Effect of demurrer.—A judgment of a district court sustaining a demurrer to a petition upon the ground that the alleged bankrupt was not, on the allegations, "a corporation entitled to the benefits of the bankruptcy act," is a bar to a subsequent petition in another district by creditors who intervened in the first proceeding, presenting the same issue raised by the demurrer to the first petition. *Matter of Culin-Pau Contracting Co.* (D. C., Mass.), 35 Am. B. R. 375, 224 Fed. 245.

120. *In re Columbia Real Estate Co.* (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 965.

121. *Philpot v. O'Brien* (C. C. A., 1st Cir.), 11 Am. B. R. 205, 126 Fed. 167; *Matter of Hudson River Elec. Power Co.* (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934. See also *Walker Roofing, etc., Co. v. Merchant & Evans Co.* (C. C. A., 4th Cir.), 23 Am. B. R.

185, 173 Fed. 771, holding that upon the issue as to whether a corporation was engaged in a trading and mercantile business, and subject to adjudication, evidence that, prior to its incorporation, its predecessor in interest had sold merchandise, is immaterial; *In re Interstate Paving Co.* (D. C., N. Y.), 22 Am. B. R. 572, 171 Fed. 604.

122. *Walker Roofing, etc., Co. v. Merchant & Evans Co.* (C. C. A., 4th Cir.), 23 Am. B. R. 185, 173 Fed. 771; *In re Interstate Paving Co.* (D. C., N. Y.), 22 Am. B. R. 572, 171 Fed. 604.

123. *In re De Lancey Stables Co.* (D. C., Pa.), 22 Am. B. R. 406, 170 Fed. 860.

124. *Carroll v. Stern & Goldsmith* (C. C. A., 6th Cir.), 34 Am. B. R. 570, 223 Fed. 723.

125. *In re Marshall Paper Co.* (D. C., Mass.), 2 Am. B. R. 653, 95 Fed. 419, but this case was overruled by the Circuit Court of Appeals (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872.

126. *Matter of Russell Wheel and Foundry Co.* (D. C., Wash.), 35 Am. B. R. 66, 222 Fed. 569.

(2) **LIABILITY OF OFFICERS, DIRECTORS, OR STOCKHOLDERS.**—It has been held that the discharge of a corporation does not prevent creditors taking judgment in a State court against the corporation, at least in so far as to enable them to proceed on a stockholder's or director's liability.¹²⁷ This subsection, inserted by the amendatory act of 1903, is thus probably but declaratory of the law. It is, perhaps, a little broader. The "bankruptcy" of a corporation, which must include all of the steps to and including adjudication, is enough. It is possible that the corporation may not seek a discharge. At any rate, the intention of Congress to save to the creditors of corporations all the rights given them against negligent or dishonest officers, directors, or stockholders by the State or territorial or Federal laws is clear. The reason which induced the prohibition on the discharge of corporations found in the law of 1867 exists no longer.¹²⁸ Where the facts warrant a bankruptcy court has jurisdiction to make a call upon stockholders for unpaid stock subscriptions.¹²⁹ As the stockholders' liability to pay such subscriptions is secondary, *i. e.*, conditioned on insufficiency of corporate assets, such want of assets must be established before demand therefor can be enforced against the stockholders.¹³⁰

APPENDIX.

CORPORATIONS SUBJECT TO BANKRUPTCY PRIOR TO AMENDMENT OF 1910.

a. "Engaged principally in."—The section as it existed prior to the amendatory act of 1910 provided that any corporation "engaged principally in" manufacturing, trading, printing, publishing, mining or mercantile pursuits might be adjudged an involuntary bankrupt. The phrase "engaged principally in" has already been frequently considered and interpreted in the courts. The weight of authority declared the test to be: In what pursuit is the corporation chiefly engaged? Thus, prior to the amendment of 1903, a mining company, which also conducted a supply store, was not subject to bankruptcy;¹³¹ on the other hand it was held that a mining company chiefly engaged in smelting was.¹³² The purposes of the corporation, as stated

127. *In re Marshall Paper Co.* (D. C., Mass.), 2 Am. B. R. 653, 95 Fed. 419. See also *Irish v. Citizens Trust Co.* (D. C., N. Y.), 21 Am. B. R. 39, 43, 163 Fed. 178; *In re Flood-Pratt Dairy Co.* (Ref., Ohio), 23 Am. B. R. 148; *In re Allemen Hardware Co.* (D. C., Pa.), 22 Am. B. R. 871, 172 Fed. 611.

Action to recover.—The discharge in bankruptcy of a corporation is a sufficient excuse for failure to secure judgment and return of execution unsatisfied, preliminary to bringing action against stockholders. *Firestone Co. v. Agnew* (N. Y. Ct. of App.), 21 Am. B. R. 292, 194 N. Y. 165.

128. Compare § 17, *post*, generally, for effect of a discharge.

129. *Matter of Munger Vehicle Tire Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 395, 168 Fed. 910.

Assessment upon unpaid capital stock.—The relation to a bankrupt corporation of stockholders is such that, even though they are non-residents, the bankruptcy court has jurisdiction over them in a proceeding to levy an assessment on the unpaid capital stock of the bankrupt. *In re Menarch Corporation* (D. C., Conn.), 28 Am. B. R. 382, 196 Fed. 252.

130. *Matter of Mfgs. Box & Paper Co.* (D. C., N. Y.), 41 Am. B. R. 763, 251 Fed. 957; *Bergdoll v. Harrigan* (C. C. A., 3d Cir.), 44 Am. B. R. 683, 263 Fed. 279; *In re Newfoundland Syndicate*

(D. C., N. J.), 28 Am. B. R. 119, 196 Fed. 443 (aff'd. 29 Am. B. R. 868, 201 Fed. 917), holding that to establish a want of corporate assets for the purpose of levying assessments on unpaid stock of a corporation, it is not necessary to institute plenary suit against the stockholders, but the trustee in bankruptcy of the corporation may file a petition in the bankruptcy court for leave to make an assessment and call upon the unpaid stock of the corporation for the purpose of paying its debts. Compare, *Benner v. Billings* (Wash. Sup. Ct.), 43 Am. B. R. 576, 181 Pac. 19.

Effect of order of Bankruptcy court.—Where an action by the trustee of a bankrupt corporation to recover the total amount unpaid on a subscription to the stock of the corporation has been authorized by an order of the United States District Court, it is not a valid objection that the complaint does not show on its face that it is necessary to collect the full amount of defendant's stock subscription in order to pay creditors of the corporation. *Jeffery v. Selwyn* (N. Y. Ct. of App.), 39 Am. B. R. 259, 115 N. E. 275.

131. *McNamara v. Helena Coal Co.* (D. C., Ala.), 5 Am. B. R. 48.

132. *In re Tecopa Mining & Smelting Co.* (D. C., Cal.), 6 Am. B. R. 250, 110 Fed. 120.

in its charter, are not necessarily controlling,¹³³ but where a corporation was organized to manufacture and sell paper made from wood pulp, and had purchased timber and erected mills but had not actually manufactured any paper, it was held subject to involuntary bankruptcy.¹³⁴ Where a corporation is organized and makes preparation for carrying out the objects of its charter, acquiring and equipping itself with the necessary plant and appliances, it thereby engages in that which it is incorporated to do,—whether manufacturing, or mining, or whatever it may be,—within the meaning of the act.¹³⁵ What a corporation is in fact doing is what will determine whether it is engaged in manufacturing, trading or mercantile pursuits;¹³⁶ if it be engaged in several different occupations, some within and some without the specified classes, the debts will be the aggregate of business in the specified classes as compared with that within those classes not specified.¹³⁷

b. Manufacturing corporations.—The word “manufacturing” as used in the act prior to the amendment of 1910 has presumably its popular meaning, that is, the making of products from raw or prepared materials by hand or machinery.¹³⁸ As a general rule, a natural product if only rendered more suitable for use by an artificial process is not a manufactured article.¹³⁹ Some difficulty has arisen in determining whether a given corporation is principally engaged in manufacturing. Precedents under the corporation tax law of the several States, and the internal revenue laws will prove valuable. A laundry company engaged in laundering shirts, collars, etc., for manufacturers, prior to their being sold in the market, is engaged in manu-

133. *In re Chicago-Joplin Lead & Zinc Co.* (D. C., Mo.), 4 Am. B. R. 712, 104 Fed. 67; *Matter of Quimby* (D. C., Mass.), 10 Am. B. R. 424, 121 Fed. 139.

134. *In re White Mountain Paper Co.* (C. C. A., 1st Cir.), 11 Am. B. R. 633, 127 Fed. 643, affg. 11 Am. B. R. 491, 127 Fed. 180.

135. *In re Bloomsburg Brewing Co.* (D. C., Pa.), 22 Am. B. R. 625, 172 Fed. 174.

136. *In re Chicago-Joplin Lead & Zinc Co.* (D. C., Mo.), 4 Am. B. R. 712, 104 Fed. 67; *In re Tontine Surety Co.* (D. C., N. J.), 8 Am. B. R. 421, 116 Fed. 460.

A corporation, as apparent owner of a business, which subjects it to bankruptcy, or the unknown equitable owners of the business, which permits the corporation to act as the principal, may be proceeded against by an involuntary petition for adjudication. *Calnan Co. v. Doherty* (C. C. A., 1st Cir.), 23 Am. B. R. 297, 174 Fed. 222.

137. *Matter of Matthews Consolidated Slate Co.* (C. C. A., 1st Cir.), 16 Am. B. R. 407, 144 Fed. 734.

138. *Lawrence v. Allen*, 7 How. 785; *People ex rel. U. P. T. Co. v. Roberts*, 145 N. Y. 375; *Matter of Concord Motor Car Co.* (C. C. A., 1st Cir.), 23 Am. B. R. 73, 173 Fed. 445.

What constitutes “manufacture.”—In the case of *Butt v. Construction Co.* (C. C. A., 4th Cir.), 15 Am. B. R. 515, 140 Fed. 840, the court quoted the following language from the case of *In re Capital Publishing Co.*, 3 MacArthur, 405, 40 Am. Rep. 446: “There can be no doubt that the word ‘manufacture’ was used in the statute in the limited sense in which it is commonly understood. The in-

dustries to which the dictionaries and the writers on political economy limit this term are where the raw materials or natural substances are wrought by hand, art or machinery into commodities for use; and the examples given are cloths, iron, shoes, cabinet work, glass, cotton and silk goods, etc. This limitation of the term manufacture is to be adopted as the true meaning of the bankruptcy law.” See also *In re Niagara Contracting Co.* (D. C., N. Y.), 11 Am. B. R. 643, 127 Fed. 782; *Friday v. Hall & Kaul Co.* (Sup. Ct.), 216 U. S. 449, 23 Am. B. R. 610, 54 L. Ed. 562, where the court said: “Manufacturing has no technical meaning. It is not limited by the means used in making, nor by the kind of product produced.” Compare *In re First Nat'l Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 269, 152 Fed. 64, in which the court said: “The word ‘manufacture’ is a generic term of broad significance, advisedly used by Congress to include many species of corporations, and its comprehensive meaning ought no to be whittled away by fine distinctions. Derivatively meaning making with the hand, its ordinary significance is producing a new article of use or ornament by the application of skill and labor to the raw materials of which it is composed.”

139. Thus, he who slaughters and refrigerates mutton (*People ex rel. New England Dressed Meat Co. v. Roberts*, 155 N. Y. 408), or who mines coal (*Byres v. Franklin Coal Co.*, 106 Mass. 131), is not a manufacturer; but he who works up standing timber on his own land is (*In re Cowles*, Fed. Cas. 3,297).

facturing.¹⁴⁰ Although it may be otherwise in respect to a corporation where the company was engaged simply in the doing of laundry work for ordinary customers.¹⁴¹ A shipbuilding corporation is a manufacturing corporation, but a corporation engaged in constructing bridges, wharves and bulkheads and in driving piles for foundations for buildings is not included within the meaning of the word.¹⁴² It has been held, however, in apparent conflict with this proposition, that a corporation principally engaged in constructing concrete arches, bridges and dressing stone is engaged in a manufacturing pursuit and is subject to adjudication in involuntary bankruptcy.¹⁴³ A corporation organized for the purpose of the manufacture and sale of paper made from wood pulp and which owns large tracts of timber land on which it had made various large expenditures in the prosecution of its general plan of manufacturing paper, is subject to involuntary bankruptcy, although no manufacturing had been actually done.¹⁴⁴ A corporation engaged chiefly in manufacturing and selling paper, paper bags, etc., is a manufacturing corporation, although its charter granted it the right to operate water works and electric lights.¹⁴⁵ A corporation which operates a plant for carrying on the process of preserving, packing and marketing salt water fish caught by it is engaged in manufacturing.¹⁴⁶ A corporation engaged in the erection of buildings has been held to be a manufacturing corporation although weighty authority is opposed to this doctrine.¹⁴⁷ A corporation engaged in the building of houses is not a manufacturing corporation within the act.¹⁴⁸ Where the only manufacturing done by a corporation chartered to engaged in the business of roofing buildings and installing steam-heat therein, was such as was incident to a particular job, the corporation is not subject to adjudication as a bankrupt.¹⁴⁹

140. *In re Troy Steam Laundering Co.* (D. C., N. Y.), 13 Am. B. R. 97, 132 Fed. 266.

141. *In re White Star Laundry Co.* (D. C., Wis.), 9 Am. B. R. 30, 117 Fed. 570. In the case of *In re Steam Laundry Co. of Queens Co.* (D. C., N. Y.), 24 Am. B. R. 457, 178 Fed. 308, it was held that a corporation engaged principally in the business of running a laundry, is not subject to adjudication in bankruptcy.

142. *Butt v. MacNichol Const. Co.* (C. C. A., 4th Cir.), 15 Am. B. R. 515, 140 Fed. 840, affg. 14 Am. B. R. 188, 134 Fed. 979. But see *In re Niagara Contracting Co.* (D. C., N. Y.), 11 Am. B. R. 643, 127 Fed. 782.

143. *In re First Nat'l Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 152 Fed. 64; *Friday v. Hall & Kaul Co.* (Sup. Ct.), 216 U. S. 449, 23 Am. B. R. 610, 54 L. Ed. 562, in which case it was held that a corporation engaged in the business of "making, constructing and erecting concrete arches, bridges, buildings, walls and other structures," which, when erected *in situ*, were attached to and became a part of the real estate, is "engaged principally in manufacturing," and therefore subject to adjudication.

144. *White Mountain Paper Co. v. Morse* (C. C. A., 1st Cir.), 11 Am. B. R. 633, 127 Fed. 644; *In re Bloomsburg Brewing Co.* (D. C., Pa.), 22 Am. B. R. 625, 172 Fed. 174.

145. *In re Georgia Mfg. & Public Service*

Co. (D. C., Ga.), 21 Am. B. R. 878, 166 Fed. 964.

146. *In re Alaska-American Fish Co.* (D. C., Wash.), 20 Am. B. R. 712, 162 Fed. 498.

147. *In re Rutland Realty Co.* (D. C., N. Y.), 19 Am. B. R. 546, 157 Fed. 296. *Contra*: *Matter of Kingston Realty Co.* (C. C. A., 2d Cir.), 19 Am. B. R. 845, 160 Fed. 445, revg. 19 Am. B. R. 465, 157 Fed. 299; *Matter of New York Tunnel Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 531, 166 Fed. 284.

148. *Matter of Kingston Realty Co.* (C. C. A., 2d Cir.), 19 Am. B. R. 845, 160 Fed. 445, revg. 19 Am. B. R. 546. *Contra*: *In re Rutland Realty Co.* (D. C., N. Y.), 19 Am. B. R. 546, 157 Fed. 296; *In re Church Construction Co.* (D. C., N. Y.), 19 Am. B. R. 549, 157 Fed. 298.

149. *Walker Roofing, etc., Co. v. Merchant & Evans Co.* (C. C. A., 4th Cir.), 23 Am. B. R. 185, 173 Fed. 771.

Construction company.—Where the business actually transacted by a corporation consists of installing heat and power plants, constructing conduits, water works and sewers, buying, selling, and erecting steam engines and occasionally making reports with reference to the proposed construction of electric light and power plants, such corporation is engaged in "manufacturing, trading or mercantile pursuits," within the meaning of § 4-b, as it existed prior to the amendment of 1910. *United Surety Co. v. Iowa Mfg. Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 726, 179 Fed. 55.

Where a corporation organized for the purpose of making and selling cement, but which had never exercised its franchise and had never actually engaged in the practice of manufacturing, is not subject to adjudication as an involuntary bankrupt.¹⁵⁰ The business of repairing automobiles is not manufacturing.¹⁵¹ Nor is the business of generating and transmitting electricity.¹⁵² The term "manufacturing" has been held to include cutting of trees into timber.¹⁵³ The words "engaged principally in manufacturing" have reference to the time when the petition was filed and a reasonable time prior thereto and not to some prior time in the history of the corporation.¹⁵⁴ From the various instances here cited it will be noticed that there is not much uniformity in the conclusions of the bankruptcy courts as to what constitutes manufacturing. There seems to be, however, a gradual relinquishment of the restrictive interpretation which was originally applied to the term.

c. Trading corporations.—A corporation engaged principally in trading may be adjudged an involuntary bankrupt. Under the law of 1867 it was a corporation engaged in "business;" in the law of 1841 it was a corporation "using the trade of merchandise." The meaning of "trader" in England has been well defined for centuries. The cases interpreting the meaning of this term in the English act will be found interesting and often valuable.¹⁵⁵ The term connotes the idea of buying merchandise for the purpose of selling it for gain.¹⁵⁶ Illustrative cases under the law of 1867 will be found in the foot-note.¹⁵⁷ Under the present law, prior to the amendment of 1910, cor-

150. *In re Toledo Portland Cement Co.* (D. C., Mich.), 19 Am. B. R. 117, 156 Fed. 83, revg. 17 Am. B. R. 375; *Matter of Concord Motor Car Co.* (C. C. A., 1st Cir.), 23 Am. B. R. 73, 173 Fed. 445, holding that whether a corporation is subject to the bankruptcy act depends upon the actual business transacted by it at or about the time a bankruptcy petition was filed against it, and not upon the business authorized by its charter.

151. *Matter of Concord Motor Car Co.* (C. C. A., 1st Cir.), 23 Am. B. R. 73, 173 Fed. 445.

152. *In re Hudson River Elec. Power Co.* (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934. This case is opposed by the case of *Charlestown Light & Power Co.* (D. C., W. Va.), 25 Am. B. R. 687, 183 Fed. 160, holding that electricity is a commercial commodity that can be manufactured in form to be bought and sold in commerce, and that therefore a corporation engaged in the business of selling electricity is a trading corporation, within the meaning of the former law.

But see *Matter of Wilkes-Barre Light Co.* (D. C., Pa.), 34 Am. B. R. 697, 224 Fed. 248, which commends and follows the opinion of Judge Ray in *In re Hudson River Elec. Power Co.*, *supra*.

153. *In re Chandler*, Fed. Cas. 2,591.

154. *In re Interstate Paving Co.* (D. C., N. Y.), 22 Am. B. R. 572, 171 Fed. 604.

Where a corporation has once engaged in manufacturing it may be proceeded against in bankruptcy regardless of the period of time between its cessation of operation and the filing of the creditor's petition, and the

claims of the petitioning creditors need not have arisen during the period in which the corporation was so engaged. *Robertson v. Union Potteries Co.* (D. C., Pa.), 22 Am. B. R. 121, 43 Pittsb. L. J. 342, 177 Fed. 270.

A corporation "engaged principally in manufacturing" is subject to adjudication under the bankruptcy act as it stood on September 21, 1908. *Matter of Culgin-Pau Contracting Co.* (D. C., Mass.), 35 Am. B. R. 375, 224 Fed. 245.

155. A trader is one who buys and sells goods or merchandise ordinarily the subject of traffic (*Sutton v. Weeley*, 7 East, 442, 3 Smith K. B. 445). An innkeeper was held not to be a trader (*Sanderson v. Rowles*, 4 Burr. 2064), nor is a lodging-house keeper a trader (*Ex parte Bowers*, 2 Deac. 99). A physician who held an apothecary's license and transacted business as such was held to be a trader. *Ex parte Crabb*, 8 DeGex, M. & G. 277; *Ex parte Danbenny*, 3 Mont. & Ayr. 16. See also *Ex parte Moule*, 14 Bea. 602; *Ex parte Lavender*, 4 Deac. & Ch. 484.

156. *Wakeman v. Hoyt*, Fed. Cas. 17,051; *In re Eleas*, Fed. Cas. 4,302.

157. The following were held traders: A baker (*In re Cocks*, Fed. Cas. 2,936); a furniture dealer (*In re Newman*, Fed. Cas. 10,175); a merchant tailor (*In re Archambrown*, Fed. Cas. 505); a saloon-keeper (*In re Sherwood*, Fed. Cas. 12,733); but a stockholder (*In re Moss*, Fed. Cas. 9,877), a lessor of oil lands (*In re Woods*, Fed. Cas. 17,990), and a railroad company (*In re Union Pacific R. R. Co.*, Fed. Cas. 14,376), were not.

porations engaged in furnishing water to cities,¹⁵⁸ in giving theatrical performances solely,¹⁵⁹ in conducting a hotel,¹⁶⁰ in conducting a saloon and restaurant business,¹⁶¹ a water transportation company,¹⁶² a social club,¹⁶³ an advertising company,¹⁶⁴ a mutual fire insurance company,¹⁶⁵ a building and loan association,¹⁶⁶ a real estate company,¹⁶⁷ a company organized to buy and sell stocks, bonds and securities,¹⁶⁸ a warehouse company,¹⁶⁹ a corporation chartered as a common carrier,¹⁷⁰ a corporation conducting a circulating library,¹⁷¹ an irrigation company,¹⁷² a breeders' club,¹⁷³ a laundry corporation,¹⁷⁴ an electric power company,¹⁷⁵ and a mercantile agency,¹⁷⁶ have been refused adjudication because not trading corporations; while a sanitarium,¹⁷⁷ a livery-stable company,¹⁷⁸ a mercantile agency,¹⁷⁹ a company buy-

158. In re New York & Westchester Water Co. (D. C., N. Y.), 3 Am. B. R. 508, 98 Fed. 711, subsequently affirmed on appeal.

159. In re Oriental Society (D. C., Pa.), 5 Am. B. R. 219, 104 Fed. 975; In re Reisler Amusement Co. (D. C., N. Y.), 22 Am. B. R. 501, 171 Fed. 283. See under former law, In re Duff, 4 Fed. 519.

160. In re United States Hotel Co. (C. C. A., 6th Cir.), 13 Am. B. R. 403, 134 Fed. 225, 67 C. C. A. 153. See under former law, In re Ryan, Fed. Cas. 12,183, where an innkeeper was held to be a trader.

161. In re Chesapeake Oyster & Fish Co. (D. C., Col.), 7 Am. B. R. 173, 112 Fed. 960. But see In re Barton Hotel Co. (Dist. Col.), 12 Am. B. R. 335.

Restaurant corporation.—A company authorized by its certificate of incorporation to manage, conduct and carry on a restaurant and saloon wherein are distributed foods and liquors at retail to be consumed upon the premises, is not subject to adjudication as a bankrupt. Matter of Wentworth Lunch Co. (C. C. A., 2d Cir.), 20 Am. B. R. 29, 159 Fed. 413.

162. In re Phila., etc., Co. (D. C., Pa.), 7 Am. B. R. 707, 114 Fed. 403.

163. In re Fulton Club (D. C., Ga.), 7 Am. B. R. 670, 113 Fed. 997.

164. In re Snyder & Johnson Co. (D. C., Ill.), 13 Am. B. R. 325, 133 Fed. 806.

165. In re Cameron Town Mut. Fire Ins. Co. (D. C., Mo.), 2 Am. B. R. 372, 96 Fed. 756. See also In re Tontine, etc., Co. (D. C., N. J.), 8 Am. B. R. 421, 116 Fed. 400; In re Moore & Muir Co. (D. C., N. Y.), 23 Am. B. R. 122, 173 Fed. 732.

166. Matter of N. Y. Bldg. & Loan Bank Co. (D. C., N. Y.), 11 Am. B. R. 51, 127 Fed. 471.

167. Matter of Altonwood Park Co. (O. C., 2d Cir.), 20 Am. B. R. 31, 160 Fed. 148; Matter of Kingston Realty Co., 19 Am. B. R. 845, 160 Fed. 445.

168. In re Surety & Guarantee Trust Co. (C. C. A., 7th Cir.), 9 Am. B. R. 129, 121 Fed. 73. Compare In re Leighton & Co. (D. C., W. Va.), 17 Am. B. R. 275, 147 Fed. 311, in which a stock, bond, grain and brokerage company was held to be within the act. A stock broker was held not to be

a trader under former bankruptcy act. In re Woodward Fed. Cas. 18,001; In re Marston, Fed. Cas. 9,142; In re Moss, Fed. Cas. 4,877.

169. In re Pacific Coast Warehouse Co. (D. C., Cal.), 10 Am. B. R. 474, 123 Fed. 749.

170. In re Quimby Freight Forwarding Co. (D. C., Mass.), 10 Am. B. R. 424, 121 Fed. 139; Philpot v. O'Brien (C. C. A., 1st Cir.), 11 Am. B. R. 205, 126 Fed. 167; In re Philadelphia & L. Trans. Co. (D. C., Pa.), 7 Am. B. R. 707, 114 Fed. 403. Otherwise under former law, Winter v. Iowa, M. & N. P. R. R. Co., Fed. Cas. 17,890.

171. In re Parmelee Library Co. (C. C. A., 7th Cir.), 9 Am. B. R. 568, 120 Fed. 235, 56 C. C. A. 583.

172. Matter of Bay City Irrigation Co. (D. C., Tex.), 14 Am. B. R. 370, 135 Fed. 850.

173. In re New England Breeders' Club (D. C., N. H.), 21 Am. B. R. 349, 165 Fed. 517.

174. In re White Star Laundry Co. (D. C., Wis.), 9 Am. B. R. 30, 117 Fed. 570.

175. In re Hudson River Elec. Power Co. (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934. This case is opposed by Charlestown Light & Power Co. (D. C., W. Va.), 25 Am. B. R. 687, 183 Fed. 160.

176. Zugalla v. International Mercantile Agency (C. C. A., 3d Cir.), 16 Am. B. R. 67, 142 Fed. 927.

177. In re San Gabriel Sanitarium Co. (D. C., Cal.), 2 Am. B. R. 408, 95 Fed. 271. But see In re Elk Park Min., etc., Co. (D. C., Cal.), 4 Am. B. R. 131, 101 Fed. 422.

178. In re Morton Boarding Stables (D. C., N. Y.), 5 Am. B. R. 763, 108 Fed. 791; In re Odell, Fed. Cas. 10,426; *Contra*: under law of 1841, Hall v. Cooley, Fed. Cas. 5,928; under present law, Gallagher v. DeLancy Stables Co. (D. C., Pa.), 19 Am. B. R. 801, 158 Fed. 381, holding that a corporation formed for the purpose of conducting a general livery and boarding stables business is not subject to involuntary bankruptcy.

179. In re Mutual Mercantile Agency (D. C., N. Y.), 6 Am. B. R. 607, 111 Fed. 152.

ing and selling ice,¹⁸⁰ a company incorporated to conduct a grain and stock brokerage business,¹⁸¹ have been held either trading corporations or engaged principally in mercantile pursuits. In analogy to cases arising under former bankruptcy acts a corporation, not otherwise engaged in trade or mercantile pursuits, which incidentally purchases or sells property will not be deemed to be subject to involuntary bankruptcy.¹⁸² Nor is a corporation which sells the natural products of its own land a trading corporation.¹⁸³ Public service corporations, such as water, gas or electric companies, are not subject to adjudication as bankrupts.¹⁸⁴ The amendment of 1910 has effectually reconciled these decisions with each other. As the law now stands it will not be important to determine whether a corporation is a trading or manufacturing corporation. If it is engaged in business or commercial enterprises it is amenable to the bankruptcy law.

d. "Printing" and "publishing."—There are few cases construing these words. They were inserted doubtless to meet the decisions under the former law that such corporations were not manufacturing companies. A company publishing ratings of business men for commercial use—the books remaining the property of the company, is not engaged in the printing or publishing business.¹⁸⁵

e. Mercantile pursuits.—The words "mercantile pursuits" as formerly used in this section appear to be by way of emphasis or explanation of the word "trading" which goes before. The word "mercantile" like the word "trading" connotes the buying and selling of commodities.¹⁸⁶ It is possible, however, that it has a broader significance and may have been used to enlarge the meaning of the word "trading."¹⁸⁷

f. Mining corporations.—The word mining was inserted in subd. b of this section by the amendatory act of 1903, to meet the quite uniform holdings that such companies were neither manufacturing nor trading corporations.¹⁸⁸ The meaning of the word is undoubtedly the common one, and a company engaged in taking from the earth any mineral or natural product for the

180. *First Nat. Bank of Wilkesbarre v. Wyoming Valley Ice Co.* (D. C. Pa.), 14 Am. B. R. 448, 136 Fed. 466; but where the proof shows that a company harvests its ice for sale to its customers, it is not a trader. *Matter of New York & New Jersey Ice Lines* (C. C. A., 2d Cir.), 16 Am. B. R. 832, 147 Fed. 214, affg. 14 Am. B. R. 61.

181. *In re Leighton* (D. C., W. Va.), 17 Am. B. R. 275, 147 Fed. 311; *Laker v. Stapely Co.* (D. C., Ohio), 21 Am. B. R. 303.

182. *In re Kimball*, 7 Fed. 461; *In re Duff*, 4 Fed. 519; *In re Rogers*, Fed. Cas. 1,301; *In re Chapman*, Fed. Cas. 2,601.

183. *In re Woods*, Fed. Cas. 17,990; *In re Clelland*, 2 Ch. App. (Eng.) 466.

184. *Matter of Hudson River Elec. Power Co.* (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934.

185. *Zugalla v. International Mercantile Agency* (C. C. A., 3d Cir.), 16 Am. B. R. 67, 142 Fed. 927, revg. 13 Am. B. R. 725.

186. *Zugalla v. Mercantile Agency* (C. C. A., 3d Cir.), 16 Am. B. R. 67, 142 Fed. 927.

187. *In re N. Y. & Westchester Water Co.* (D. C., N. Y.), 3 Am. B. R. 508, 98 Fed. 711; which declares that "The business of a trader includes both buying and selling either goods or merchandise or other goods ordinarily the subject of traffic; and the term 'mercantile pursuits' means the buying or selling of goods or merchandise or dealing in the purchase or sale of commodities." *In re Surety & Guarantee Trust Co.* (C. C. A., 7th Cir.), 9 Am. B. R. 129, 121 Fed. 73.

188. *In re Tecopa Mining & Smelting Co.* (D. C., Cal.), 6 Am. B. R. 250, 110 Fed. 120; *In re Keystone Coal Co.* (D. C., Pa.), 6 Am. B. R. 377, 109 Fed. 872; *McNamara v. Helena Coal Co.* (D. C., Ala.), 5 Am. B. R. 48; *In re Woodside Coal Co.* (D. C., Pa.), 5 Am. B. R. 186, 105 Fed. 56; *In re Chicago-Joplin Lead & Zinc Co.* (D. C., Mo.), 4 Am. B. R. 712, 104 Fed. 67; *In re Rollins Gold & Silver Mining Co.* (D. C., N. Y.), 4 Am. B. R. 327, 102 Fed. 982; *In re Elk Park Mining & M. Co.* (D. C., Col.), 4 Am. B. R. 131, 101 Fed. 422.

purpose of selling or reducing it or working it up into a salable article was subject to adjudication. The word "mining" as used in the original act was sufficiently broad in its meaning to include the quarrying of slate, granite and stone.¹⁸⁹

189. *Matter of Matthews Consolidated Slate Co.* (C. C. A., 1st Cir.), 16 Am. B. R. 407, 144 Fed. 737, *affg.* 16 Am. B. R. 350; *In re Quincy Granite Quarries Co.* (D. C., Mass.), 16 Am. B. R. 823, 147 Fed. 279; *Burdick v. Dillon*, 16 Am. B. R. 407, 144 Fed. 737.

SECTION FIVE.

PARTNERS.

§ 5. **Partners.**—*a* A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b The creditors of the partnership shall appoint the trustee: in other respects so far as possible the estate shall be administered as herein provided for other estates.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not

adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Analogous provisions: In U. S.: Act of 1867, § 36; R. S., § 5121; Act of 1841, § 14.
In Eng.: Act of 1883, §§ 110, 112, 113, 115; General Rules 258-270.
In Can.: Act of 1919, §§ 28, 37, 47, 51, 69, 70, 76.
Cross-references: To the law: §§ 1 (19), 2 (1), 3, 4, 6, 7, 8, 18, 19, 32, and 59.
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I. BANKRUPT PARTNERSHIP.

a. **Historical and general.**—General Order VIII, relating to proceedings in partnership cases, should be read in connection with this section.¹ All bankruptcy laws have specific provisions regulating the adjudication of partnerships and the interrelation of the debts and assets of the partnership and its members. The English statute here resembles our present and past laws;

1. See General Orders in Bankruptcy, VIII, *post*.

the interpretation of the two statutes is not, however, always identical. Section 36 of our law of 1867 is strikingly similar to § 14 of its predecessor of 1841. The present section expresses in fewer words all that those sections did, and something more. The provisions of the Canadian act are similar to those of our own act, although scattered through several sections.

b. What constitutes a partnership.—(1) DEFINITION.—The term “partnership” is not specifically defined in this act. By § 1 (19) it is included in the meaning of the term “person” and it is also provided in § 1 (6) that “corporations” include “limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association.”

(2) PARTNERSHIPS AFFECTED BY ACT.—The section under discussion applies only to general partnerships. It does not extend to partnerships by estoppel but such as are partnerships as to creditors only.² The existence of a partnership must be shown to be an actual status, valid as against creditors, and not a status created by estoppel against a former partner.³ Under all the cases it is necessary in order to proceed to adjudication that an actual partnership be shown.⁴ The provisions of the section relate to a partnership between the parties where there may be both joint and individual assets.⁵ The mere “holding out” of a person to be a partner is not of itself sufficient to

2. In *re Kenney* (D. C., N. Y.), 3 Am. B. R. 353, 97 Fed. 554; *Lott v. Young* (C. C. A., 9th Cir.), 6 Am. B. R. 436, 109 Fed. 798. As to what is a partnership, see *In re Beckwith* (D. C., Pa.), 12 Am. B. R. 453, 130 Fed. 475; *In re Alden* (Ref., Ohio), 16 Am. B. R. 362. See Am. Bankr. Dig. § 134.

A partnership is a “person” under the definition in § 1 (19) and may be adjudged a bankrupt irrespective of any adjudication against the individual members. *Mills v. J. H. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897.

3. Status at time of filing petition.—In the case of *In re Pinson* (D. C., Ala.), 24 Am. B. R. 804, 180 Fed. 787, the court said: “The existence of a partnership within the meaning of this section is its actual status, as distinguished from a status created by estoppel against a former partner. If it has been dissolved by the partners *inter sese* before the filing of the petition, it is not thereafter an existing partnership, and the proceedings in bankruptcy cannot be said to have been instituted ‘during the continuation of the partnership business,’ nor can debts created thereafter by the continuing partner be considered partnership debts. The jurisdiction of the bankruptcy court to adjudicate and administer attaches only upon the showing of the actually existing partnership, constituting a legal entity at the time of the filing of the petition.”

Rule in Montana.—The rule of law that where there is no partnership in fact, there can be none as to third persons, unless the party sought to be held as a partner has, by his acts, put himself in such a position that he is estopped from denying that he is a partner, obtains in the State of Montana. *Lott v. Young* (C. C. A., 6th Cir.), 6 Am. B. R. 436, 109 Fed. 798.

4. In *re Hudson Clothing Co.* (D. C., Ma.), 17 Am. B. R. 826, 148 Fed. 305; *Rush v. Lake* (C. C. A., 9th Cir.), 10 Am. B. R. 455, 122 Fed. 561; *Buckingham v. First Natl. Bank* (C. C. A., 6th Cir.), 12 Am. B. R. 465, 131 Fed. 192; *In re Beckwith & Co.* (D. C., Pa.), 12 Am. B. R. 453, 130 Fed. 475; *Lott v. Young* (C. C. A., 9th Cir.), 6 Am. B. R. 436, 109 Fed. 798; *Buffalo Milling Co. v. Lewisburg Dairy Co.* (D. C., Pa.), 20 Am. B. R. 279, 159 Fed. 319.

An association formed for the purpose of dealing in real estate, taking title thereto in the name of a trustee under a trust deed wherein the members agreed to share in the profits and losses, is a partnership. *Matter of Alden* (Ref., Ohio), 16 Am. B. R. 362. Where two persons intending to form a corporation, which was never organized, associate themselves in a mercantile business, one contributing goods and the other cash, which was deposited in bank and used for the business, there is a partnership in fact, which may be adjudicated bankrupt. *Manson v. Williams* (C. C. A., 1st Cir.), 18 Am. B. R. 674, 153 Fed. 525, affg. 17 Am. B. R. 826, 148 Fed. 305, affd. 213 U. S. 453, 22 Am. B. R. 22, 53 L. Ed. 869.

Proof of existence of partnership.—To justify the adjudication of a member of a firm as a partner there must be evidence from which the court may find as a fact that such member was a partner; it is insufficient that to various creditors such member had held himself out as a partner, because while an estoppel may give rights to those who were misled, in order to give rights to all creditors he must be in fact a partner. *Matter of Kaplan* (C. C. A., 7th Cir.), 37 Am. B. R. 104, 234 Fed. 866.

5. In *re Kenney* (D. C., N. Y.), 3 Am. B. R. 353, 97 Fed. 554.

bring the alleged partnership within the act.⁶ With this limitation, however, the State decisions on partnership law seem controlling. An unincorporated company doing business as a private bank under a State law giving it some of the privileges of a corporation is, nevertheless, a partnership.⁷ The fact that one person, having the title to real estate in his own name, pays some portion of the income thereof to another person does not establish that they are partners.⁸ A partnership which has ceased to exist, but has remaining assets and debts, is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their debts.⁹

c. The entity doctrine.—(1) IN GENERAL.—A partnership now is something other than that under the law of 1867. There the words were, "two or more persons who are partners in trade." Now it is "a partnership" that "may be adjudged a bankrupt." This phrasing, coupled with other clauses, has led to the doctrine that a partnership is in bankruptcy a legal entity¹⁰—a joint relation where the identity of the members has been lost—and that, therefore, the individuals and the partnership are entities separate and distinct from each other.¹¹

(2) APPLICATION OF DOCTRINE.—A partnership being a distinct entity, it owns its property and owes its debts apart from the individual property of its members which it does not own, and apart from the individual debts of its members which it does not owe. It may be adjudged bankrupt, although the partners who compose it are not so adjudicated.¹² In other words, the firm

6. *Jones v. Burnham, Williams & Co.* (C. C. A., 3d Cir.), 15 Am. B. R. 85, 138 Fed. 986.

7. *Burkhart v. German-American Bank* (D. C., Ohio), 14 Am. B. R. 222, 137 Fed. 958.

8. *In re Lamon* (D. C., N. Y.), 22 Am. B. R. 635, 171 Fed. 516.

9. *Holmes v. Baker & Hamilton* (C. C. A., 9th Cir.), 20 Am. B. R. 252, 160 Fed. 922; *In re Hirsch* (D. C., N. Y.), 3 Am. B. R. 44, 97 Fed. 571.

10. See *In re Meyers* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; *In re Stein* (C. C. A., 6th Cir.), 11 Am. B. R. 536, 127 Fed. 547; *In re McLaren* (D. C., N. Y.), 11 Am. B. R. 141, 125 Fed. 835; *In re Perley* (D. C., Mo.), 15 Am. B. R. 54, 138 Fed. 927. See cases cited under following notes and in Am. Bankr. Dig., § 133.

11. *In re Sanderlin* (D. C., N. Car.), 6 Am. B. R. 384, 109 Fed. 857; *In re McMurtrey* (D. C., Tex.), 15 Am. B. R. 427, 142 Fed. 853.

The partnership is an entity for certain purposes, but not necessarily to avoid consideration of the available resources of solvent partners in determining the bankruptcy of the partnership. *Francis v. McNeal* 228 U. S. 695, 700, 30 Am. B. R. 244, 57 L. Ed. 1029; *Matter of Samuels and Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845.

12. *In re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B. R. 577, 157 Fed. 363. The following cases are cited as establishing this proposition: *In re Corcoran* (Ref., Ohio), 12 Am. B. R. 283; *In re Stein & Co.*

(C. C. A., 7th Cir.), 11 Am. B. R. 536, 538, 127 Fed. 547, 62 C. C. A. 272; *In re Mercur* (C. C. A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384, 58 C. C. A. 472; *In re Farley* (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 359; *In re Sanderlin* (D. C., N. C.), 6 Am. B. R. 384, 109 Fed. 857; *Green River Deposit Bank v. Craig* (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137; *In re Hale* (D. C., N. O.), 6 Am. B. R. 35, 107 Fed. 432; *Strause v. Hooper* (D. C., N. C.), 5 Am. B. R. 225, 106 Fed. 590; *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 553; *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976, 39 C. C. A. 368; *In re Russell* (D. C., Iowa), 3 Am. B. R. 91, 97 Fed. 32; *In re McFaun* (D. C., Iowa), 3 Am. B. R. 66, 96 Fed. 592; *In re Meyers* (D. C., N. Y.), 2 Am. B. R. 707, 96 Fed. 408; *In re Cebalos & Co.* (D. C., N. J.), 20 Am. B. R. 459, 464, 161 Fed. 445; *Matter of Everybody's Market* (D. C., Okl.), 21 Am. B. R. 925, 173 Fed. 492; *In re Junck & Balthazard* (D. C., W. Va.), 22 Am. B. R. 298, 169 Fed. 481.

A partnership is a distinct entity, a "person" under § 1(19). *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 239, 159 Fed. 897.

The adjudication of a partnership draws to the court for administration the individual estate of the partners, though as individuals they have not been adjudicated. *Matter of Latimer* (D. C., Pa.), 23 Am. B. R. 388, 174 Fed. 824; *In re Stokes* (D. C., Pa.), 6 Am. B. R. 262, 106 Fed. 312; Compare *Matter of Samuels & Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 203, 207 Fed. 195.

must petition or be petitioned against; if the latter, the firm, or a member of it acting within the scope of the partnership, must have committed the act of bankruptcy; and, if adjudication follows, the firm, *so nomine*, must be adjudicated.¹³ Under this principle a partnership as an entity may be adjudged to be a bankrupt, irrespective of any adjudication against the individual members.¹⁴

(3) EFFECT OF DOCTRINE ON RIGHTS OF PARTNERS AND CREDITORS.—This doctrine is essentially different from that of the English law, where even if the firm be proceeded against, the adjudication must be against the partners individually.¹⁵ Our law and practice, prior to the present statute, were to the same effect. This new doctrine of entity, however, has already led to some decisions of far-reaching importance, and should be kept continually in mind by the student or practitioner who would understand one of the most confusing branches of the law of bankruptcy.¹⁶ The entity doctrine permits of the adjudication in bankruptcy of a partnership one of the members of which is insane,¹⁷ but will not justify an adjudication where some of the alleged members deny the existence and composition of the partnership.¹⁸

Opposition to entity doctrine.—In the case of *In re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137, "For some purposes a partnership has been treated as an entity apart from the partners; for other purposes it has been treated as a congeries to partners. Some courts have suggested that the Act of 1898 has adopted for bankruptcy the theory of an entity separate from the partners. Yet this treatment of a partnership is irreconcilable with other provisions of the statute. Section 5-h of the act provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt. This is in effect a provision that the partnership shall not be made bankrupt, except by the adjudication of all its partners. Adjudication without accompanying distribution of the bankrupt estate would be worse than a vain form, for it would confuse inextricably questions of preference, lien, attachment and the like. . . . Section 5-b contemplates that the adjudication under a joint petition shall be both joint and several. If the adjudication were joint only, there would be no object in providing that the joint creditors alone shall elect the trustee. Still again, section 5-c gives to the court which has jurisdiction of one partner 'jurisdiction of all the partners' and says nothing about jurisdiction of the partnership as an entity. Read as a whole, Form No. 2 agrees with section 5-h, and not with the theory of entity. It is in terms the petition of individuals. It sets out that they owe debts which they cannot pay and that they desire the benefits of the bankrupt act." And see *Abbott v. Anderson*, 265 Ill 285, 33 Am. B. R. 383, 106 N. E. 782.

13. Where there is no adjudication against the firm, assets may not be administered by the bankruptcy court, if there be one member not adjudicated, unless he consent. In such cases the unadjudicated partner has the right

to wind up the firm, paying over only the share of the bankrupt partner to his trustee. *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897.

14. *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897; *Matter of Union Bank* (C. C. A., 6th Cir.), 25 Am. B. R. 148, 184 Fed. 224, in which case the court said: "The difference in this regard between section 5 of the present bankruptcy act on the one hand, and section 14 of the act of 1841, and section 36 of the act of 1867 on the other, is enough to show that Congress intended by the present act to treat partnerships as entities, distinct from their members, for the purpose at least of permitting partnerships to be adjudicated bankrupts either through voluntary or involuntary proceedings." In *re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; *Matter of Hansley & Adams* (D. C., Cal.) 36 Am. B. R. 1, 228 Fed. 564, holding that a partnership is an entity to the extent that it may be declared a voluntary or an involuntary bankrupt without the necessity of the individual partners being adjudicated bankrupts.

15. Act of 1883, § 115; General Rules 264.

16. In *re Pincus* (D. C., N. Y.), 17 Am. B. R. 331, 337, 147 Fed. 621, in which the court said: "The right to proceed in bankruptcy against a partnership as a legal entity is new, and before the act of 1898 was unheard of." For interesting case relative to the result of a literal application of the doctrine of entity to partnerships in bankruptcy, see *In re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 138.

17. In *re Stein & Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547.

18. In *re McLaren* (D. C., N. Y.), 11 Am. B. R. 141, 125 Fed. 835.

Adjudication of individual as partner.—When no petition in bankruptcy has been filed against him, an individual who asserts under oath that he is not a partner cannot

This doctrine prevents, in considering the value of the partnership property, the including of the homestead of one of the partners in the assets.¹⁹ The recognition and application of this doctrine does not modify in any way the established rule, fixing the substantive rights of creditors, irrespective of the partnership and of its individual members.²⁰ The full force and application of the doctrine is in connection with the adjudication of the partnership, separate and distinct from the adjudication of the several partners.²¹ The rule seems firmly established that the partnership as a distinct entity may be adjudicated a bankrupt, without a proceeding being prosecuted against the other members of the partnership, and on the other hand proceedings may be instituted against the individual members of the partnership without in any way involving the partnership itself.²²

d. *Receivership as act of bankruptcy*.—Under the original law, following the analogy of the corporation cases, it was held that the consent to or the

be summarily adjudicated a partner in an inquiry before a referee in bankruptcy to which he does not consent. *Matter of Samuels and Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195.

19. *In re McMurray* (D. C., Tex.), 15 Am. B. R. 427, 142 Fed. 853. This doctrine has been carried even so far as to require the payment of the statutory fees for partnerships and each of the individuals in *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 553, and *In re Farley* (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 359, though the soundness of these rulings has been frequently challenged.

20. *Matter of Union Bank* (C. C. A., 6th Cir.), 25 Am. B. R. 148, 184 Fed. 224.

* Notwithstanding the entity doctrine "the fact remains as true as ever that partnership debts are debts of members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever privities there may be in the marshalling of assets." *Mr. Justice Holmes in Francis v. McNeal*, 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1029, affg. 26 Am. B. R. 555, 186 Fed. 481, 108 C. C. A. 459.

21. *Adjudication of partnership apart from members*.—*Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 23 Am. B. R. 237, 159 Fed. 897, in which case the court held that the partnership as an entity may be adjudged to be a bankrupt, irrespective of any adjudication against the individual members; *In re Bertenshaw* (C. C., 8th Cir.), 19 Am. B. R. 577, 167 Fed. 363, in which case the court said: "The uniform current of authority is that under this act a partnership is a distinct entity, separate from the individuals who compose it; that it owns its property and owes its debts which are respectively separate and distinct from the individual property and the individual debts of its partners, and that the adjudication of the partnership a bankrupt apart from or in addition to the adjudication of its partners bankrupts is indispensable to the jurisdiction

of the court of bankruptcy to administer the partnership property." See *Fidelity Trust Co. v. Gaskell* (C. C. A., 8th Cir.), 28 Am. B. R. 4, 195 Fed. 865, in which the court said: "A partnership is a distinct entity, a person separate from the partners who compose it and from all other partnerships. It owns its property apart from the individual property of its members and apart from the property of every other partnership of which any of its members happen to be members and it owes its debts apart from the individual debts of its members, and from the debts of other partnerships of which any of its members are members. . . . A receiver or trustee of a partnership adjudged a bankrupt is not the receiver or trustee of the property of another unadjudicated partnership in which the members of the bankrupt partnership were also members, and he has no more right to seize or to administer such property than he has to take and distribute the property of any other stranger."

22. *Am. Steel & Wire Co. v. Coover* (Okla., Sup. Ct.), 27 Okl. 131, 25 Am. B. R. 58, 111 Pac. 217, citing *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976, 39 C. C. A. 366; *In re Stein & Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547, 62 C. C. A. 272. *In re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B. R. 577, 157 Fed. 363; *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, 108 C. C. A. 459, holding that a partnership is a legal entity that may be adjudged a bankrupt either in a voluntary or an involuntary proceeding irrespective of the adjudication against any of its members, but where in an involuntary proceeding an act of bankruptcy charged involves the insolvency of the partnership there can be no adjudication unless it and all its members are insolvent; affd. 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1029, and see *In re City Contracting & Bldg. Co.* (D. C., Hawaii), 30 Am. B. R. 133; *Matter of Samuels and Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195.

appointment of receivers of a partnership was not an act of bankruptcy.²³ This is no longer true. Section 3-a (4), as amended, means that the appointment of a receiver of an insolvent partnership is an act of bankruptcy.²⁴

II. WHEN PARTNERSHIP MAY BE ADJUDGED BANKRUPT.

a. **Statutory provision.**—The statute provides that: "A partnership during the continuation of the partnership business or after its dissolution and before the final settlement thereof may be adjudged a bankrupt." During the continuation of the partnership business the partnership may be adjudged bankrupt. The limitation of the filing of petitions by or against a partnership found in the words "after the dissolution and before the final settlement thereof," is of little importance. It has been held that there can be no final settlement until all the debts are paid.²⁵ The partnership affairs are unsettled within the meaning of this provision so long as partnership debts are left unpaid.²⁶ It is doubtless true that the existence of assets is not essential to a partnership adjudication. It has been questioned whether a partner can in an individual proceeding, secure a discharge that will be effective against his partnership liability.²⁷ If this be so, it may be questioned whether either the bankrupt or his creditors would be beneficially affected by the adjudication of a partnership which has no assets. The only benefit to accrue to the creditors of the firm would be the appointment of a trustee who, in the exercise of the powers conferred upon him, might discover assets of the firm which had not been disclosed.²⁸ In other words, the limitation stated above may, in actual practice, where the partnership has no assets, amount to an absurdity. In other respects the limitation is declaratory of the law. The mere dissolution of a copartnership does not destroy its existence as to its creditors. It was otherwise under the law of 1867.²⁹ But even after dissolution a partnership may not be adjudicated a bankrupt so long as there is a solvent

23. *Vaccaro v. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; *Davis v. Stevens* (D. C., S. Dak.), 4 Am. B. R. 763, 104 Fed. 235. See also *In re Mercur* (D. C., Pa.), 8 Am. B. R. 275, 116 Fed. 655.

24. Compare discussion under § 3-a (4), *ante*.

25. *In re Levy, etc.* (D. C., N. Y.), 2 Am. B. R. 21, 95 Fed. 812; *In re Meyers*, 2 Am. B. R. 707, 96 Fed. 408; *In re Hirsch* (D. C., N. Y.), 3 Am. B. R. 344, 97 Fed. 571. But *Royston v. Wies* (C. C. A., 5th Cir.), 7 Am. B. R. 584, 112 Fed. 962, seems to imply that lapse of time is equivalent to a settlement. Compare *Holmes v. Baker & Hamilton* (C. C. A., 9th Cir.), 20 Am. B. R. 252, 160 Fed. 922.

26. **Settlement of affairs.**—In the case of *In re Pinson* (D. C., Ala.), 24 Am. B. R. 804, 180 Fed. 787, the court said: "The act also provides for the adjudication of a partnership so long as its affairs are unsettled. If there are outstanding firm debts at the time of the filing of the petition in a requisite amount, a proper case is made for adjudication, the other elements being present, though the partnership has long ceased to do business; otherwise not. The partnership affairs are unsettled within the meaning of this section so long as partnership debts are left unpaid. Debts which are binding upon the partners only by estoppel as to creditors without notice of dissolution are not

firm debts. The administration might be of no avail if there were no assets, partnership or individual, for distribution; but the jurisdiction of the court to adjudicate would exist nevertheless, and it would be properly exercised for the purpose of affording opportunity to the firm creditors through the appointment of a trustee to discover such assets."

27. See discussion and cases cited under Section Fourteen of this work, subtitle: "Application for Discharge; Who may apply." See also *In re Feigenbaum* (D. C., N. Y.), 7 Am. B. R. 339, 151 Fed. 508.

28. *In re Pinson* (D. C., Ala.), 24 Am. B. R. 804, 180 Fed. 787.

29. See cases cited in *In re Hirsch* (D. C., N. Y.), 3 Am. B. R. 344, 97 Fed. 571. In the case of *Holmes v. Baker & Hamilton* (C. C. A., 9th Cir.), 20 Am. B. R. 252, 160 Fed. 922, it was held that where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors, until its property is subjected to the satisfaction of other claims.

After the sale by a partner in good faith and for a valuable consideration of his interest in the firm to his copartner, and the consequent dissolution of the firm, the only remedy of the creditors is to proceed in some form of action against the former partners as individuals, or perhaps within the four months provided by the Bankruptcy Act to proceed against the firm, setting up the transfer as one in fraud of their rights, etc. *Matter of Fackelman* (D. C., Cal.), 41 Am. B. R. 14, 248 Fed. 565.

member.³⁰ The individual assets of members of a firm may be administered by the court so far as may be necessary to settle the partnership affairs, although such members are not individually declared to be bankrupt.³¹

b. Acts of bankruptcy by a partnership.—(1) **IN GENERAL.**—The general rule that whatever a partner does within the scope of the partnership binds the other partners applies to the commission of acts of bankruptcy. Since a partnership is now an entity, petitions which, under the previous law, would not confer jurisdiction because the act of bankruptcy was not committed by all the partners, are now sufficient.³²

(2) **COMMISSION OF ACT OF BANKRUPTCY BY ONE PARTNER.**—Generally speaking, the commission of an act of bankruptcy as to the partnership property by either partner amounts to an act of bankruptcy by the firm.³³ An act of bankruptcy by a single partner in respect to partnership property, within the legitimate scope of his authority, will bind the partnership and warrant an adjudication; his act must be such as to be imputed to the partnership.³⁴ For instance a voluntary assignment of all the assets of a firm, by one of the partners, constitutes an act of bankruptcy for which the firm may be adjudged a bankrupt, for the reason that it affected the partnership business and disposed of its assets.³⁵ If the act pertains to individual property with the intent to hinder, delay or defraud individual creditors, it does not bind the partnership.³⁶ It has been held that even the fifth act of bankruptcy, when com-

30. *Matter of Young* (D. C., Mass.), 35 Am. B. R. 200, 223 Fed. 659.

31. *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 72 C. C. A. 261, 140 Fed. 849; *Matter of Wing Yick Co.* (D. C., Hawaii), 2 U. S., D. C. Hawaii 259, 13 Am. B. R. 757; *Abbott v. Anderson* (Sup. Ct., Ill.), 265 Ill. 285, 33 Am. B. R. 383, 106 N. E. 782.

32. Compare *In re Richmond Fed. Cas.* 11,632.

Scope of partnership.—Where the act complained of was in the scope of the partnership business it may constitute an act of the firm and be sufficient to justify the adjudication in bankruptcy of the firm. *In re Kersten* (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929; *In re Duguid* (D. C., N. C.), 3 Am. B. R. 794, 100 Fed. 274; *In re Shapiro* (D. C., N. Y.), 5 Am. B. R. 839, 106 Fed. 839.

33. *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976, affg. *Bank v. Meyer* (D. C., N. Y.), 1 Am. B. R. 565, 92 Fed. 896. To same effect, *In re Grant Bros.* (D. C., N. Y.), 5 Am. B. R. 837, 98 Fed. 976; *In re Borelli* (D. C., Ct.), 16 Am. B. R. 115, 142 Fed. 296; *In re Perlhefter* (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299.

34. *In re Perley & Hays* (D. C., Mo.), 15 Am. B. R. 54, 138 Fed. 927; *In re Kersten* (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929.

35. **Disposition of firm assets by one partner.**—In the case of *Yungbluth v. Slipper* (C. C. A., 9th Cir.), 26 Am. B. R. 265, 185 Fed. 773, the court said: "The only question which requires any extended discussion is presented by the contention that the appellant could not be adjudged a bankrupt on account of the individual act of bank-

ruptcy of his copartner *Schafer* made the assignment for creditors, and there is no proof that the appellant assented to it. There can be no doubt that *Schafer's* act was an act of bankruptcy for which the partnership was properly adjudged bankrupt, for it was an act which affected the partnership business and disposed of the partnership assets. *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976, 39 C. C. A. 368; *In re Kersten* (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929; *In re Borelli* (D. C., Ct.), 16 Am. B. R. 115, 142 Fed. 296. But the proceeding in this case was not only against the partnership, but was also against each individual member. In some of the decisions it has been said broadly that one partner may not be adjudged bankrupt for the act of his copartner, and undoubtedly the statement is true as to certain acts of individual partners. Thus it has been held that neither a firm nor the other partners may be adjudged bankrupt for the act of a partner in preferring out of his individual estate one of his own or the firm's creditors. *Mills v. J. H. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656. But we think the true doctrine is that, if the act of the individual partner is one for which the partnership itself may be adjudged bankrupt, the other members of the firm may also be adjudged bankrupt unless they can show in defense that the property of the firm, together with that of all the partners applicable to the payment of the partnership debts, is sufficient to pay the same."

36. *In re Hovall Grocery Co.* (D. C., Ga.), 20 Am. B. R. 537, 161 Fed. 882; *Hartman*

mitted by one partner, binds the copartnership;³⁷ on the other hand, the embezzlement of the funds of the partnership by an absconding partner is not an act of bankruptcy.³⁸ If a partner out of his individual estate prefers one of his own or one of the firm creditors, it is not an act of bankruptcy for which the firm may be adjudged bankrupt.³⁹ Where the administrator of a deceased partner applies for the appointment of a receiver to wind up the partnership, upon the surviving partner announcing his intention of not exercising his statutory right to take the interest of his deceased partner at the appraised value, such surviving partner does not commit an act of bankruptcy by joining in the application for the receiver.⁴⁰

(3) WHAT CONSTITUTE ACTS OF BANKRUPTCY.—If the insolvency of the partnership was one of the substantial reasons for the appointment of a receiver the partnership may be adjudicated a bankrupt.⁴¹ A general assignment by a partnership and each of the individual members thereof is an act of bankruptcy by the partnership and the partners.⁴² The filing of a petition in bankruptcy by one partner against his copartnership is not an act of bankruptcy on the part of the partnership.⁴³ Where an execution was levied after the dissolution of a partnership, the failure to discharge it is an act of bankruptcy by all the members of the firm, for which it and all the partners may be adjudged bankrupt.⁴⁴

c. *Insolvency*.—In determining the question of insolvency the individual property of the partners should be considered.⁴⁵ Where the assets of a partnership, together with the individual properties of each partner, exceeds their liabilities, the partnership is not insolvent.⁴⁶ It has been well said that this principle is at variance with the universal doctrine that under the

v. *John Peters & Co. (D. C., Pa.)*, 19 Am. B. R. 61, 146 Fed. 82.

A conveyance by one partner of his individual property, although an act of bankruptcy as against him, will not sustain a proceeding in bankruptcy as against the firm, even though such conveyance was made with intent to hinder, delay or defraud firm creditors, or with a view of giving preference to a firm creditor. In such case the proceedings must be against such partner alone. In re *Redmond*, 9 Nat. Bankr. Reg. 408, Fed. Cas. 11,632.

37. In re *Kersten (D. C., Wis.)*, 6 Am. B. R. 516, 110 Fed. 929.

38. *Davis v. Stevens (D. C., S. Dak.)*, 4 Am. B. R. 763, 104 Fed. 235.

39. *Mills v. Fisher & Co. (C. C. A., 6th Cir.)*, 20 Am. B. R. 237, 241, 159 Fed. 897, in which the court said: "The application by one partner of his individual property to the payment of one firm creditor would be an individual act, and not the joint act of the firm, and therefore not an act for which the firm could be adjudged bankrupt."

40. *Moss Nat'l Bank v. Arend (C. C. A., 6th Cir.)*, 16 Am. B. R. 867, 146 Fed. 351.

41. In re *Beatty (C. C. A., 1st Cir.)*, 17 Am. B. R. 738, 150 Fed. 293.

42. *Green River Deposit Bank v. Oraig Bros. (D. C., Ky.)*, 6 Am. B. R. 381, 110 Fed. 137. Where such an assignment is made the partnership should be adjudged bankrupt irrespective of the question of its

insolvency. *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098.

Where an application for a receiver is made by a partnership under a State law, and a temporary receiver is appointed, it is not equivalent to a general assignment and will not support an involuntary adjudication in bankruptcy of the partnership. In re *Boyd v. Boyd Fry Stove & China Co. (Ref., Ga.)*, 20 Am. B. R. 330.

43. In re *Ceballos & Co. (D. C., N. J.)*, 20 Am. B. R. 459, 161 Fed. 445.

44. *Holmes v. Baker & Hamilton (C. C. A., 9th Cir.)*, 20 Am. B. R. 252, 160 Fed. 922.

45. In re *Perley (D. C., Mo.)*, 15 Am. B. R. 54, 138 Fed. 927.

Insolvency; one solvent partner.—Where a partnership is insolvent at the time of the commission of acts of bankruptcy, the acts proven will be acts of bankruptcy as against the partners, but will not be acts of bankruptcy as against one partner individually whose estate is sufficient to meet the partnership deficit. *Matter of Kobre et al. (D. C., N. Y.)*, 35 Am. B. R. 389, 224 Fed. 106.

46. *Vaccaro v. Security Bank of Memphis (C. C. A., 6th Cir.)*, 4 Am. B. R. 474, 103 Fed. 436, 43 C. C. A. 279. See also In re *Forbes (D. C., Mass.)*, 11 Am. B. R. 787, 791, 128 Fed. 137; *Davis v. Stevens (D. C., S. Dak.)*, 4 Am. B. R. 763, 772, 104 Fed. 235; In re *Blair (D. C., N. Y.)*, 3 Am. B. R. 588, 99 Fed. 76; In re *Boyd v. Boyd*

present bankruptcy act a partnership is a legal entity, separate from the partners who compose it.⁴⁷ But it is now well settled by the weight of authority that if the act of bankruptcy charged is one involving insolvency, the individual property of the partners must be combined with the property of the partnership in determining the insolvency of the partnership;⁴⁸ and that a partnership

Fry Stone & China Co. (Ref., Ga.), 20 Am. B. R. 330; *In re Duke & Son* (D. C., Ga. Ref.), 28 Am. B. R. 195; *Abbott v. Anderson* (Sup. Ct., Ill.), 265 Ill. 285, 33 Am. B. R. 383, 106 N. E. 782; *Matter of Samuels and Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195.

47. *In re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B. R. 577, 588, 157 Fed. 363; *Matter of Everybody's Market* (D. C., Okl.), 21 Am. B. R. 925, 173 Fed. 492.

Only property of partnership to be considered.—The case of *In re McMurtrey v. Smith* (D. C., Tex.), 15 Am. B. R. 427, 142 Fed. 853, is analogous to the case last cited. It was there held that upon the question of the insolvency of a partnership, sought to be adjudged bankrupt, the firm and its individual members are strangers to each other, and a homestead, the individual property of one partner, may not be counted as part of the partnership property. In the case of *In re Morgan & Williams* (D. C., Ga.), 25 Am. B. R. 861, 184 Fed. 938, the court said: "Assuming the entity doctrine to prevail under the more recent decisions of the courts, as contended by counsel for petitioning creditors, and that the firm's assets and liabilities would be the test of solvency or insolvency as against the firm, and that notwithstanding the fact that the individuals composing the firm are proceeded against also, still it must appear, to justify an adjudication in bankruptcy, that the real indebtedness on the part of the alleged bankrupt firm to the petitioning creditor or creditors exceeds the aggregate, at a fair valuation, of the alleged bankrupt firm's property."

48. *Insolvency of partnership and of partners.*—In the case of *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, affd. 228 U. S. 695, 30 Am. B. R. 240, 57 L. Ed. 1029, the court cited the authorities and said: "A partnership cannot be adjudged a bankrupt, in an involuntary proceeding, unless it has committed an act of bankruptcy. If the act charged be one involving insolvency, since every partner is liable in solido for all the partnership debts, the adjudication against the partnership must be based on allegations and proofs that the assets of its members, in excess of their individual debts, plus the assets of the partnership, are insufficient to pay the partnership debts. Otherwise there is no partnership insolvency, notwithstanding the entity doctrine. *In re Blair* (D. C., N. Y.), 3 Am. B. R. 588, 99 Fed. 76; *Vaccaro Security Bank* (C. C. A.,

6th Cir.), 4 Am. B. R. 474, 103 Fed. 436, 43 C. C. A. 279; *Davis v. Stevens* (D. C., S. D.), 4 Am. B. R. 763, 104 Fed. 235; *In re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137; *In re Perley & Hays* (D. C., Mo.), 15 Am. B. R. 54, 138 Fed. 927; *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; *Worrell v. Whitney* (D. C., Pa.), 24 Am. B. R. 749, 179 Fed. 1014. That doctrine furnishes a direct proceeding against the partnership as a legal entity, but it does not authorize an adjudication of bankruptcy against a partnership, where the act of bankruptcy charged is one involving insolvency, unless as above stated, it is shown that there is an insufficiency of partnership and individual assets to pay the partnership debts. If a partnership is insolvent, in the sense above explained, all the assets of the partnership and its members are needed for the proper winding up of the partnership affairs."

In the case of *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960, the court said: "If the component parts of the firm may be made to pay the firm's debts, the suit lacks reason and substance, and it cannot be held that the defendant has obtained a greater percentage of his debts than other creditors of the same class. If the members of the firm are solvent, all creditors may be paid in full. If the individual members of the partnership are not shown to be insolvent at the date of the payments, the preference is not voidable." This case pertained to the recovery of a preference, but the reasoning is applicable to the question of insolvency where an act of bankruptcy is alleged. See also *In re Perlheffer v. Shatz* (D. C., N. Y.), 25 Am. B. R. 576, 585, 177 Fed. 295; *Crane & Co. v. Wade* (Okla. Sup. Ct.), 26 Okl. 757, 25 Am. B. R. 880, 110 Pac. 778; *In re Samuels & Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845 (revg. 30 Am. B. R. 293, 207 Fed. 195); *In re Duke & Son* (Ref., Ga.), 29 Am. B. R. 93. A partnership cannot be compulsorily adjudicated a bankrupt where any partner appears to be solvent to the extent of having a surplus of property over the debts for which he is personally liable and the debts for which he is liable as a member of the firm. *Matter of Kobre* (D. C., N. Y.), 35 Am. B. R. 389, 224 Fed. 116.

is not bankrupt so long as one of the members who compose it is individually solvent.⁴⁹

d. Death, insanity, or infancy of a partner.— (1) **DEATH OF PARTNER.**— The estate of a deceased debtor cannot in this country be adjudged a bankrupt.⁵⁰ It follows that there can be no partnership adjudication against a firm, one member of which is dead.● The surviving partner can still be adjudged either a voluntary or an involuntary bankrupt as an individual and as survivor.⁵² The court of bankruptcy may thereby obtain jurisdiction of the partnership estate, or by consent, if in the hands of an administrator;⁵³ and the estate of the deceased partner is in any event still liable to pay the firm debts.⁵⁴ A trustee in bankruptcy of a surviving partner may not close the affairs of the partnership and proceed as though the surviving partner was not a bankrupt; all that the trustee can do is to take the remaining interest of the bankrupt partner after the firm obligations have been paid.⁵⁵ This doctrine of the lack of jurisdiction of the court of bankruptcy to adjudicate as to the bankruptcy of a partnership after the death of one partner is not recognized or upheld by some of the later cases. There is an apparent conflict of authority upon this question.⁵⁶ The only difficulty attending upon adjudication in such a case is the consequent interference with the administration of the probate court of the estate of the deceased partner. In the absence of express statutory authority it would seem more consistent to leave the creditors to their remedy in the probate court. The apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate, but it leads to confusion rather than denial of justice. The rights of creditors, in all ordinary cases, are fully conserved even though the administration of assets may be in two courts. The death of a partner after adjudication does not affect the proceeding.⁵⁷

(2) **INSANITY OF PARTNER.**— The effect of insanity of the alleged bankrupt on the jurisdiction of the court has already been noted.⁵⁸ Conceding that an insane person may not be adjudicated a bankrupt it has been held, nevertheless, that a partnership of which he was or is a member may be so adju-

49. *Matter of Samuels & Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195.

50. See as to estates of bankrupt decedents *ante*, p. 146.

Where a partnership is dissolved by death of a partner it is not subject to bankruptcy, and the voluntary petition in bankruptcy of the surviving partner only affects his individual estate. *In re Evans* (D. C., Ga.), 20 Am. B. R. 406, 161 Fed. 590.

51. *In re Temple*, Fed. Cas. 13,825; *Adams v. Terro*, 4 Fed. 802; *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436, 43 C. C. A., 279; *Dalton v. Humphreys* (C. C. A., 4th Cir.), 39 Am. B. R. 360, 242 Fed. 777; *Matter of Fackelman* (D. C., Cal.), 41 Am. B. R. 14, 248 Fed. 565, citing *Collier on Bankruptcy* (11th ed.), 175.

Contract providing for continuance in case of death.— Where a partnership contract provided that upon the death of one partner, the partnership should be continued by the survivors for a certain period, the partnership and the surviving partners may be adjudicated involuntary bankrupts. *In re Coe* (D. C., N. Y.), 19 Am. B. R. 618, 154 Fed. 162. If the adjudication has been made, it cannot be attacked collaterally.

Wilson v. Parr, 115 Ga. 629, 8 Am. B. R. 230, 42 S. E. 5.

52. *In re Pierce* (D. C., Wash.), 4 Am. B. R. 489, 102 Fed. 977; *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; *Briswalter v. Long*, 14 Fed. 153; *In re Stevens*, Fed. Cas. 13,393.

53. *In re Pierce* (D. C., Wash.), 4 Am. B. R. 489, 102 Fed. 977; *Briswalter v. Long*, 14 Fed. 153.

54. *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436.

55. *Moses v. Pond* (Sup. Ct., Spec. T. N. Y.), 4 Am. B. R. 655, 32 Misc. (N. Y.) 406, 66 N. Y. Supp. 600.

56. *In re Stein & Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547; *In re Coe* (D. C., N. Y.), 19 Am. B. R. 618, 154 Fed. 162, although in this case the partnership agreement expressly provided for the continuance of the partnership business for a certain period after the death of either partner.

57. See Bankr. Act, § 8, *post*.

58. See Bankr. Act, § 4, *ante*.

cated, and the firm property applied to the payment of the firm debts.⁵⁹ There is the same difficulty with this question as there is with that relating to the effect of the death of one of the partners upon the jurisdiction of the court. The statute does not apparently authorize the intervention of committees in involuntary proceedings against the lunatics they represent, so that where such committees have been appointed in proceedings to determine judicially the incompetency of a person, the jurisdiction of the State court would seem to supersede that of a court of bankruptcy and thus preclude the administration of the lunatic's estate in a proceeding instituted to adjudicate the bankruptcy of a partnership of which he was a member.

(3) **INFANCY OF PARTNER.**—If one of the partners is an infant the partnership itself may be adjudicated bankrupt and so may the individual members thereof who are of age, or the petition will be dismissed as to the partner who is an infant.⁶⁰

(4) **EXEMPTION OF PARTNER.**—A partnership and some of its members may be adjudicated involuntary bankrupts, although the other members belong to the exempt classes.⁶¹

III. PRACTICE BEFORE ADJUDICATION.

a. **In general.**—If all the partners petition voluntarily, the proceeding prior to adjudication is identical with an individual petition. The owing of debts,⁶² and the facts as to residence, domicile, or principal place of business,⁶³ must at least appear on the face of the petition to confer jurisdiction. Conversely, if the petition be involuntary, the facts as to the partners not being included in either of the excepted classes and owing at least \$1,000,⁶⁴ as to the provable debts of the petitioners and the number of the creditors,⁶⁵ as to the commission of an act of bankruptcy within four months,⁶⁶ and, in cases where insolvency is necessary to the act, that it existed at the time of its commission and also at the time of the filing⁶⁷ must clearly appear or the court will not acquire jurisdiction. It must also appear affirmatively that both the partnership as an entity and the individuals composing it were and are insolvent at the times mentioned.⁶⁸ A petition to have a partnership adjudicated bankrupt *nunc pro tunc*, for the purpose of which is to overturn transactions already closed, will usually be refused.⁶⁹ If an issue is raised as to the partnership in an involuntary proceeding, the burden is on the petitioners to show that there was a partnership.⁷⁰

59. In re Stein & Co. (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547. See also In re Ives (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. 911.

60. In re Duguid (D. C., N. C.), 3 Am. B. R. 794, 100 Fed. 274; In re Dunningan (D. C., Mass.), 2 Am. B. R. 628, 95 Fed. 428.

61. Matter of Disney (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294.

62. Bankr. Act, § 4-a.

63. Bankr. Act, § 2 (1).

64. Bankr. Act, § 4-b.

65. Bankr. Act, § 59-b.

66. Bankr. Act, § 3-a. See In re Shapiro (D. C., N. Y.), 5 Am. B. R. 839, 108 Fed. 495; In re Grant (D. C., N. Y.), 5 Am. B. R. 837, 106 Fed. 496; In re Meyer (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976.

67. See p. 173, *ante*.

68. In re Blair (D. C., N. Y.), 3 Am. B. R. 588, 99 Fed. 76; In re Meyer (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; In re Miller, 104 Fed. 764; Vaccaro v. Security Bank (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; Matter of Samuels & Lessers (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195; Compare In re Bertenshaw (C. C. A., 8th Cir.), 19 Am. B. R. 577, 157 Fed. 363; Houghton Wool Co. v. Morris (C. C. A., 1st Cir.), 41 Am. B. R. 271, 249 Fed. 434.

69. In re Mercur (D. C., Pa.), 8 Am. B. R. 275, 116 Fed. 655.

70. Jones v. Burnham (C. C. A., 3d Cir.), 15 Am. B. R. 85, 138 Fed. 986. See under heading "What constitutes bankruptcy," *ante*.

b. Petition by partners where all do not join.—(1) **IN GENERAL.**—It has been held, following the entity doctrine, that separate petitions must be filed by the firm and by the individuals.⁷¹ The better opinion is, however, to the contrary, viz., that but one petition need be filed.⁷² Where some but not all the partners file a voluntary petition the proceeding is voluntary as to the petitioning partners, but involuntary as to the nonjoining partners who, upon notification, do not join therein.⁷³ In such a case it is not necessary to allege or prove as to non-consenting partners the commission of an act of bankruptcy, or, in fact, any of the jurisdictional facts peculiar to involuntary applications;⁷⁴ but such partner may set up the defense of solvency, and upon that issue he is entitled to trial by jury.⁷⁵

(2) **RIGHTS OF NON-JOINING PARTNER.**—Under General Order VIII, the non-joining or absentee partner is entitled to the same notice as if petitioned against, and to answer to the petition and to allege and prove any of the facts which would be pertinent to a proceeding against the partnership.⁷⁶ A convenient form for notice to the non-consenting partners is found in the case of *In re Murray*.⁷⁷ This notice, of course, may be given by publication;⁷⁸ but such notice is so far jurisdictional that the consent of non-joining partners after adjudication of the bankruptcy of the firm will not render it valid.⁷⁹ It seems that immediately the partnership adjudication is granted, the proceeding becomes strictly voluntary.⁸⁰ It may be doubted whether the court has jurisdiction to adjudge the non-consenting insolvent partner a bankrupt individually unless the prayer of the petition asks individual adjudication.⁸¹

71. *In re Farley* (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 359; *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 53.

72. *In re Gray* (D. C., N. H.), 3 Am. B. R. 529, 98 Fed. 870; *In re Langslow* (D. C., N. Y.), 1 Am. B. R. 258, 98 Fed. 969.

73. *In re Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600; *In re Carleton* (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246.

Petition by continuing partner.—Where B., who had purchased the interest of his copartner E., filed a petition in bankruptcy signed B. & E. by B., the proceeding should be regarded as having been instituted by B., doing business as B. & E. *Matter of Baker & Edwards* (D. C., N. Car.), 35 Am. B. R. 469, 224 Fed. 611.

74. *In re Carleton* (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246.

75. *In re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137.

76. **Notice to non-joining partner.**—It seems that notice to an undisclosed partner is not necessary. *In re Harris* (D. C., Ohio), 4 Am. B. R. 132, 108 Fed. 517. As to non-joining partner being entitled to notice of proceeding, etc., see *In re Russell* (D. C., Iowa), 3 Am. B. R. 91, 97 Fed. 32; *In re Elliott*, 2 N. B. N. 350; *In re Moore*, Fed. Cas. 9,750, 5 Biss. 79; *In re Prankard*, Fed. Cas. 1,136, 1 N. B. R. 297; *In re Lewis*, Fed. Cas. 8,311, 2 Ben. 96; *In re Fowler*, Fed. Cas. 4,998, 1 Low. 161.

A petition to adjudge a partnership a voluntary bankrupt which is made by some of the partners without notice to the non-

joining partner is irregular and will not warrant the adjudication of the firm as bankrupts; such a defect is not cured by subsequent unverified consent signed by the attorneys for the non-joining partners. *In re Altman* (D. C., N. Y.), 2 Am. B. R. 407, 95 Fed. 263; *Matter of City Contracting & Bldg. Co.* (D. C., Hawaii), 29 Am. B. R. 171; *Armstrong v. Fisher* (C. C. A., 8th Cir.), 34 Am. B. R. 701, 224 Fed. 97.

Special partner.—In a voluntary proceeding by general partners, a copy of the petition should be served with the usual subpoena upon a special partner, but failure to serve said petition may be supplied after service of the subpoena. *Matter of Carrion & Co.* (D. C., Porto Rico), 41 Am. B. R. 304, 10 Porto Rico Fed. 332.

77. (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600.

78. See Bankr. Act, § 18, *post*.

79. *In re Russell* (D. C., Iowa), 3 Am. B. R. 91, 97 Fed. 32; *In re Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600; *In re Altman* (D. C., N. Y.), 2 Am. B. R. 407, 95 Fed. 263.

80. Compare *In re Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600, with *Metsker v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 654.

81. *Chemical Bank v. Meyer*, *affd.* in *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976.

Rights of objecting partner.—In the case of *In re Junck v. Balthazard* (D. C., Wis.), 22 Am. B. R. 289, 169 Fed. 481, the court said: "It seems to me that the following conclusions are sustained by fair construction of the Bankrupt Act of 1898. First, that the objecting partner cannot be adjudicated against his will. Second that such non-consenting partner does not hold a veto on the jurisdiction of the court over the partnership, as an entity. If this concession were made, the objecting partner

but, under principles discussed later in this section, that would seem immaterial, the partnership adjudication drawing to itself of necessity the administration of the individual estates as well. The rule is different where the non-consenting partner proves to be solvent. Where the same persons are members of distinct firms, it was held under the former law that they could not petition together.⁸² The entity doctrine seems to intensify rather than weaken this ruling. An alleged partner is not entitled to a jury trial of the question as to whether he was a partner at the time the petition was filed.⁸³ Where the petitioners are members of different partnerships with others who do not join, adjudication will undoubtedly be refused, but with leave to refile in the form of separate petitions.⁸⁴ It has been held that a partner may file a petition praying for adjudication against his partnership, either on the sole ground of the insolvency of the partnership and all its partners or on the sole ground that the partnership has, through one or more of the non-joining partners, committed an act of bankruptcy.⁸⁵

(3) INTERVENTION BY CREDITORS.—While the proceeding as to the non-joining partner may be involuntary, it is not involuntary so as to enable the creditor to intervene to resist the adjudication of the partnership.⁸⁶

c. Form of petition.—Form No. 2 should not be relied on too implicitly. The prayer of the petition should at least ask for an adjudication of the individuals as well as of the firm.⁸⁷ Careful practice also seems to com-

might bar the way to any discharge from partnership debts, and thus neutralize section 4-a of the act, which expressly confers 'the benefits of this act,' on any person who owes debts. Third, that the inherent right of the solvent partner to close up the affairs of the firm must be recognized by the court of bankruptcy. This right was not conferred by the bankruptcy act, neither can it be abridged or taken away by it. Balthazard, the surviving partner, might defeat the jurisdiction of the bankruptcy court in two ways: First, by proving the solvency of the firm; Second, by showing himself solvent, and agreeing to take upon himself the settlement of the partnership business, reporting to the court, according to the equitable rule of residuum, all assets remaining to be distributed by the court among the partnership creditors."

⁸². In re Wallace, Fed. Cas. 17,095.

⁸³. In re Samuels & Lesser (D. C., N. Y.), 30 Am. B. R. 293, 207 Fed. 195, (revd. on other grounds, 32 Am. B. R. 436, 215 Fed. 845).

⁸⁴. As to the amendment of petitions in these cases, see In re Freund (Ref., Iowa), 1 Am. B. R. 25; In re McFaun (D. C., Iowa), 3 Am. B. R. 66, 96 Fed. 592.

⁸⁵. In re Ceballos & Co. (D. C., N. J.), 20 Am. B. R. 459, 161 Fed. 445.

⁸⁶. Intervention by creditors.—In the case of In re Carleton (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246, the court said: "Notwithstanding the decisions of the Supreme Court in *Metsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654, it appears to me that this court is not compelled to hold, either under the Act of 1867 and General Order 18, or under the Act of

1898 and General Order 8, that this petition is so far involuntary as to permit a creditor of the firm to intervene in order to resist adjudication. See *In re Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600. As to the petitioner these proceedings are purely voluntary. As to him a creditor has no more right to intervene than in the case of any other voluntary petition. As to the non-joining partner, the proceedings are in some sense involuntary. As to intervention by creditors it is most convenient and most consistent with justice and the general scheme of the act, to hold that the right 'to make all defenses which any debtor proceeded against has a right to make,' is confined to the non-joining partner. If he makes any objection then, so far as adjudication is concerned, the petition is to be treated generally as if it were altogether voluntary. Had this been an ordinary voluntary petition by both partners the creditor could not have intervened to contest the adjudication. If partners are willing to be adjudicated bankrupt, whether on the petition of one or on that of all of them, they are to have their way." In the case of *In re Junck v. Balthazard* (D. C., Wis.), 22 Am. B. R. 289, 169 Fed. 481, the court said: "In the case of the non-consenting partner, the procedure as to him, is the same as in an involuntary case; but as to creditors, the petition is voluntary, and there is no room for the issue which the creditor attempts to raise by his intervention, and his answer may be stricken from the files."

⁸⁷. *Matter of Wing Yick Co.* (D. C., Hawaii), 13 Am. B. R. 757, 2 U. S., D. C., Hawaii 259.

Petition to follow official form; amend-

mand that words indicating that both the partners and the individuals owe debts that they cannot pay in full, and offering to surrender both firm and individual properties, be inserted. It may be that the mere statement that debts are owed is sufficient to cover the jurisdictional requirement that partnerships cannot be adjudged bankrupt after the final settlement thereof, but it is better to allege that there has been no such settlement in very words; it has been held insufficient to state that the "copartners are insolvent."⁸⁸ If an act of bankruptcy is alleged in a petition against a partnership, consisting of a preferential transfer and a transfer with intent to hinder and delay creditors, the petition is sufficient though it neither alleges the insolvency of the individual partners, nor that the solvent partners, if any, consent to the adjudication.⁸⁹ If one partner lives in another jurisdiction, that fact should be stated. If a partner refuses to join, that fact should also be stated, and the prayer of the petition should include a request for the issue of the usual subpoena to him as if to an alleged bankrupt. The schedules should be complete,⁹⁰ both for the firm and for each partner. Where the petition is against a copartnership even greater care should be used. Here Form No. 3 is not reliable other than by way of suggestion; it does not contain all the jurisdictional allegations.⁹¹

IV. ADJUDICATION.

a. In general.—A partnership may be adjudicated bankrupt irrespective of any adjudication as to the individual partners.⁹² The adjudication may be in the name of an ostensible partner, where it appears that such name is

ment.—Where an adjudication is desired of petitioning partners as individuals as well as the firm, official Form No. 2 should not be literally followed, but there should be inserted in the prayer of the petition a request for an adjudication of the petitioning partners as well as of the firm. The omission of such an allegation may be supplied by amendment. *Matter of Lenoir-Cross & Co.* (D. C., Tenn.), 35 Am. B. R. 774, 226 Fed. 227.

Involuntary proceedings; petition.—Where a partnership has been dissolved and one partner has transferred his interest in the firm to his copartner, a petition in involuntary bankruptcy against the firm and the members thereof may be amended by striking out the firm and the partner so that an adjudication may be had against the copartner, although the partner opposes the amendment because he has claims against the copartner which came into existence after the date of the petition. *Matter of Young* (D. C., Mass.), 35 Am. B. R. 200, 223 Fed. 659.

⁸⁸ *Matter of Wing Yick Co.* (D. C., Hawaii), 13 Am. B. R. 757, 2 U. S., D. C., Hawaii 259.

Petition not to allege act of bankruptcy.—Where a petition for voluntary bankruptcy is filed by one partner and opposed by another partner it is not required to allege that the firm had committed an act of bankruptcy. The better rule seems to be that in such case the ordinary averment that the firm has not sufficient assets to pay its obligations and is willing to submit its prop-

erty for distribution, is sufficient, and the filing of such a petition by one of the partners is of itself considered the equivalent to an act of bankruptcy. In *re Junck v. Balt-hazard* (D. C., Wis.), 22 Am. B. R. 289, 169 Fed. 481.

⁸⁹ *Matter of Everybody's Market* (D. C., Okl.), 21 Am. B. R. 925, 173 Fed. 492.

⁹⁰ This is Form No. 1, Schedule A (1), (2), (3), (4), (5), and B (1), (2), (3), (4), (5), and (6), with the summary.

Schedules by non-joining partner.—Upon an adjudication of bankruptcy against a firm the non-joining partner, although not liable to adjudication where there is no allegation of an act of bankruptcy committed by him individually, may be required to file a schedule of his debts and an inventory of his property, in accordance with the eighth General Order. *Matter of Lenoir-Cross & Co.* (D. C., Tenn.), 35 Am. B. R. 774, 226 Fed. 227.

⁹¹ As to these allegations, see *ante*, and compare "Acts of Bankruptcy by a Partnership," and similar paragraphs in this section, *post*.

⁹² In *re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 977. See also *Matter of Livingston* (D. C., Hawaii), 13 Am. B. R. 357, 2 U. S. D. C., Hawaii 254. Text cited in *Matter of Latimer* (D. C., Pa.), 23 Am. B. R. 388, 174 Fed. 824.

When individual cannot be summarily adjudicated liable as partner.—A court of bankruptcy in proceedings against a partnership has no jurisdiction to administer upon the

that under which the partnership does business.⁹³ The entity doctrine requires that the adjudication, while substantially as prescribed by Form No. 12, should declare, after modifying its recitals slightly, that "The copartnership known as Smith & Jones, composed of John Smith and George Jones, and the said John Smith and George Jones as individuals⁹⁴ be and each is hereby declared and adjudged bankrupt." If, however, the petition asks for a partnership adjudication only, that alone should be granted.⁹⁵ The form of the adjudication is, however, important only to the bankrupts. The adjudication should conform to the contents of the petition and that which is not asked for should not be granted; so where the bankruptcy of the partnership itself is sought independent of that of the individual partners, adjudication should not be granted in respect to the partners although it may have been shown that the partners were each of them insolvent.⁹⁶ Where the partnership and the partners are insolvent, and one of them dies, the adjudication of the surviving partner, carries with it the entire rights and obligations of the partnership as it existed prior to the death of the other partner.⁹⁷ The order of adjudication is only conclusive against those entitled to be heard in the proceedings; it is not conclusive as to the existence of a partnership or the title to its assets as against a trustee of one of the alleged partners who was not permitted to intervene.⁹⁸

b. Effect of adjudication on discharge.—(1) **IN GENERAL.**—If the adjudication is of the firm only, the discharge following it will be a bar only to firm debts.⁹⁹ If the application is for individual bankruptcies only, the discharge will not affect firm liabilities.¹⁰⁰ But, while in the first case it would seem necessary that the individuals file new separate petitions,^{100a} in the latter case an amendment of the petition and adjudication praying for the partnership bankruptcy has been allowed. Where new individual petitions are filed, they may be consolidated with the pending partnership proceeding. Where,

estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent. *Matter of Kramer & Muchuck* (D. C., Pa.), 33 Am. B. R. 223, 218 Fed. 138.

^{93.} *Matter of Harris* (D. C., Ohio), 4 Am. B. R. 132, 108 Fed. 517.

^{94.} This latter only if individual bankruptcy has been asked. See *Hagar & Alexander Bankr. Forms*, 2d Ed., p. 73.

^{95.} See *Bank v. Meyer* (D. C., N. Y.), 1 Am. B. R. 565, 92 Fed. 896, and *In re Sanderlin* (D. C., N. C.), 6 Am. B. R. 384, 109 Fed. 857; though the doctrine of the former case seems to be accepted with caution in *In re Stokes* (D. C., Pa.), 6 Am. B. R. 262, 106 Fed. 312.

^{96.} See *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; *In re Ceballos & Co.* (D. C., N. J.), 20 Am. B. R. 467, 161 Fed. 451.

For form of order of adjudication, see *Hagar & Alexander Bankr. Forms*, 2d Ed., p. 69.

^{97.} *Matter of Stringer* (D. C., N. Y.), 37 Am. B. R. 713, 234 Fed. 454.

^{98.} *Manson v. Williams*, 213 U. S. 453, 22 Am. B. R. 22, 53 L. Ed. 969, affg. 18 Am. B. R. 674, 153 Fed. 525.

^{99.} *In re Hale* (D. C., N. C.), 6 Am. B. R. 85, 107 Fed. 432; *Dodge v. Kaufman* (Sup. Ct., N. Y.), 15 Am. B. R. 542, 46 N. Y. Misc. 248; *Homer v. Hamner* (C. C. A., 4th Cir.), 40 Am.

B. R. 817, 249 Fed. 137. Where there is only a partnership adjudication, individual discharges cannot be granted. *In re Pincus* (D. C., N. Y.), 17 Am. B. R. 331, 147 Fed. 621; *In re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B. R. 577, 157 Fed. 363.

Individual estates.—The decisions to the effect that the bankruptcy of a partnership does not necessarily draw to the court of bankruptcy the administration of the individual estates of the partners are in point upon this proposition. *In re Stein* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547, 62 C. C. A. 272; *Stranoe v. Hooper* (D. C., N. C.), 5 Am. B. R. 225, 105 Fed. 590; *In re Duguid* (D. C., N. C.), 3 Am. B. R. 749, 799, 100 Fed. 274; *In re Blair* (D. C., N. Y.), 3 Am. B. R. 588, 99 Fed. 76.

^{100.} *In re Myers* (D. C., N. Y.), 3 Am. B. R. 260, 97 Fed. 753; *In re Morrison* (D. C., Tex.), 11 Am. B. R. 498, 127 Fed. 186. But compare *In re Feigenbaum* (D. C., N. Y.), 7 Am. B. R. 339, 151 Fed. 508.

^{100a.} **Right of partner in voluntary proceeding.**—A member of a partnership in a voluntary proceeding in bankruptcy is entitled to be discharged from all debts provable against his estate on the date of his adjudication, although in a prior proceeding in bankruptcy against the partnership no application was made for a discharge and the individual members were not mentioned or adjudicated bankrupts. *Horner v. Hamner* (C. C. A., 4th Cir.), 40 Am. B. R. 817, 249 Fed. 134.

however, the adjudication is of the individual partners only, a question has arisen which is still undetermined.

(2) **DISCHARGE OF PARTNERSHIP DEBTS.**—Following the entity doctrine and the controlling authorities under the former law,¹⁰¹ the earlier cases held that to cut partnership debts there must be a partnership adjudication.¹⁰² The later cases, however, seem to hold that a discharge resting on an individual adjudication will, provided there be no firm assets and the firm creditors are scheduled and receive notice, be an available bar to subsequent suits on the bankrupt's partnership liabilities.¹⁰³ While such a view is necessarily an exception to the entity doctrine, it seems more reasonable. The Meyers case¹⁰⁴ is clearly distinguishable, for in that case there were firm assets.¹⁰⁵ If there are no firm assets and the firm is insolvent, a judgment on a partnership debt may be released by the discharge of an individual partner.¹⁰⁶ It has also been held that where a partner is adjudicated a bankrupt upon his individual petition, which is silent as to partnership assets and liabilities, although his schedules disclose both individual and firm debts, the bankrupt is not entitled to a discharge from partnership debts, although the firm no longer exists and is without assets.¹⁰⁷ It is difficult to declare a rule based upon the majority of the cases. A very unsatisfactory conflict exists among the authorities. It may be asserted, however, in view of the reasoning in nearly all the cases, that where there are no firm assets and the firm creditors are duly scheduled and receive notice, the individual discharge of a bankrupt partner should operate as a discharge from partnership debts.¹⁰⁸ The scheduling of the firm debts

101. See *Amsinck v. Bean*, 22 Wall. 395-405, and other cases cited in Judge Brown's opinion in the *Meyers* case, immediately *post*.

102. In *re Freund* (Ref., Iowa), 1 Am. B. R. 25; In *re Meyers* (D. C., N. Y.), 2 Am. B. R. 707, 96 Fed. 408. In the case of *In re Mercur* (C. C. A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384, 58 C. C. A. 472, it was held that a trustee in bankruptcy of the individual estates of all the partners who had been adjudged bankrupts could not draw to himself and administer the property of the unadjudicated partnership.

103. In *re Laughlin* (D. C., Iowa), 3 Am. B. R. 1, 96 Fed. 589; *Jarecki Mfg. Co. v. McElwaine* (D. C., Ind.), 5 Am. B. R. 751, 107 Fed. 249; In *re Feigenbaum* (D. C., N. Y.), 7 Am. B. R. 339, 151 Fed. 508; In *re Kaufman* (D. C., N. Y.), 14 Am. B. R. 393, 136 Fed. 262; *Loomis v. Walblom* (Sup. Ct., Minn.), 94 Minn. 392, 13 Am. B. R. 687, 102 N. W. 1114; *Dodge v. Kaufman* (Sup. Ct., N. Y.), 15 Am. B. R. 542, 46 N. Y. Misc. 248, 91 N. Y. Supp. 727; N. Y. Institution for the Deaf and Dumb v. *Crockett* (Sup. Ct., N. Y.), 17 Am. B. R. 233, 117 N. Y. App. Div. 269, 102 N. Y. Supp. 412; *Gordon v. Texas Co.* (Me. Sup. Ct.), 45 Am. B. R. 157, 100 Atl. 368.

104. 2 Am. B. R. 707, 96 Fed. 408.

105. Likewise of *In re McFaun* (D. C., Iowa), 8 Am. B. R. 66, 96 Fed. 592, where there was no notice to firm creditors.

106. *Berry Bros. v. Sheehan* (Sup. Ct., N. Y.), 17 Am. B. R. 322, 115 N. Y. App. Div. 488.

107. In *re Morrison* (D. C., Tex.), 11 Am.

B. R. 498, 127 Fed. 186; In *re Laughlin* (D. C., Iowa), 3 Am. B. R. 1, 96 Fed. 589.

108. Discharge from partnership debts.—In *re McFaun* (D. C., Iowa), 3 Am. B. R. 66, 96 Fed. 592; *New York Institution for the Deaf and Dumb v. Crockett*, 17 Am. B. R. 233, 117 N. Y. App. Div. 269, 102 N. Y. Supp. 412, in which case the court states, that the tendency of the decisions in the State courts is toward holding that where a court acquires jurisdiction and grants a full discharge, in the language of the statute, from all provable debts properly scheduled, that joint as well as individual debts are discharged; In *re Kaufman* (D. C., N. Y.), 14 Am. B. R. 393, 136 Fed. 262, holding that where an individual partner on adjudication, schedules firm debts his discharge releases him from liability thereon, and after the term at which it was granted, may be amended so as to discharge him as an individual from any liability on account of the debts of the firm.

In the case of *Jarecki Mfg. Co. v. McElwaine* (C. C. A., Ind.), 5 Am. B. R. 751, 107 Fed. 249, the court said: "There is some disagreement in the authorities as to whether a discharge of an individual partner releases him from liability upon partnership debts. The great weight of authority is in favor of the doctrine that the discharge of a partner on his individual petition operates as a release both from individual and his partnership indebtedness. The cases which held to the contrary seemed to be based upon a misconception of the extent of the rights of the trustee over the bankrupt's

and notice to creditors are prerequisites to a discharge of an individual partnership from firm debts.¹⁰⁹ Of course, if the adjudication is of the partnership but not of all the partners, individual creditors of the non-consenting insolvent partner are not affected by the discharge.¹¹⁰

V. JURISDICTION WHERE PARTNERS ARE DOMICILED IN DIFFERENT DISTRICTS.

Subsection *c* provides that: "The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property." The analogous provision in the law of 1867 was: "If such copartners reside in different districts, that court in which the petition was first filed shall retain exclusive jurisdiction over the case." This clause did not occur in the law of 1841. General Order XVI under the law of 1867 is substantially the same as present General Order VI, the last two sentences of which are as follows: "In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed having jurisdiction shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should

estate and as to the effect upon the firm of the bankruptcy of one of its members. The cases holding that a discharge granted to one member of a firm does not release him from partnership indebtedness, where he alone is adjudged a bankrupt, proceed on the principle that a trustee could not acquire possession of and administer the assets of the firm. In so holding, it seems to have been overlooked, that the bankruptcy of one member is *ipso facto* a dissolution of the firm, and that while the solvent partner would be allowed to administer the partnership assets, yet the trustee in bankruptcy is entitled to the bankrupt's share of the partnership assets, after the payment of the partnership debts. The separate estate of the bankrupt partner and his beneficial interests in the firm, after the payment of firm debts, is to be administered by the trustee for the payment of the bankrupt's individual debts. The adjudication of one partner as a bankrupt, brings within the jurisdiction of the court his entire estate for administration, and if, after the payment of his individual debts out of his individual estate, any surplus remains, it will be applicable to the payment of firm indebtedness. For the purpose of reaching any such surplus, firm creditors may prove against the estate of the bankrupt partner. The most elaborate and exhaustive discussion of the subject under the bankrupt act of 1867, is found in the case of *Wilkins v. Davis*, Fed. Cas. 17,664, and in my opinion, the reasoning in that case as applied to the present bankrupt act, clearly demonstrates

that the discharge of one partner, releases him from all partnership indebtedness."

109. *Petition and schedules.*—In the case of *In re Laughlin* (D. C., Ia.), 3 Am. B. R. 1, 96 Fed. 591, the court said: "To become entitled to a discharge barring the firm creditors under such circumstances, the proper foundation must be laid in the proceedings instituted on behalf of the bankrupt partnership. In the petition originally filed it should be averred that the petitioner is indebted in his individual capacity, if such be the fact, and also as a member of a firm, naming it and giving the names of the several partners; and the petition should pray for the discharge from the firm as well as his individual debts. To this petition should be attached the proper schedules setting forth the firm debts, the firm property, if any, and all other matters, the same as is required in the case of a proceeding brought by one of the partners." See also *In re Meyers* (D. C., N. Y.), 3 Am. B. R. 260, 97 Fed. 757.

Notice to firm creditors.—Where one of the members of a firm desires a discharge from firm as well as individual debts, a notice to that effect must be contained in the notice given of the first meeting of creditors, in the petition for a discharge, and in the notice to creditors therefor. *In re Russell* (D. C., Ia.), 3 Am. B. R. 91, 97 Fed. 32. See also *In re Morrison* (D. C., Tex.), 11 Am. B. R. 498, 127 Fed. 186.

110. Compare, for collateral attack and generally on the effect of discharges on partnership liabilities, discussion under Sections Fourteen and Seventeen of this work.

proceed with the case, order them to be transferred to that court." It will be noticed that this provision supplements subdivision *c* and gives it effect. The statute and the general order modified the rigid rule of the former law, that the court which has acquired jurisdiction of one of the partners had exclusive jurisdiction over both subject-matter and of the partners.¹¹¹ Under the general order the court retaining jurisdiction may transfer the case to another court for the greater convenience of the parties in interest, thus substituting the flexible rule of convenience of parties in the place of the rigid rule of the former law.¹¹² The proceeding may be brought in another district where the partner might have petitioned as an individual.¹¹³

VI. TRUSTEES OF BANKRUPT PARTNERSHIPS.

a. *In general.*—This section contains certain special provisions applicable to trustees of bankrupt partnerships. Except as otherwise expressly provided in this section the powers and duties of such trustees are the same as in the case of trustees of individuals. It will not be attempted under this section to declare rules governing in all respects partnership trustees in the performance of their duties. Subdivision *b* provides that: "In other respects (except as to the appointment of trustees) so far as possible the estate shall be administered as herein provided for other estates."

b. *Choice of trustees.*—Subdivision *b* provides that "The creditors of the partnership shall appoint the trustee." This preference in the choice of the trustee was also contained in the acts of 1841 and 1867.¹¹⁴ There is here an apparent discrimination in favor of the joint creditor, for the individual creditor has a petitioning creditor's debt in proceedings against the copartnership;¹¹⁵ so also firm creditors can vote for the trustees of the individual estates;¹¹⁶ but an individual creditor of one of the partners may not vote at a meeting of the firm creditors for a partnership trustee.¹¹⁷ This restriction only applies in the case of a joint petition and not where a petition is separately brought against an individual partner.¹¹⁸ The reason for the apparent preference of firm over individual creditors will appear hereafter.¹¹⁹ Where possible and convenient the same trustees should be appointed for partnership and individual estates; but separate trustees may be appointed in the discretion of the court where the circumstances demand it.¹²⁰

c. *Powers in respect to individual estates.*—On the appointment of a trustee of a partnership, he may take possession and administer the property of one

111. *In re Boylan*, Fed. Cas. 1,757; *In re Penn*, Fed. Cas. 10,927.

Where the partner resided in districts other than that which was the place of the partnership business, it was held under the former law that an involuntary petition against the firm could be filed only in the district where the business was conducted. *Cameron v. Canio*, Fed. Cas. 2,340.

112. *In re Waxelbaum* (D. C., N. Y.), 3 Am. B. R. 392, 98 Fed. 589.

As to the transfer of cases where petitions are filed against partners in different districts, see Bankr. Act, § 32, *post*. This whole question of transfer for the convenience of parties is ably discussed in the case of *In re Sears* (D. C., N. Y.), 7 Am. B. R. 279, 112 Fed. 58.

113. *In re Blair* (D. C., N. Y.), 3 Am. B. R. 588, 99 Fed. 76, holding also that the petition may be amended to show jurisdiction; *In re Sears* (C. C. A., 2d Cir.), 8 Am. B. R. 713, 117 Fed. 294.

114. Compare *In re Phelps*, Fed. Cas. 11,071.

115. *In re Mercur* (D. C., Pa.), 2 Am. B. R. 626, 95 Fed. 634.

116. *In re Webb*, Fed. Cas. 17,317.

117. *In re Eagles & Crisp* (D. C., N. C.), 3 Am. B. R. 733, 90 Fed. 696.

118. *In re Beck* (D. C., Mass.), 8 Am. B. R. 554, 110 Fed. 140.

119. For the method of choosing the trustee, see Bankr. Act, §§ 44 and 56, *post*.

120. *In re Currie* (D. C., Mich.), 28 Am. B. R. 834, 197 Fed. 1012; *Matter of Wood* (C. C. A., 6th Cir.), 40 Am. B. R. 810, 248 Fed. 246.

of the partners so far as is necessary to settle the partnership estate.¹²¹ He becomes, by virtue of his office, the trustee of the separate estates of the individual partners, for the purpose of paying the partnership debts.¹²² Where the adjudication is that of a bankrupt partner, the trustee may not administer the affairs of solvent members of the firm, and his duties will be restricted to the ascertained interest of the bankrupt partner in the partnership; if any controversy arises as to such interest the solvent partner's claim is adverse, and he may insist that such claim be adjudicated out of bankruptcy.¹²³ But where the individual and sole surviving member of a partnership is adjudged a bankrupt, the bankruptcy court has complete jurisdiction over the partnership estate.^{123a}

d. Separate account.—Subdivision *d* of this section requires the trustee to keep separate accounts of the partnership property and of the property belonging to the individual partners. This follows from the very nature of his duties and the interrelation of the debts and assets over which he is given charge. There were similar clauses in the laws of 1841 and 1867. The necessity of keeping separate accounts is obvious.¹²⁴

e. Expenses and fees.—It is provided in subdivision *e* that "the expenses shall be paid from the partnership property and the individual property in such proportion as the court shall determine." There are few reported cases under the present law.¹²⁵ In computing trustees fees where the partnership and its members are joined in one petition, the proceeding is regarded as a single proceeding, and allowances are not to be made from partnership and individual estates, separately computed.¹²⁶

VII. PROVABILITY OF DEBTS.

a. In general.—The provisions of § 63 of the bankruptcy act declaring the debts which may be proved and allowed against a bankrupt estate are applicable to debts against a partnership. A member of a partnership being liable for all of the partnership debts, a debt against the partnership is provable against the individual estate of the bankrupt members,¹²⁷ but a claim arising on an obligation executed by a part only of the members of the partnership is not provable in bankruptcy against the estate of the partnership.^{127a}

b. Claims of partnership against individual partners and vice versa.—(1) **STATUTORY PROVISION.**—Subsection *g* provides that "the court may permit

121. *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 140 Fed. 849; *Matter of Latimer* (D. C., Pa.), 23 Am. B. R. 388, 174 Fed. 824; *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878; *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, *affd.* 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1029.

Transfer of lease by operation of law.—An adjudication against a partnership transfers by operation of law to the trustee a lease held by one of the partners, and authorizes the lessor to avoid the lease for a transfer "by operation of law" without his consent, in violation of a covenant of the lease. But with a receiver in possession the lessor cannot avail himself of the right under the lease to enter into possession of the premises and remove all persons and property therefrom. He can merely bring its rights in due time to the notice of the bankruptcy court. *Matter of Georgalas Brothers* (D. C., Ohio), 40 Am. B. R. 168, 245 Fed. 129.

122. *In re Stokes* (D. C., Pa.), 6 Am. B. R. 262, 106 Fed. 312; *In re Smith* (D. C., Ind.), 2 Am. B. R. 9, 92 Fed. 35; *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, *affd.* 228 U. S. 695, 30 Am. B. R. 244, 57 L.

Ed. 1029; *Matter of Georgalas Brothers* (D. C., Ohio), 40 Am. B. R. 168, 245 Fed. 129.

123. *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878. See *Marnet Oil & Gas Co. v. Haley* (C. C. A., 5th Cir.), 33 Am. B. R. 266, 218 Fed. 45.

123a. *Matter of Stringer* (C. C. A., 2d Cir.), 41 Am. B. R. 510, 253 Fed. 352.

124. *In re Denning* (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219.

125. For expenses of administration in general, see *Bankr. Act*, §§ 63 and 64, *post*. See *In re City Contracting & Bldg. Co.* (D. C., Hawaii), 30 Am. B. R. 133.

126. *Matter of Rider* (D. C., Mont.), 34 Am. B. R. 280, 220 Fed. 193; *In re McMurtrey* (D. C., Tex.), 15 Am. B. R. 427, 142 Fed. 863; *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 553; *In re Farley* (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 359.

127. *In re Hee* (D. C., Hawaii), 13 Am. B. R. 8, 2 U. S. D. C. Hawaii 159; *In re Webb*, Fed. Cas. 17,317; *Wilkins v. Davis*, Fed. Cas. 17,664. *In re Frear*, Fed. Cas. 5,074.

127a. *Matter of Schattman Bros.* (D. C., N. Y.), 40 Am. B. R. 537.

the proof of the claim of the partnership estate against individual assets and *vice versa*." But this subsection does not permit a solvent partner to prove against the separate estate of his bankrupt partner until all the partnership creditors have been paid in full;¹²⁸ nor a retired partner on notes received by him for his interest in the firm.¹²⁹

(2) **PRIOR PAYMENT OF CREDITORS.**—The general rule is that the separate estate of one partner shall not claim against the joint estate of the partnership in competition with joint creditors, nor shall the joint estate claim against the separate estate in competition with the separate creditors.¹³⁰ One principle may be deduced from the cases to the effect, that where the partnership and the individual members thereof are all adjudged bankrupts and the estates of all are before the court, the rule of distribution prescribed by § 5 (f), is not to be varied by the proof of the claim of a partnership estate against an individual estate and *vice versa*, as provided in § 5(g). In other words, the joint creditors of a bankrupt partnership must be paid before the claim of an individual partner may be paid, and, on the other hand, the individual creditors of the bankrupt partners must be paid before the claim of the partnership against the partner will be allowed.¹³¹ The claim of a partner for money advanced to the firm in excess of his agreed contribution to the capital of the firm is subject to this principle; such claim may not share in the distribution of the estate of the bankrupt partnership until all the joint creditors are paid.¹³² Subsection g of this section was evidently not intended to modify the rule that before claims of partners against a partnership may be paid firm debts must be disposed of. There must be some clearly expressed statutory provision in order that the partner may have this privilege. This subsection is to be construed as consummating the evident purpose of the act to secure to creditors of the firm and all the members thereof an equitable distribution of the assets belonging to the respective estates. This distribution must be made in accordance with well recognized principles, applicable to the rights and liabilities of partnerships and the partners comprising the same.¹³³ A

¹²⁸. In re Stevens (D. C., Vt.), 5 Am. B. R. 9, 104 Fed. 323; Emery v. Bank, Fed. Cas. 4,446.

¹²⁹. In re Denning (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219.

¹³⁰. Amsinck v. Bean, 22 Wall. 395, 402, 22 L. Ed. 501. See as to construction of sub-section g in connection with sub-section f, Farmers & Mechanics Nat. Bank of Philadelphia v. Ridge Ave. Bank, 240 U. S. 498, 36 Am. B. R. 728, 60 L. Ed. 767.

¹³¹. In re Filmar (C. C. A., 7th Cir.), 24 Am. B. R. 194, 177 Fed. 170; In re Terens (D. C., Wis.), 23 Am. B. R. 680, 175 Fed. 495; In re Ervin (D. C., Pa.), 6 Am. B. R. 356, 109 Fed. 135, affd. 7 Am. B. R. 256, 112 Fed. 124.

Claim of partner against partnership estate.—In the case of In re Denning (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219, the court said: "It is plain that the bankrupt's former partner cannot be allowed to prove in this case. To permit him to do so, would permit him to compete with his own creditors. There are joint creditors in this case who have proved, and until the claims of the joint creditors are settled, the partner cannot share in the distribution of his former partner's estate. There is nothing in section 5 (g) of the act to change this well-established rule." See also Matter of Tassenari (D. C., Mass.), 41 Am. B. R. 148, 249 Fed. 990.

In the case of Matter of Union Bank (C. C. A., 6th Cir.), 25 Am. B. R. 148, 184 Fed. 224, it was held that while the trustee of a bankrupt partnership is entitled to prove a claim of the partnership against the individual estate of one

of the bankrupt partners, his claim cannot share therein *pari passu* with the claims of other individual creditors, but only after the other individual creditors have been paid in full. It was further held that the claim of the partnership cannot share *pari passu* with the claims of other creditors of one of the bankrupt partners, on the principle that a partnership is an entity distinct from its membership. Since the recognition of the partnership as an entity cannot, in the absence of express statutory authority, be said to work a change in the rule fixing the substantial rights of creditors respectively of the partnership and of its individual members.

¹³². In re Effinger (D. C., Md.), 25 Am. B. R. 930, 184 Fed. 728, in which case this entire question has been carefully considered and the authorities cited and applied.

¹³³. **Construction of sub-section (g).**—There is no indication in this sub-section taken as a whole, that there was any intent on the part of Congress to change the rule of distribution which had heretofore been held to be equitable. The intent was simply to remove all arbitrary rules of practice and procedure which had interfered with the distribution of the estates of bankrupt partnerships and partners, in accordance with the settled rules of equity. The sub-section does not change previously existing rules of distribution, but merely abolishes certain technical rules of procedure to secure equitable distribution of such estates. In re Effinger (D. C., Md.), 25 Am. B. R. 930, 184 Fed. 728; Farmers & Mechanics' Nat. Bank of

solvent partner cannot prove his own separate debt against the separate estate of the bankrupt partner so as to come into competition with the joint creditors of the partnership.¹³⁴ But this rule would probably not apply where a creditor of a bankrupt estate becomes, after the debt is incurred, a joint partner of the bankrupt in an entirely separate and distinct enterprise.¹³⁵

(3) SUBROGATION OF PARTNER.—It is, however, well settled that the right of subrogation exists between a partnership estate and the estate of a partner.¹³⁶ Hence, when a retired partner is later compelled to respond to his partnership liability, because the continuing partner is unable to do so, he becomes subrogated to the claim of the creditors *pro tanto*, and thus may prove against the partnership estate as well as the separate estate of the bankrupt partner.¹³⁷ Where a retired partner left the money which he had invested in the firm as a loan, and provides in his will that such money should be permitted to remain in the firm for five years after his death, the legatee is entitled to prove the claim against the partnership, upon its being adjudicated a bankrupt some years after the death of the testator; under such circumstances, the interest of the decedent did not remain in the firm as capital at the risk of the business but was a loan to the firm.¹³⁸ Where one partner pays all the debts of a partnership, whose other member has been adjudged a bankrupt, the sum which may be shown to be due him upon a partnership accounting is a debt which may be proved against the estate of the bankrupt partner.¹³⁹

VIII. MARSHALLING ASSETS AND DISTRIBUTION.

a. So as to prevent preferences.—The court is authorized by subsection g of this section to “marshal the assets of the partnership estate and individual estates so as to prevent preference.” These words and the clause in which they are found supplement and emphasize the first clause of the subsection. Whether “preferences” here means a bankruptcy preference as defined in § 60-a is doubtful. Yet the estate of the individual being often a creditor of the copartnership and *vice versa*, it is possible that the definition of “preference” there phrased may apply. It has been said to be “aimed at the fraud brought about by partners agreeing just before bankruptcy to change joint into separate estates,” thus accomplishing preferences to the separate creditors.¹⁴⁰ But it is hardly supposable that the partners so agreeing will be able

Philadelphia v. Ridge Ave. Bank, 240 U. S. 728, 36 Am. B. R. 728, 60 L. Ed. 767.

In the case of *In re Henderson* (D. C., W. Va.), 16 Am. B. R. 91, 142 Fed. 588, *affd.* 17 Am. B. R. 838, 149 Fed. 975, 79 C. C. A. 485, the court said: “Clause (f) states the precepts of the law. Clause (g) relates to the procedure under it. The law in (f) demands that ‘the net proceeds shall be appropriated’ as directed by it, while (g) provides simply that in carrying out these precepts and as an aid in doing so, the court may do certain things, to-wit: permit proof of claims of partnership estates against individual estates and *vice versa* and marshal the assets of such estates so as to prevent preferences and secure equitable distribution of such estates.”

134. *Amsinck v. Bean*, 22 Wall. 395, 402, 22 L. Ed. 801, in which the reason was stated as being that the solvent partner is himself liable to all the joint creditors which is suffi-

cient to show that in equity he cannot be permitted to claim any part of the funds of the bankrupt partner before all the creditors to whom he is liable are fully paid.

135. *Matter of Strawbridge* (Ref., Pa.), 25 Am. B. R. 355.

136. *In re Dillon* (D. C., Mass.), 4 Am. B. R. 63, 100 Fed. 627; *In re Bates* (D. C., Vt.), 4 Am. B. R. 56, 100 Fed. 263; *In re May*, Fed. Cas. 9,327; *In re Foot*, Fed. Cas. 4,906.

137. Compare generally on this subject § 40(3) of the English Act of 1883, General Rule No. 293, and cases cited in Baldwin on Bankruptcy (8th Ed.), pp. 510-520.

138. *Matter of Lough & Burrows* (C. C. A., 2d Cir.), 25 Am. B. R. 597, 182 Fed. 961.

139. *Matter of Hirth* (D. C., Minn.), 26 Am. B. R. 666, 189 Fed. 926.

140. The preferences supposed to interfere with a just and equitable distribution may result from the action of partners calculated

to show themselves solvent at the time and, unless they can, the transaction becomes actually fraudulent and may be disregarded. The evident purpose of the subsection is not only to prevent preferences, in the technical meaning of that word, but also secure the equitable distribution of the assets of the several estates among both firm and individual creditors.¹⁴¹

b. **Marshalling estate of unadjudicated partner against his consent.**—Subsection *g* authorizes the court to marshal and distribute the assets of the partnership estate and individual estates. Subsection *h* provides in effect that where one or more but not all of the members of a partnership are adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by the consent of the unadjudicated partner. This provision is for the purpose, as will hereafter be considered, of enabling a solvent partner to settle the partnership business outside of bankruptcy. The consent here referred to is only required to prevent bankruptcy where a proceeding is against one or more of the partners but not against the partnership. Such consent is not required when the proceedings are against the partnership and one of its members.¹⁴² If the proceeding is directed against the partnership, subsection *g* permits the marshalling of the assets of the partnership and of the individual partners so as to provide for the payment of the partnership debts.¹⁴³ The subsection declares a rule of administration and does not apply until the partnership property is placed in *custodia legis*.¹⁴⁴ The language of this subsection must be reasonably construed with the view to carrying into effect its obvious purpose. It does not provide for the adjudication of an individual partner who does not consent thereto.¹⁴⁵ Under the entity doctrine a partnership may be adjudged a bankrupt, irrespective of an adjudication of bankruptcy against any of its members. But this doctrine may not be applied so as to prevent the exercise of the power expressly conferred upon a court to "marshal" the estates of the partnership and of the partners. Where the circumstances demand it, the court will upon adjudication of partnership, administer not only the estate of the partnership, but also the estates of partners who have not been adjudicated bankrupts.¹⁴⁶ So that where the partnership has been

to convert partnership property into individual assets, thus giving undue advantage to individual creditors. In *re Terens* (D. C. W. Va.), 23 Am. B. R. 680, 688, 175 Fed. 495.

141. In *re Denning* (D. C. Mass.), 8 Am. B. R. 133, 113 Fed. 219; In *re Effinger* (D. C. Md.), 25 Am. B. R. 930, 184 Fed. 728.

142. *Matter of Wood* (C. C. A., 6th Cir.), 40 Am. B. R. 810, 248 Fed. 246; *Armstrong v. Fisher* (C. C. A., 8th Cir.), 34 Am. B. R. 701, 224 Fed. 97, in which case it was held that § 5h, requiring consent of the solvent partner is inapplicable to a case of this character, is limited in its effect to those cases in which one or more but not all of the partners have been, and the partnership has not been, adjudged bankrupt, and that even if such a case as that in hand were governed by section 5-h the failure of the petitioner to object to the administration of the partnership property in bankruptcy and himself to settle the partnership business, would estop him from successfully claiming that his individual estate could not be drawn into and administered by the bankruptcy court. Citing *Francis v. McNeal*, 238 U. S.

695, 700, 701, 30 Am. B. R. 244, 57 L. Ed. 1020.

143. In *re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 568, 140 Fed. 849.

144. *Matter of McConnell & Williams* (D. C., Cal. Ref.), 32 Am. B. R. 589.

145. In *re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B. R. 577, 157 Fed. 363, in which the court said: "No express provision can be found in this legislation and no indication or implication is perceived in it that the adjudication of a partnership draws into the administration of its estate in the court of bankruptcy, the property of the solvent partners who are not adjudged bankrupts."

146. In *re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 140 Fed. 849; *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, *affd.* 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1020, in which case the court said: "It is settled that a partnership is an entity

adjudicated in bankruptcy, an estate of one of the partners, who is solvent and has not been adjudged a bankrupt, may be administered by the trustee, when necessary for the payment of the partnership debts.¹⁴⁷ As has already been indicated, a partnership may not be adjudicated a bankrupt unless the partnership and all its members are insolvent, in those cases where insolvency is an essential element in the act of bankruptcy.¹⁴⁸ In such cases, it appearing that the partnership and the members thereof are insolvent, the assets of all the members are drawn into the proceeding for administration, although adjudication be against the bankrupt partnership only.¹⁴⁹ And even though one of the partners was chiefly engaged in farming, and therefore not subject to bankruptcy, his estate, he being insolvent, may be brought into the proceeding for adjudication.¹⁵⁰ While the court has jurisdiction over the interest of the bankrupt partners in the partnership property, the solvent partner, may, after that interest has been ascertained and set apart, insist that the partnership property be administered elsewhere than in bankruptcy.¹⁵¹

c. Distribution.—(1) IN GENERAL.—It is provided in subsection *g* that the court may marshal the partnership and individual estates, "and secure the equitable distribution of the property of the several estates," and subsection *f* provides for the appropriation of the net proceeds of the several estates to the payment of the debts either of the partnership or of the partner as therein directed. Where the adjudication is of the partnership only and

which may be adjudged a bankrupt, irrespective of the adjudication of bankruptcy against any of its members. Undoubtedly, in a case where a partnership and all its members have been adjudged bankrupts, the trustee of the partnership may administer the estates of the partnership and its members, and as we read section 5, the trustee of the partnership which has been adjudged a bankrupt, may, in certain cases, to be hereafter mentioned, administer the estates of its unadjudicated members; "Matter of Latimer (D. C., Pa.), 23 Am. B. R. 388, 174 Fed. 824, holding that the adjudication of a partnership draws to the court of bankruptcy, for administration, the individual estates of the partners, though as individuals they have not been adjudicated bankrupt. See *In re Duke & Son* (D. C., Ga.), 29 Am. B. R. 93, 199 Fed. 199.

147. *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878; citing *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, *affd.* 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1020; *Matter of Wood* (C. C. A., 6th Cir.), 40 Am. B. R. 810, 248 Fed. 246.

148. See discussion under sub-heading "Insolvency," *ante*, p. 173.

149. *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, *affd.* (U. S. Sup. Ct.), 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1020.

The adjudication of individual members of the partnership does not draw into the bankruptcy proceedings the assets of the partnership of which the bankrupt is a member, but against which no bankrupt proceedings are pending. *America Steel & Wire Co. v. Coover* (Okla. Sup. Ct.), 27 Okl. 131, 25 Am. B. R. 58, 111 Pac. 217; *In re Mercur* (C. C.

A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384, 56 C. C. A. 472, in which case the court said: "There has been no adjudication against the firm and the trustee was not appointed to represent it, but only the two members who happened to oppose it in their separate and individual capacity. Under such circumstances, the trustee has no authority to demand or interfere with the firm assets. In the case of *Amsinck v. Bean*, 22 Wall. 395, 402, which arose under the act of 1867, it was held that while the assignee in bankruptcy of the joint stock and property of a partnership is required by the statute to administer the separate estate of the individual members, as well as that of the firm, there is no reciprocal regulation with regard to the estate of the partnership, where an individual member of it has alone been adjudged a bankrupt." See *In re City Contracting & Bldg. Co.* (D. C., Hawaii), 30 Am. B. R. 133.

150. Administration of estate of nonadjudicated member.—Where an act of bankruptcy has been committed by a partnership whose individual members, as well as the firm, are insolvent, the fact that one of the partners cannot be adjudicated an involuntary bankrupt because chiefly engaged in farming, does not prevent the adjudication of the firm and its other members; and, in such case, the estate of the nonadjudicated member is brought into the proceeding for administration. *In re Duke & Son* (D. C., Ga.), 29 Am. B. R. 93, 199 Fed. 199.

151. *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878; *Marnet Oil & Gas Co. v. Staley* (C. C. A., 5th Cir.), 33 Am. B. R. 266, 218 Fed. 45.

there are no separate assets belonging to the individuals, administration and distribution follow the same practice and rules as in individual cases. Where however, there are both joint and separate estates, especially where the court has not jurisdiction of all the members, complications result which may be troublesome and require careful treatment.¹⁵²

(2) **PARTNERSHIP AND INDIVIDUAL CREDITORS.**—Subsection *f* provides that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts. The surplus remaining after the payment of individual debts may be distributed among partnership creditors; and the surplus remaining after the payment of partnership debts may be distributed among the individual creditors in proportion to the interest of each partner in the partnership assets.¹⁵³ The rule of law phrased in the present statute is declaratory of the equitable rule that partnership property is primarily a fund for the payment of partnership debts,¹⁵⁴ and that

152. Some of these complications have already been discussed; another class of them will be found under sub-section *h*, post.

153. In *re James* (C. C. A., 2d Cir.), 13 Am. B. R. 341, 133 Fed. 912; In *re Groetsinger* (C. C. A., 3d Cir.), 11 Am. B. R. 723, 127 Fed. 814; In *re Denning* (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219; *Jarecki Mfg. Co. v. McElwaine* (D. C., Ind.), 5 Am. B. R. 751, 107 Fed. 249; In *re Wilcox* (D. C., Mass.), 2 Am. B. R. 117, 84 Fed. 94; In *re Rice* (D. C., Pa.), 21 Am. B. R. 205, 164 Fed. 514; *Miller v. New Orleans Acid & Fertilizer Co.* (Sup. Ct.), 211 U. S. 496, 21 Am. B. R. 417, 53 L. Ed. 300; *Matter of Stringer* (D. C., N. Y.), 40 Am. B. R. 474, 244 Fed. 629; *Matter of Wood* (C. C. A., 6th Cir.), 40 Am. B. R. 510, 248 Fed. 246; *Gordon v. Texas Co.* (Me. Sup. Ct.), 45 Am. B. R. 157, 109 Atl. 368.

The priority of firm creditors depends upon the existence of the partner's lien and if a partner consents that the firm assets shall become the individual property of one of the partners the priority of the firm creditors is gone; therefore, where firm assets are transferred to another the creditors of the firm are deprived of their priority in bankruptcy proceedings. *Matter of Stringer* (C. C. A., 2d Cir.), 39 Am. B. R. 170, 240 Fed. 392.

Dissolution of partnership.—The rule of administration requiring partnership property to be applied in satisfaction of partnership debts in preference to the individual debts of the respective partners, depends upon the partnership being maintained intact. *Matter of Fackelman* (D. C., Cal.), 41 Am. B. R. 14, 248 Fed. 565.

A claim for personal taxes due a city from a member of a firm cannot be enforced out of firm assets until the firm creditors have been paid in full. *Matter of Flatau & Stern* (Ref., N. Y.), 21 Am. B. R. 352.

In the administration of partnership property in the courts, the creditors of the partnership have the right to the application of the partnership property to the payment of the partnership debts in preference to individual debts of the respective partners. *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 160 Fed. 57; In *re Terens* (D. C., W. Va.), 23 Am. B. R. 680, 175 Fed. 495. Where a bankrupt, prior to his adjudication, took over the partnership property, agreeing to pay partnership debts, the partnership creditors are entitled to payment out of the partnership property in advance of his individual creditors. In *re Filmar* (C. C. A., 7th Cir.), 24 Am. B. R. 194, 177 Fed. 770.

Allowance to the widow and children of a deceased member of a bankrupt partnership

cannot be made by a trustee out of the firm assets before the firm debts are paid, and a probate court has no authority to decree that such allowances be made. In *re Dobert & Son* (D. C., Tex.), 21 Am. B. R. 634, 165 Fed. 749.

Money advanced by partner.—In the case of In *re Effinger* (D. C., Md.), 25 Am. B. R. 930, 184 Fed. 723, it was insisted that if a partner has advanced money to the partnership beyond his agreed contribution to its capital, his individual creditors are entitled to have his claim against the partnership proved and allowed, and to have it participate in the distribution of the firm assets on equal terms with the other firm creditors. The court on this question said: "Partnership creditors have a right to insist that assets which have been paid by a partner into a firm, and which are found in the firm at the time of its bankruptcy, shall, as against him and his individual creditors, be held to be partnership property. A partner cannot swell the assets of his firm by contributing money or property to it, and then when the firm becomes insolvent, assert therein his own interest or that of his individual creditors for what he had paid into the firm was a mere loan to it, and was not part of its assets. If the contention of the individual creditor in this case is sound, little reliance could in practice be placed on partnership statements."

Bankrupt firm composed of individual and partnership conducting a separate business.—Where a bankrupt partnership is composed of an individual and a separate partnership doing business in another State, under whose laws it had made an assignment for the benefit of creditors, and the assignee of the partnership member, having liquidated its assets, has turned over the proceeds to bankrupt's trustee, although bankrupt's creditors may prove against such fund, the creditors of the partnership member have a prior claim thereon which must first be satisfied. In *re Knowlton & Co.* (D. C., Pa.), 28 Am. B. R. 140, 196 Fed. 837, affd. 29 Am. B. R. 729, 202 Fed. 480. To the same effect see *Bank of Reidsville v. Burton* (C. C. A., 4th Cir.), 43 Am. B. R. 374, 259 Fed. 218.

154. *Matter of Nashville Laundry Co.* (D. C., Tenn.), 39 Am. B. R. 22, 240 Fed. 795; *Schall v. Camors* (C. C. A., 5th Cir.), 41 Am. B. R. 76, 250 Fed. 6; *Lansing Liquidation Corp. v. Heinze* (N. Y. App. Div.), 42 Am. B. R. 512, 184 App. Div. 129; In *re Stein & Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547, in which the court said: "The present Bankruptcy Act recognizes the equitable

the individual debts of a partner are entitled to be first paid out of his individual property.¹⁵⁵ It is found in substantially the same language in the statutes of 1841 and 1867.¹⁵⁶ The English act contains practically the same provision.¹⁵⁷

(3) **EFFECT OF WAIVER OR RELEASE PRIOR TO BANKRUPTCY.**—The right of the creditor of the partnership to payment out of the partnership property in preference to the individual creditor is derivative in nature, and is worked out by subrogation to the existing rights of one of the partners to assert this equitable principle. Until the assets have been brought into the custody of the law, each partner has plenary power at any time to release or waive his right; and if no partner retains this right, then no creditor of the partnership has it. However this release or waiver must have been bona fide on the part of the partners and without any intent to hinder, delay or defraud creditors.¹⁵⁸

(4) **SOLVENCY OF PARTNERS; NO FIRM ASSETS.**—The rule has been held to be subject to the exception that where there are no firm assets and no solvent living partner, the firm creditors share *pari passu* with the individual creditors.¹⁵⁹ The exception itself is qualified by cases (1) which seem to overlook the necessity of the existence of a solvent living partner,¹⁶⁰ and (2) which question whether it is absolutely essential that there be no assets or merely not sufficient assets to pay expenses of administration.¹⁶¹ The tendency is, however, to cast aside this ancient and inequitable exception.¹⁶² The opinion of Judge Lowell in the Wilcox case is an historical monograph of great value. It is to be hoped that it has sounded the knell of all exceptions to the broad rule that joint creditors share in joint assets and individual creditors in individual assets.¹⁶³ The Supreme Court in the case of Farmers and Mechanics' Nat. Bank v. Ridge Ave. Bank¹⁶⁴ has expressly approved the opinion of Judge

able rule that partnership property is primarily a fund for the payment of copartnership debts, and that the interest of a copartner is subject to that special equity and attaches only to the surplus remaining after the payment of the copartnership debts."

¹⁵⁵ *Vaccaro v. Security Bank* (C. C. A., 8th Cir.), 4 Am. B. R. 474, 482, 103 Fed. 436; *Schall v. Camors* (C. C. A., 5th Cir.), 41 Am. B. R. 76, 250 Fed. 6; *Lansing Liquidation Corp. v. Heinse* (N. Y. App. Div.), 42 Am. B. R. 512, 184 App. Div. 129.

¹⁵⁶ See Bankr. Act of 1867, § 36; Bankr. Act of 1841, § 14.

¹⁵⁷ The corresponding section of the English Act of 1853, § 40 (3), is as follows:

(3) In the case of partners the joint estate shall be applicable in the first instance in the payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates, it shall be dealt with as a part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as a part of the respective separate estate in proportion to the right and interest of each partner in the joint estate. (See also § 59 of the same act.)

¹⁵⁸ *Matter of McConnell & Williams* (Ref., Cal.), 32 Am. B. R. 589.

¹⁵⁹ *Story on Part.*, § 380; *Ex parte Sadler*, 15 Ves. 52; *Conrader v. Cohen* (C. C. A., 3d Cir.), 9 Am. B. R. 619, 121 Fed. 804, 58 C. C. A. 249, affg. *In re Conrader* (D. C., Pa.), 9 Am. B. R. 85, 118 Fed. 676; *In re Green* (D. C., Iowa), 8 Am. B. R. 553, 116 Fed. 118; *In re Gray* (D. C., Pa.), 31 Am. B. R. 146, 208 Fed. 959.

¹⁶⁰ *In re Mills*, Fed. Cas. 9,611; *In re Knight*, Fed. Cas. 7,380; *In re Downing*, Fed. Cas. 4,044.

¹⁶¹ *In re Goedde*, Fed. Cas. 5,500; *In re McEwan*, Fed. Cas. 8,783.

Any firm assets available for distribution will defeat the right of firm creditors to dividends from the separate estates of the members until after the individual debts are paid. *In re Blumer*, 12 Fed. 489; *In re Litchfield*, 5 Fed. 47; *In re Smith*, Fed. Cas. 12,987; *In re Warwick*, Fed. Cas. 9,181; *In re Morse*, Fed. Cas. 9,854.

¹⁶² *In re Wilcox* (D. C., Mass.), 2 Am. B. R. 117, 94 Fed. 84; *In re Mills* (D. C., Ind.), 2 Am. B. R. 667, 95 Fed. 269; *In re Daniels* (D. C., R. I.), 6 Am. B. R. 699, 110 Fed. 745; *In re Corcoran* (Ref., Ohio), 12 Am. B. R. 283; *In re Henderson* (D. C., W. Va.), 16 Am. B. R. 91, 128 Fed. 527.

¹⁶³ *In re Mosier* (D. C., Va.), 7 Am. B. R. 268, 112 Fed. 138. The view expressed in the text was approved by Mack, referee, in *In re Corcoran* (Ref., Ohio), 12 Am. B. R. 283.

¹⁶⁴ 240 U. S. 498, 36 Am. B. R. 728, 50 L. Ed. 767, in which Chief Justice White, commended the conclusion of Judge Lowell and it was held that when a partnership, as such, is insolvent and each individual member is also insolvent, and the only fund for distribution is produced by the individual estate of one member, the individual creditors

Lowell and the rule now is established firmly that although there are no firm assets and no solvent partner, the firm creditors may only participate in the surplus of individual assets after the payment of individual debts.¹⁶⁵ The result is that where one member of a firm is adjudicated a bankrupt and there are no firm assets, the firm creditors may not participate in the distribution of the individual estate of the partner until his individual creditors have been paid in full.¹⁶⁶ Regard must be had for the plain and unequivocal language of subsection *f* which provides for the payment of partnership debts out of partnership property, and of individual debts out of individual property; individual debts may only be paid out of the surplus remaining after the payment of partnership debts, and, on the other hand, partnership debts may only be paid out of the surplus of the individual estate remaining after the payment of individual debts. The statute must not be construed to admit of exceptions which do not exist. If it had been intended to make an exception in a case where there are no partnership assets or where the partnership and all the members thereof are insolvent, provision would have been made therefor.¹⁶⁷ The character of a partnership debt is not changed by its reduction to judgment; judgment creditors of a partnership do not become creditors of the individual partners so as to permit them to share equally with individual creditors in the distribution of individual assets.¹⁶⁸ This subsection

of such member are entitled to priority in the distribution of the fund.

165. In *re James* (C. C. A., 2d Cir.), 13 Am. B. R. 341, 133 Fed. 912; In *re Henderson* (D. C., W. Va.), 16 Am. B. R. 91, 142 Fed. 568, *affd. sub nom. Euclid Nat'l Bank v. Union Trust Co.* (C. C. A., 4th Cir.), 17 Am. B. R. 834, 149 Fed. 975. In the cases last cited the Circuit Court of Appeals calls attention to the conflicting decisions on these questions and says: "The decision of Judge Lowell in *In re Wilcox* (D. C., Mass.), 2 Am. B. R. 177, 94 Fed. 84, contains an extended review of the entire subject and especially a history of the law, to which we take the liberty of referring. The Circuit Court of Appeals of two of the circuits have taken antagonistic views under the present bankruptcy act. In *Conrader v. Cohen*, 9 Am. B. R. 619, 121 Fed. 801, a decision of the Circuit Court of Appeals for the 3d Circuit, the petitioner's right to share as partnership creditors in the individual assets of the bankrupt, is fully recognized; and in *re James*, 13 Am. B. R. 341, 133 Fed. 912, a decision of the Circuit Court of Appeals for the 2d Circuit, a contrary view is taken. A careful consideration of the entire subject and review of the authorities, convinces this court that whatever may have been the correct rule under the former bankruptcy acts, the latter case presents the correct construction of the law under the present act; and however much force there may have been in the contention made by petitioners under the former bankruptcy acts, or what may be the correct general doctrine applicable to the settlement and distribution of partnership estates, that it was clearly within the power of Congress to adopt a method for marshalling such assets, to be applied to the respective classes

of creditors, which it has done, and in terms too clear and comprehensive to admit of the necessity for interpretation further than to adopt and follow its plain mandates." See *Matter of Hull* (D. C., Ohio), 34 Am. B. R. 447, 224 Fed. 796.

166. In *re Daniels* (D. C., R. I.), 6 Am. B. R. 699, 110 Fed. 745; In *re Corcoran* (Ref., Ohio), 12 Am. B. R. 283; In *re James* (C. C. A., 2d Cir.), 13 Am. B. R. 341, 133 Fed. 912.

167. This is the definite result of the determination of the Supreme Court in the case of *Farmers & Mechanics Nat. Bank of Philadelphia v. Ridge Ave. Bank*, 240 U. S. 498, 36 Am. B. R. 728, 60 L. Ed. 767; In *re Mills* (D. C., Ind.), 2 Am. B. R. 667, 95 Fed. 269; *Buckingham v. First National Bank* (C. C. A., 6th Cir.), 12 Am. B. R. 465, 131 Fed. 192.

Exception to rule.—In the case of *In re Henderson* (D. C., W. Va.), 16 Am. B. R. 91, 142 Fed. 468, *affd.* 17 Am. B. R. 834, 149 Fed. 975, the court in speaking of the exception says: "It is admitted to be an exception to the general rule, which rule in plain, clear, apt and in unambiguous language is written in the law itself, while the exception is not; on the contrary it must depend solely upon judicial construction, which, because it in effect provides a different method of distribution from that provided by the law itself cannot be considered short of mere judicial legislation. It is to be recalled how easily the Congress, had it designed such exception to be made, could have incorporated it as such in the law itself."

168. Effect of reducing claims to judgment. — The reduction of claims to judgment by partnership creditors, within four months of the bankruptcy of the partnership, does not change the character of such indebtedness

treats of administration in the bankruptcy court, and hence of the partnership and individual property, the title to which is in the bankrupt at the time the petition against him is presented to the court.¹⁶⁹ It has been held that the interest on a note given to a bank by a partner should not be paid out of the assets of the partner, where it appears that the whole net proceeds of the individual and partnership assets are insufficient to meet the partnership debts.¹⁷⁰

d. What are firm assets and what are individual assets.—Questions of this character frequently arise, sometimes from the nature of the property, but more often from transactions between the partners, or between the firm and one partner. Again, the test is substantially *bona fides*. If the firm be solvent and the transaction be in good faith, one member can purchase the assets or buy out the interest of the other partners.¹⁷¹ But if the firm be insolvent, or if for any reason the transaction would be inequitable, it will be treated as void.¹⁷² It is well settled also that real property purchased for partnership purposes with partnership funds, even though held in the name of an individual, is, as to the firm's creditors, personal property.¹⁷³ Premises used by the partnership for partnership purposes are presumptively partnership property.¹⁷⁴ Generally speaking, the partnership property consists of its money, its stock in trade, its outstanding accounts, and all other property purchased by the firm's money;¹⁷⁵ while the individual property consists of those chattels or rights possessed by the individual partner solely.¹⁷⁶ The fact that a life insurance policy was pledged to secure the payment of a partnership debt, does not make the policy partnership property.¹⁷⁷ Property originally owned

from a partnership debt to an individual debt, but changes the form of the debt only. Its character as a partnership debt remains as before, and for which each member of the partnership may be liable, if the partnership assets are insufficient to pay the sum; and section 5f of the Bankruptcy Act, providing how the distribution of the assets of the partnership and of the individual members thereof shall be made among their creditors, controls in the distribution of such assets. *Matter of Haeker & Co.* (D. C., Ia.), 35 Am. B. R. 647, 225 Fed. 869.

169. *Sergeant v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 123, 160 Fed. 57.

170. *In re Ohandler* (C. C. A., 7th Cir.), 25 Am. B. R. 865, 184 Fed. 887.

171. *In re Collier*, Fed. Cas. 3,002; *In re Long*, Fed. Cas. 8,476; *In re Wiley*, Fed. Cas. 17,656; *In re Montgomery*, Fed. Cas. 9,727; *In re McEwen*, Fed. Cas. 8,783; *In re Lane*, Fed. Cas. 8,044; *In re Rahley*, Fed. Cas. 7,593.

Title to firm property purchased by partner more than four months prior to his bankruptcy.—The title to firm property, purchased by a partner over four months prior to his bankruptcy, vests in him subject to no lien in favor of partnership creditors, and passes to his trustee in bankruptcy, and firm creditors cannot interfere with such property, or levy upon it, or sell it, or enforce any levy made within the four months preceding the bankruptcy of the purchasing partner. Such property must remain in the possession of

the bankruptcy court for purposes of administration and distribution. *Matter of Suprenant* (D. C., N. Y.), 33 Am. B. R. 454, 217 Fed. 470.

172. Compare § 5-g. And see *In re Rudwick* (D. C., Wash.), 4 Am. B. R. 531, 102 Fed. 750; *In re Byrne*, Fed. Cas. 2,270; *In re Cook*, Fed. Cas. 3,150; *Collins v. Hood*, Fed. Cas. 3,015; *In re Zug*, Fed. Cas. 18,222.

173. Thus, for instance, *Greenwood v. Martin*, 111 N. Y. 423. See *In re Groetzinger* (C. C. A., 3d Cir.), 11 Am. B. R. 723, 127 Fed. 814, affg. 6 Am. B. R. 399, 110 Fed. 366; *Taylor v. Rasch*, Fed. Cas. 13,801. And under the English Bankr. Act see *Smith v. Smith*, 5 Ves. 193; *Ex parte Hinds*, 3 DeGex & S. 613; *Ex parte Connell*, 3 Deac. 201.

174. *Osborn v. McBride*, Fed. Cas. 10,593; *Featherstonhaugh v. Fenwick*, 17 Ves. (Eng.) 308.

175. See *Hiscock v. Jaycox*, Fed. Cas. 6,531; *Osborn v. McBride*, Fed. Cas. 10,593.

176. *In re Lowe*, Fed. Cas. 8,564; *In re Clark*, Fed. Cas. 2,798.

177. *Matter of Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 362, 142 Fed. 445, affd. *sub nom.* *Hiscock v. Varick Bank*, 206 U. S. 28, 18 Am. B. R. 1, 51 L. Ed. 945.

Insurance policy on life of one partner in favor of other.—Where, in Tennessee, a bankrupt and his wife are partners in a mercantile business, the proceeds of a policy of insurance on his life in her favor, do not, under the State law, constitute a trust fund held

by one or more partners and used for partnership purposes may be joint or separate estate as agreed between the parties.¹⁷⁸ A seat or membership in the New York Stock Exchange, held in the name of one of the members of a firm, is partnership property, it appearing from the articles of partnership that such seat or membership was held and used for the benefit of the firm, and was actually the property of the firm.¹⁷⁹

c. *Firm debts and individual debts.*—(1) *IN GENERAL.*—As a rule it will not be difficult to distinguish between firm obligations and individual obligations.¹⁸⁰ The determination depends upon the real character of the transaction, and if that be unmistakably and exclusively a partnership one, neither fiction nor implication should be resorted to to give it a different character.^{180a} Some of the numerous authorities relative to the provability of individual partnership debts are cited and considered in the foot-note.¹⁸¹

by her for the benefit of herself and children, free from the claims of the partnership creditors. *In re Day* (D. C., Tenn.), 23 Am. B. R. 735, 176 Fed. 377.

178. *In re Swift* (D. C., Mass.), 9 Am. B. R. 237, 114 Fed. 947, in which case the evidence was considered and held sufficient to justify a finding that seats in a stock exchange, owned by the members and never transferred to the firm, but used for firm business, were a part of a joint estate. See *Buckingham v. Bank* (C. C. A., 5th Cir.), 12 Am. B. R. 465, 131 Fed. 192.

179. *Matter of Harbitt, Hatch & Co.* (C. C. A., 2d Cir.), 13 Am. B. R. 50, 135 Fed. 504.

180. Compare also for firm debts, *In re Holbrook*, Fed. Cas. 6,583; *In re Tesson*, Fed. Cas. 13,844; *In re Kitzinger*, Fed. Cas. 7,361; *Taylor v. Rasch*, Fed. Cas. 13,600; and, for individual debts, *In re Mills*, Fed. Cas. 9,611; *In re Bucyrus Machine Co.*, Fed. Cas. 2,100; *In re Dell*, Fed. Cas. 2,774.

A mortgage of partnership property, given by one partner to secure his individual indebtedness, with the consent of the other partner, is not enforceable in bankruptcy against firm creditors. *In re Blanchard* (D. C., N. C.), 20 Am. B. R. 417, 161 Fed. 793.

180a. *Schall v. Camors* (C. C. A., 5th Cir.), 41 Am. B. R. 75, 259 Fed. 6.

181. See §§ 533-564 of the title "Bankruptcy" in the *American Digest Century edition* (Vol. 6, pp. 686-696), and *Am. Bankr. Dig.* §§ 854-857. The treatises on the English bankruptcy law, of which Baldwin's and Williams' and Robson's are typical, should be consulted for analogous cases arising under the system from which our doctrine of distribution has been inherited. Liability under contract executed by one of the members held to be a partnership debt, see *Adams v. Deckers Valley Lumber Co.* (C. C. A., 4th Cir.), 29 Am. B. R. 42, 202 Fed. 48.

Amendment.—Where a claimant proves a claim against the individual member of a firm, he may withdraw his claim and prove it against the firm itself. *Matter of Schattman Bros.* (D. C., N. Y.), 40 Am. B. R. 537.

Rights of claimant to be subrogated to rights of individual partners.—Where some of the partners of a firm enter into an obligation which cannot support a claim against the firm, the claimant cannot be subrogated to the rights of the partners, although the agreement may have been made for the benefit of the firm, for the reason that partnership assets can only be applied to the payment of partnership debts. *Matter of Schattman Bros.* (D. C., N. Y.), 40 Am. B. R. 537.

Cases on provability of partnership debts.—Our courts, under the present law, have held, among other things, as follows:

(1) As to individual debts not provable against firm assets, that, where a firm indorsement on an individual note was made while the firm was embarrassed, and without any new con-

sideration, the claim should not be allowed against the partnership estate (*In re Jones* [D. C., Mo.], 4 Am. B. R. 1441, 100 Fed. 781; *In re Hardie & Co.* [D. C., Tex.], 16 Am. B. R. 351, 143 Fed. 553); and that the surrender of the firm note more than four months before the bankruptcy and the taking of an individual note instead, makes the holder a creditor of the individual estate only, even though the firm continued to pay the interest (*In re Lehigh Lumber Co.* [D. C., Pa.], 4 Am. B. R. 231, 101 Fed. 216); that a solvent partner is as to the partnership and individual estates an individual creditor (*In re Stevens* [D. C., Vt.], 5 Am. B. R. 9, 104 Fed. 323); and that under the laws of South Carolina a sealed note given by one member of a firm without authority from his copartners and not confirmed or ratified by them is not provable against the firm (*Hollock v. Jones* [C. C. A., 4th Cir.], 10 Am. B. R. 616, 124 Fed. 163, affg. 9 Am. B. R. 262); as to proof of notes signed by individual members of a firm under seal, see *Davis v. Turner* (C. C. A., 4th Cir.), 9 Am. B. R. 701, 120 Fed. 605, 56 C. C. A. 108. See also *Mercantile Bank v. Thomas* (C. C. A., 5th Cir.), 10 Am. B. R. 399, 121 Fed. 806, 57 C. C. A. 374; *Matter of Stringer* (C. C. A., 2d Cir.), 39 Am. B. R. 170, 240 Fed. 592.

(2) As to firm debts not provable against individual assets, that, where partnership creditors have received 55 per cent. from a proceeding in the State court, they cannot prove claims in the individual bankruptcy of one of the partners unless they surrender such 55 per cent. (*In re Mills* [D. C., Ind.], 3 Am. B. R. 667, 93 Fed. 269); and that a suit by the solvent partner on a partnership debt is an election of remedies, and a claim cannot thereafter be proven against the individual estate of the bankrupt partner (*In re Polidori*, 3 N. B. N. 923). See also on the question of jurisdiction, where a firm creditor presents a claim against the individual estate (*In re Sanderlin* [D. C., N. C.], 6 Am. B. R. 354, 109 Fed. 857); and where real estate was in the name of the bankrupt, but as between the partners it appeared to have been firm property, individual creditors have no claim on the proceeds (*In re Groetzinger* [D. C., Pa.], 6 Am. B. R. 399, 110 Fed. 366).

(3) In general, a firm creditor may prove against the individual estate on individual notes taken by him and credited on the partnership debt (*In re Stevens* [D. C., Pa.], 4 Am. B. R. 231, 101 Fed. 216; a

(2) **COMMERCIAL PAPER; FIRM AS MAKER OR INDORSER.**—Whenever a partnership name appears on commercial paper the firm is presumably bound, and the burden is on the firm to show that it is not liable.¹⁸² So where a partnership indorses a promissory note for the accommodation of the maker the obligation is presumably that of the partnership and it becomes allowable against the partnership estate, in favor of a *bona fide* holder of the note.¹⁸³ Any note or other obligation signed or indorsed in the firm name, the benefits of which accrued to the firm, is a partnership debt.¹⁸⁴ On the other hand, where the notes, although signed by all of the partners, and therefore joint obligations, are not given in furtherance of the business of the partnership, but are merely the joint individual debts of the partners, they are not entitled to share in the distribution of the partnership property equally with partnership debts.^{184a} The note or other obligation of one of the individual partners, although given for a consideration moving to the partnership, may nevertheless be treated as an individual debt.¹⁸⁵ But where the note or obligation, although

partner who purchases judgments against his firm may prove them against the individual estates to the amount of his partners' respective shares (In re Carmichael [D. C., Iowa], 2 Am. B. R. 815, 96 Fed. 594); a note made by the firm and indorsed by a member of it continues to be the obligation of the firm, whether the individual bankrupt's liability as indorser is fixed or not (Lamoille Bank v. Stevens' Estate [D. C., Vt.], 6 Am. B. R. 164, 107 Fed. 245); notes taken by a partner in payment of his interest in the firm within four months of the bankruptcy of the continuing partner are not provable against the latter until all the firm creditors are paid (In re Denning [D. C., Mass.], 8 Am. B. R. 133, 114 Fed. 219). Where the surviving member of a solvent partnership upon its dissolution, immediately formed a new firm and took over the assets of the old firm and placed them in the new firm and assumed therewith the debts of the old firm, the debts of the old firm may be proven against the bankrupt estate of the new firm. Matter of Stringer (D. C., N. Y.), 37 Am. B. R. 713, 234 Fed. 454.

182. Winship v. Bank, 5 Peters, 529, 8 L. Ed. 216.

183. Union Nat'l Bank v. Neill (C. C. A., 5th Cir.), 17 Am. B. R. 841, 149 Fed. 720; Merchants' Bank v. Thomas (C. C. A., 5th Cir.), 10 Am. B. R. 299, 121 Fed. 306. See also McDaniel v. Straud (C. C. A., 4th Cir.), 5 Am. B. R. 635, 106 Fed. 486.

184. Gauss v. Schrader, 48 Fed. 816; Bush v. Crawford, Fed. Cas. 2,224.

Firm Indorsements.—In the cases of In re Norris, Fed. Cas. 10,802 and In re Morse, Fed. Cas. 9,863, firm indorsements were made at the time the firm was in an embarrassed financial condition, and it was held that they were not new considerations moving from the individual creditor to the firm, within the four months' period, and the claim should be disallowed against the partnership estate.

Bankrupt firm as makers.—The claim arising from a note signed by the bankrupt firm as makers and indorsed by the individual bankrupt, one of the members of the firm, remains a firm obligation whether the individual bankrupt's liability as indorser has been fixed or not. Lamoille County Nat'l

Bank v. Stevens (D. C., Vt.), 6 Am. B. R. 164, 107 Fed. 245.

Power of partner to bind firm by indorsement.—In an ordinary trading partnership, one partner has implied authority as to transactions within the scope of the partnership business, to borrow money on the credit of the firm, to draw and accept, make and indorse bills of exchange and promissory notes in the name of the firm. Such partner has no implied authority to sign the firm name as an accommodation indorser to a negotiable promissory note, but where he does so the partnership is liable thereon to an innocent indorsee who acquired the note in the usual course of trade for value and before maturity. Union National Bank v. Neill (C. C. A., 5th Cir.), 17 Am. B. R. 841, 149 Fed. 720.

184a. Matter of Nashville Laundry Co. (D. C., Tenn.), 39 Am. B. R. 22, 240 Fed. 795.

185. In re Lehigh Lumber Co. (D. C., Pa.), 4 Am. B. R. 221, 101 Fed. 216. In the case of In re Jones (D. C., N. C.), 8 Am. B. R. 628, 116 Fed. 341, it was held that a note made by an individual partner, which on its face did not indicate that it constituted a partnership liability, was not a partnership debt. See also In re Lamon (D. C., N. Y.), 22 Am. B. R. 635, 171 Fed. 516; In re Stevens (D. C., Vt.), 5 Am. B. R. 9, 104 Fed. 323; In re Webb, Fed. Cas. 17,313; In re Robbin, Fed. Cas. 11,989.

186. In re Warren, Fed. Cas. 17,191; Davis v. Turner (C. C. A., 4th Cir.), 9 Am. B. R. 704, 120 Fed. 605; In re Culver (D. C., Minn.), 23 Am. B. R. 779, 176 Fed. 450.

187. In re Stoddard Bros. Lumber Co. (D. C., Idaho), 22 Am. B. R. 435, 169 Fed. 190, *affd. sub nom.* Mock v. Stoddard (C. C. A., 9th Cir.), 24 Am. B. R. 403, 177 Fed. 611.

188. In re Webb, Fed. Cas. 17,313; In re Herick, Fed. Cas. 6,420; Strause v. Hooper (D. C., N. C.), 5 Am. B. R. 225, 106 Fed. 590. See also Matter of Schattman Bros. (D. C., N. Y.), 40 Am. B. R. 537.

188a. Matter of Nashville Laundry Co. (D. C., Tenn.), 39 Am. B. R. 22, 240 Fed. 795.

Notes signed by partners.—When persons who are partners unite in making notes; though they sign their several names instead of the partnership name, if the note is one given in a partnership transaction and the partnership receives the consideration, they should be proved and allowed as a partnership obliga-

signed or indorsed by an individual partner, is for the sole benefit of the firm, it is a partnership debt;¹⁸⁶ and it may be shown by parol evidence that notes signed by the individual members of a firm were partnership obligations.¹⁸⁷

(3) **PARTNER SIGNING INDIVIDUAL NAME.**—The question as to the character of the debt will also arise where each member of the firm has in its behalf incurred an individual liability by signing his name instead of the firm name. The debt thereby becomes individual only.¹⁸⁸ But an obligation executed by the members of a firm in their individual capacity may be proven against the partnership estate and share in the partnership assets, upon extrinsic evidence showing that the obligations was intended as a partnership debt, incurred in the furtherance of the firm business.^{188a} The fact that the proceeds of a loan to a partner went into the partnership business and was utilized by the partnership for partnership purposes does not make the loan a partnership debt; the question is in each case was credit given to a partner or to the partnership?¹⁸⁹ An individual debt is none the less such because

tion in bankruptcy. *Matter of Kendrick & Co.* (D. C., Vt.), 35 Am. B. R. 623, 226 Fed. 978.

A joint and several note, signed by all the members of a partnership in their individual capacity, constitutes two contracts, and a holder thereof is entitled to prove his claim against and participate in the distribution of both the estate of the partnership and of the individual composing it. Where notes have been signed by one or the other member of a partnership, entered upon the partnership books, and treated as partnership transactions, and the partnership has received the benefit, claimants may treat the notes as the obligations of individuals and claim against the individual estate, or may treat the signatures of the individuals as the signature of the partnership by said individuals as the agents of the partnership, and so claim against the partnership. *Matter of Kuhn & Co.* (D. C., Ref. Pa.), 36 Am. B. R. 615, 64 Pittsburgh Leg. News 161.

189. *Strause v. Hooper* (D. C., N. C.), 5 Am. B. R. 225, 105 Fed. 590, in which case the respective fathers of the two partners of the bankrupt firm, had, prior to bankruptcy, each loaned a sum of money, with intent to set up their respective sons in business, and taken as security, bonds or notes signed by both partners individually. It was held that the notes were the individual debts of the partners.

Notes signed by partner in his own name.—In the case of *In re Lehigh Lumber Co.* (D. C., Pa.), 4 Am. B. R. 221, 101 Fed. 216, it appeared that more than four months prior to bankruptcy, a creditor of the bankrupt firm surrendered a claim against the firm and took the note of one of the partners in lieu thereof, which was renewed from time to time and judgment finally entered thereon within four months of the bankruptcy of the firm; it was held that such creditor ceased to be a creditor of the firm upon taking the individual note and the giving of such note and the judgment thereon did not constitute a voidable preference as against the firm.

The question whether an indebtedness is a firm or individual indebtedness often arises in cases where all the members have incurred a written obligation by signing their respective individual names instead of the firm name. Where this is the case the weight of authority is that it is the individual indebtedness of each of the members of the firm and not a partnership indebtedness. The fol-

lowing authorities under former bankruptcy act are in point. In *re Webb*, Fed. Cas. 17,313; In *re Bucyrus Machine Co.*, Fed. Cas. 2,100; In *re Miller*, 1 N. Y. Leg. Obs. 38; In *re Herrick*, Fed. Cas. 6,420; In *re Roddin*, Fed. Cas. 11,989. See also *In re Waren*, Fed. Cas. 17,191, holding that in such case there is merely a presumption that the obligation is individual rather than firm, and that the presumption may be rebutted if in fact it is a firm obligation. In the case of *In re Thomas*, Fed. Cas. 13,886, 8 Biss. 139, a note was signed by the partners individually for a loan, the proceeds of which went to the partnership. The court cited the above cases and said: "Thus it results that after the indorsement or individual signature of one of the firm, the firm creditor would have no right to claim against the individual assets until individual creditors have been first satisfied. But holding the individual indorsement or signature the firm creditor may in the first instance prove against the separate as well as the joint estate. Now such separate liability would seem to be at least in the nature of security, though differing radically it is true, in character and form, from that of a mortgage, and yet double proof by the firm creditor in such cases may be made without any abatement of advantage which his diligence has secured."

Mortgage of individual property to secure partnership obligation.—The bankrupts, who were joint partners, contracted as individuals for the purchase of certain goods on the instalment plan. One of the partners gave a bond and mortgage on his individual property as security for the payment thereof, binding himself to pay the obligation to the mortgagee. Contract of sale, bond and mortgage were assigned for valuable consideration before any default. It was held that under the State law which made joint partners severally liable for partnership obligations, the partner giving the mortgage was a principal debtor, and not a guarantor or

it is entered on the firm books with the knowledge of the creditor and payments have been made thereon by checks on partnership funds.¹⁹⁰

(4) ASSUMPTION OF PARTNERSHIP DEBTS.—The question as to whether a debt is a firm or an individual debt arises where one partner has bought out the other and assumed the partnership debts. The debts thereby become the individual debts of the continuing partner, provided the firm was solvent and the transaction was not tainted with fraud.¹⁹¹ It does not necessarily follow that the creditors of the firm must look to the continuing partner for the payment of their debts. If the bankruptcy of the continuing partner ensues, the creditors of the partnership may not have lost their lien but may follow the firm assets and assert the priority of their liens in respect thereto.¹⁹² If the partnership creditors either impliedly or expressly consent to the assumption of the debts by the continuing partner they become individual creditors and the debts are provable in the same manner as the other individual debts.¹⁹³ If the retiring partner is, notwithstanding the transfer of his interest in the firm assets, compelled to pay any of the debts of the firm,

surety. That the bond and mortgage were assignable with the debt before default in payment on the contract of sale; and that the assignee was entitled to the surplus proceeds of the sale of the mortgaged property, as against the trustee in bankruptcy of the individual mortgagor. *In re Forse & Roseboom* (D. C., N. Y.), 25 Am. B. R. 843, 184 Fed. 85.

Individual notes of partner pledged as security for firm obligation.—A partner under a firm contract made by him personally with a firm creditor, pledged as collateral for a firm obligation on which he was indorser certain notes made by him individually to the firm for personal loans, and after the bankruptcy of the firm and its members, the creditor sold the collateral, pursuant to the terms of the contract. It was held that the obligation of the partner on his notes to the firm was wholly independent of his obligation as indorser on the firm notes, and that the purchaser of the individual notes was entitled to prove a claim thereon against the individual estate of such partner. *In re White* (C. C. A., 7th Cir.), 25 Am. B. R. 541, 183 Fed. 310. See also *In re Effinger* (D. C., Md.), 25 Am. B. R. 930, 184 Fed. 728. Claims against a partnership based on notes examined and held to be provable. *Frederick v. Citizens National Bank* (C. C. A., 3d Cir.), 37 Am. B. R. 22, 231 Fed. 667.

The wife of a partner loaned to him \$2,000, of which he paid \$1,500 into the business, and loaned his copartner the remaining \$500, which he put into the business. Thereafter the wife purchased her husband's interest in the firm which was of value, and within a few days sold her interest to the copartner for \$1,500 taking his notes. About four months thereafter the copartner filed a petition in bankruptcy. Held, that the wife of the partner was entitled to prove her claims against the firm assets, as the partner-

ship creditors had no lien on the property. *Matter of Baker & Edwards* (D. C., N. Car.), 35 Am. B. R. 469, 224 Fed. 611.

190. *Hibberd v. McGill* (C. C. A., 3d Cir.), 12 Am. B. R. 101, 129 Fed. 590, affg. 10 Am. B. R. 550, 123 Fed. 187. See *First Nat. Bank v. Bank* (C. C. A., 9th Cir.), 12 Am. B. R. 429, 131 Fed. 422.

191. *In re Downing*, Fed. Cas. 4,044; *In re Collier*, Fed. Cas. 3,002; *In re Rice*, Fed. Cas. 11,750; *In re Long*, Fed. Cas. 8,476; *In re Pease*, Fed. Cas. 10,881. Compare also *In re Denning* (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219.

192. *In re Gillette* (D. C., N. Y.), 5 Am. B. R. 123, 104 Fed. 769; *N. Y. Institution for Deaf & Dumb v. Crockett*, 17 Am. B. R. 233, 241, 117 N. Y. App. Div. 269, 102 N. Y. Supp. 412; *In re Pease*, Fed. Cas. 10,881; *In re Lloyd*, 22 Fed. 88; *In re Downing*, Fed. Cas. 4,044; *In re Rice*, Fed. Cas. 11,750; *In re De Mare* (Ref., Miss.), 28 Am. B. R. 207.

Contra.—*Matter of Zartman* (D. C., Pa.), 30 Am. B. R. 544, 242 Fed. 595.

193. *In re Denning* (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219; *In re Keller* (D. C., Iowa), 6 Am. B. R. 334, 336, 109 Fed. 118.

If the creditor does not assent to a dissolution of the partnership and the assumption of its liabilities by one of the partners, his debt remains a partnership debt and a lien upon partnership assets; in respect to him the several estates are to be treated as though the transaction had not taken place. *In re Worth* (D. C., Iowa), 12 Am. B. R. 566, 130 Fed. 927.

No trust or lien in favor of partnership creditors.—The assumption of payment of partnership debts by one partner in consideration of an absolute conveyance of the partnership property to him by the other creates no trust in and fastens no lien upon the property thus conveyed in favor of the partnership creditors prior to any request for the interposition of a court to administer the partnership property. *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 160 Fed. 57.

he is subrogated to the rights of the firm creditors whose debts were paid by him, and the amount thereof becomes a debt against the continuing partner,¹⁹⁴ but he is not entitled to prove a claim for the debts for which he as a partner remains liable without showing payment thereof by himself.^{194a} When, upon the retirement of one partner, the others constitute a new firm, such new firm is not liable for the old firm's debts. Hence, in the absence of an assumption of such debts, a creditor of the old firm cannot prove his claim in bankruptcy against the new firm.^{194b}

(5) ASSUMPTION OF INDIVIDUAL DEBTS.—Where debts of an individual member of the firm are assumed by the firm, and sufficient consideration is shown to support the assumption, such debts may become partnership debts.¹⁹⁵ Where the creditor had no notice of the assumption of the individual debt by the partnership and did not acquiesce therein, the character of the debt remains unchanged.¹⁹⁶

f. Proof against and dividends from each estate.—Since the act of 1861, in England, joint and several creditors have been permitted to prove against and receive dividends from both joint and separate estates.¹⁹⁷ The weight of American authority has always been in favor of this rule.¹⁹⁸ Though at first glance this rule seems inequitable, the firm and the individuals are separate entities and have made separate contracts and may, therefore, be held to the performance of them. It follows, therefore, that under certain circumstances there may be a joint and several liability on the part of the partners, in which case a creditor may file double proof, both against the partnership assets and against the individual assets of each partner.¹⁹⁹ Where notes or other obligations for a partnership debt are signed or assumed by the partnership, and by one or more of the partners individually, the debt is both joint and several, and may be proved both against the estates of the partnership and of the partners.²⁰⁰ This principle may not be carried to the extent of permitting double proof against the estates of the partnership and the partners, where the partnership in the course of firm business converted securities belonging

194. In re Dillon (D. C., Mass.), 4 Am. B. R. 63, 100 Fed. 627; In re Cormichael (D. C., Iowa), 2 Am. B. R. 815, 96 Fed. 594.

194a. Matter of Tassinari (D. C., Mass.), 41 Am. B. R. 148, 249 Fed. 990.

194b. Matter of Stringer (C. C. A., 2d Cir.), 89 Am. B. R. 170, 240 Fed. 802.

195. In re Dresser (C. C. A., 2d Cir.), 13 Am. B. R. 747, 135 Fed. 495; Merchants' Nat'l Bank v. Thomas (C. C. A., 5th Cir.), 10 Am. B. R. 299, 121 Fed. 306; Dacovich v. Schley (C. C. A., 5th Cir.), 13 Am. B. R. 752, 134 Fed. 72; In re Speer Bros. (D. C., Or.), 16 Am. B. R. 524, 144 Fed. 910; First Nat'l Bank of Miles City v. State Nat'l Bank (C. C. A., 9th Cir.), 12 Am. B. R. 429, 131 Fed. 422, in which it was held where there was no sufficient evidence to sustain a finding that a partnership assumed the indebtedness of one partner at the formation of the partnership, the notes of the firm given to a bank in renewal of the individual partner's indebtedness, are not partnership debts, where the bank had notice.

196. Hibberd v. McGill (C. C. A., 3d Cir.), 12 Am. B. R. 101, 129 Fed. 590.

197. Compare Baldwin on Bankruptcy (8th ed.), p. 518.

198. In re Bigelow, Fed. Cas. 1,397; Mead v. Bank, Fed. Cas. 9,366; Emery v. Canal Bank, Fed. Cas. 4,446; Matter of W. S. Kuhn & Co. (D. C., Pa.), 39 Am. B. R. 823, 241 Fed. 935, quoting Collier on Bankruptcy (8th ed.), 136.

199. In re Cole (C. C. A., 2d Cir.), 28 Am. B. R. 352, affg. 22 Am. B. R. 384, 169 Fed. 1002;

Matter of W. S. Kuhn & Co. (D. C., Pa.), 39 Am. B. R. 823, 241 Fed. 935.

200. Buckingham v. First Nat. Bank (C. C. A., 6th Cir.), 12 Am. B. R. 465, 131 Fed. 192; Robinson v. Seaboard Nat. Bank (C. C. A., 3d Cir.), 41 Am. B. R. 203, 247 Fed. 667, affg. 39 Am. B. R. 823, 241 Fed. 935; Bank of Reidsville v. Burton (C. C. A., 4th Cir.), 43 Am. B. R. 374, 250 Fed. 218.

Double proof of debts.—In the case of In re McCoy (C. C. A., 7th Cir.), 17 Am. B. R. 760, 150 Fed. 106, it was held that where partners for the benefit of the firm borrowed money upon their individual credit, the lender, after the receipt of a dividend from the partnership estate, might prove for the balance of his claim against the bankrupt estate of the individual partners. In this case the court said: "In England the old rule was that in administering the bankrupt laws of that country double proof against the partnership estate and the individual estate was not allowed. This rule has not been followed in this country and there is nothing in the bankruptcy act showing that this English rule was intended to be embodied in our act. Indeed it is doubtful if the old rule is now in force in England." Citing Emyre v. Canal National Bank, Fed. Cas. 4,446; In re Bradley, Fed. Cas. 1,772; In re Farnum, Fed. Cas. 4,074; Mead v. National Bank of Lafayette, Fed. Cas. 9,366, 6 Blatchf. 180; In re Bigelow, Fed. Cas. 1,397, 3 Ben. 146.

A claim in the nature of a tort for false representations alleged to have been made by

to a claimant, who, waiving the tort, proved a claim based upon an implied contract against the partnership estate. Such contract is an obligation of the firm and not of the individual members.²⁰¹

IX. WHERE ONE OR MORE PARTNERS ARE SOLVENT.

a. In general.— Subsection *h* of this section provides that "In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt;" in such case it is made the duty of the solvent partner to settle the partnership business and account for the interest of the partner adjudged bankrupt. This provision is new, but is declaratory of the practice under the former law. The subdivision contemplates a case where one or more, but not all, of the members of a partnership are adjudged bankrupt, while the partnership as such is not before the court.²⁰² This doctrine seems to spring from the fact that bankruptcy works a dissolution of the firm, and the solvent partner may, therefore, close up the business of the firm as if the bankrupt member were actually dead. The provision commanding expedition and an accounting to the trustee should also be noted.

b. Waiver of consent.— The right to administer is absolute, unless waived by the solvent partner.²⁰³ It would seem that, by allowing an adjudication of partnership bankruptcy, as by making no response when served with notice as provided in General Order VIII, or by failing to disclose the relation and knowingly permitting an adjudication, this right to administer will be deemed waived. It can also be waived by a writing or declaration to that effect.²⁰⁴ If he stands by without protest and allows the assets of the partnership to be taken into the custody and control of the bankruptcy court, he may be deemed to have given his consent.²⁰⁵ But his participation in the bankruptcy proceeding against his partner by the presentation of an alleged provable claim upon which he attempted to vote for a trustee will not constitute a waiver.²⁰⁶

members of a firm inducing claimants to purchase drafts may not be proven against the individual assets of the partners when a claim has been filed and allowed against the partnership upon the drafts as partnership obligations in contract, it not appearing that the claimants were creditors both of the partnership and of the individual members thereof. *Schall v. Camors* (C. C. A., 5th Cir.), 41 Am. B. R. 76, 250 Fed. 6.

Proof against partner individually.—Proof of claim against a bankrupt partnership upon a note of the firm, endorsed by a member thereof, and also upon an open account, examined and held not to constitute a proof of claim against the member of the firm individually. *Adams v. Brown & Hill* (C. C. A., 4th Cir.), 35 Am. B. R. 302, 226 Fed. 688.

201. Conversion by partnership.—In the case of *Reynolds v. N. Y. Trust Co.* (C. C. A., 1st Cir.), 26 Am. B. R. 698, 188 Fed. 611, the court said: "Where there are separate and distinct express contracts of the firm and of a copartner to pay a debt contracted by the firm, the right to prove against both estates may be conceded. If one dealing with a firm procures also the individual undertaking of a partner to answer for a firm debt, there are substantial reasons for permitting him to resort to both estates. An additional several contract of a partner is not implied from the firm transaction, but may be created by a distinct act of the copartner. As the conversion in the present case was by the firm in the

course of firm business, as the actual participation of the partner is not proved, as there is no evidence that his individual estate benefited by the firm conversion . . . there is difficulty in finding any substantial ground to imply from the circumstances a separate contract of the partner, which corresponds to an express individual contract to answer for a firm debt." See also *Schall v. Camors* (C. C. A., 5th Cir.), 41 Am. B. R. 76, 250 Fed. 6.

Where fraudulent representations were made by partners in the course of the partnership business, for the benefit of the firm and without benefit to the partners as individuals, no legal or equitable claim as against the individuals that might be deemed to arise out of it, by waiver of the tort or otherwise, can displace the equities of other creditors, recognized in the Bankruptcy Act, and put the claimant for such fraud in a position of equality with others who actually were creditors of the individual partners. *Schall v. Camors* (U. S. Sup. Ct.), 44 Am. B. R. 647, 40 Sup. Ct. 135.

202. In *re Junck & Balthazard* (D. C., W. Va.), 22 Am. B. R. 298, 169 Fed. 481.

Construction of Section 5 (h).—Sub-section *h* of Section 5 is not applicable to a cause where a partnership has been adjudged a bankrupt. It applies only where less than all of the members of the partnership, but not the partnership itself, have been so adjudged. *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 535, 186 Fed. 481, 108 C. C. A. 459, affd. 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1029;

c. Application and effect of subsection.—This subsection does not apply where the solvent partner retired shortly before the bankruptcy and holds the continuing partner's notes for his interest in the firm.²⁰⁷ It merely preserves to an existing solvent partner the right to administer the affairs of the partnership if he so desires; it has no application to a case where distinct proceedings are instituted against the individual members of a partnership but not against the partnership itself.²⁰⁸ The connection between subsections *h* and *c* should be noted. When construed together they provide in effect that when a partnership and one or more of the partners, but not all of them are adjudged bankrupt, those who are not so adjudged may administer the partnership property, and *a fortiori* their individual property, and the court may not do so without their consent, but, if the unadjudicated members consent, the court may administer the partnership property and their individual estates.²⁰⁹

Marnet Oil and Gas Co. v. Staley (C. C. A., 5th Cir.), 33 Am. B. R. 286, 218 Fed. 45.

^{208.} *Marnet Oil and Gas Co. v. Staley* (C. C. A., 5th Cir.), 33 Am. B. R. 286, 218 Fed. 45.

^{204.} *In re Harris* (D. C., Ohio), 4 Am. B. R. 132, 108 Fed. 517; *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 978.

^{206.} *In re Harris* (Ref., Ohio), 4 Am. B. R. 132.

^{206.} *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 680, 226 Fed. 878.

^{207.} *In re Denning* (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219.

^{208.} *In re Mercur* (C. C. A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384; *Mahoney v. Ward* (D. C., N. C.), 3 Am. B. R. 770, 100 Fed. 278.

^{209.} **Rights of solvent partner.**—In the case of *In re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B. R. 577, 583, 157 Fed. 363, the court said: "These provisions thus interpreted are fair, just and reasonable. The solvent partner cannot in any event escape payment of the debts of the partnership. His individual property is subject to attachment, execution and to the processes of the law to satisfy them. He is more competent to manage the individual property and the property of his firm which he had the shrewdness and ability to accumulate, more competent to convert them into money and to apply them upon his obligations, than any trustee chosen by his creditors can be. He knows the property, its value, its availability for various uses, its market. He has a vital interest in securing the best price for it, and the fact that it is his property, that it is to be applied to his debts, gives him a preferential equity to apply it speedily and efficiently to the payment of his obligations. The opposite process would be unreasonable, unfair to

those who have accumulated and preserved the property, and liable to much injustice." See also *Matter of Solomon* (D. C., N. Y.), 20 Am. B. R. 488, 163 Fed. 140; *In re Junck & Balthazard* (D. C., W. Va.), 22 Am. B. R. 298, 169 Fed. 481.

Right of firm trustee to administer separate estate of partner not separately adjudicated.—In an involuntary proceeding against a partnership which is unable to pay its debts in full even with separate estates of the partners, an adjudication against the partnership alone authorizes the administration of the separate estate of one of the partners by the trustee in bankruptcy of the firm, particularly where such partner has neither objected to the firm property being administered nor to failure to adjudicate him but on the contrary consents to turn over his property for administration. *Francis v. McNeal*, 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1029, affg. 26 Am. B. R. 555, 186 Fed. 481, 108 C. O. A. 459. See also *In re Samuels & Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195.

Appointment of solvent members as trustee.—Where a partnership and two of its three members are insolvent and the third member, although solvent, consents to the administration of the firm and individual assets, section 5h of the Bankruptcy Act applies, and an adjudication against the firm and the two members thereof may be had, and all the assets administered in the bankruptcy court, and the solvent partner will be entitled to share in the administration and may be appointed trustee. *Matter of Kobre et al.* (D. C., N. Y.), 35 Am. B. R. 389, 264 Fed. 106.

SECTION SIX.

EXEMPTION OF BANKRUPTS

§ 6. Exemption of Bankrupts.—*a.* This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Analogous provisions: In U. S.: Act of 1867, § 14 (as amended by Act of June 8, 1878; and by Act of March 23, 1873), R. S., § 5045; Act of 1841, § 3; Act of 1800, § 34, 35, 53.

In Eng.: Act of 1883, § 64 (3).

In Can.: Act of 1919, § 25.

Cross-references: To the law: Power of court of bankruptcy to determine exemptions, § 2(11). Schedules of bankrupt to contain claim of exemptions, § 7-a(8). Schedules to be prepared by referee in case of bankrupt's failure, § 39-a (6). Trustee to set apart bankrupt's exemptions, § 47-a(11). Property recovered by trustee to be part of estate of bankrupt unless exempt, § 67-e. Exempt property not to pass to trustee, § 70-a.

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V. Table of Cases on Exemptions under Present Law, 243.**I. HISTORY AND CONSTITUTIONALITY.**

a. History in general.—Ever since bankruptcy laws ceased to be essentially penal, allowances or exemptions to the bankrupt have been sanctioned by statute. The law takes his property from him and gives it to his creditors. Anglo-Saxon jurisprudence, however, has for nearly two centuries decreed either that the creditors shall make the bankrupt an allowance such as will keep him and his family from want until he can begin again, or else shall permit him to retain a specific sum to the same end. The former is at present the English method; the latter the American and Canadian. By § 64(2) of the English act of 1883 the trustee, with the permission of the committee of inspection, may from time to time make an allowance to the bankrupt for his support and that of his family. Formerly, the English bankrupt was given a certain proportion of his assets for the same purpose.¹

b. In the United States.—Our first law, besides exempting wearing apparel and beds and bedding (§ 18) and giving an allowance for the necessary support of the debtor and his family during the pendency of his proceeding (§ 53), allowed him a small percentage of the assets, with an upward limit as to the total, but on a sliding scale dependent on dividends paid to creditors. This, though generous, was at least uniform throughout the country. The law of 1841 was also uniform; under it (§ 3) wearing apparel, household furniture, and other necessary articles to the value of not over \$300, were set aside by the assignee for the bankrupt. The law of 1867, as amended (R. S., § 5045), re-enacted the provisions of the previous law, though increasing the upward limit to \$500, and, in addition, after exempting the arms and equipment of one who had served as a soldier, gave effect to the exemption laws of the States to such extent as such laws were more liberal than the bankruptcy law. From this latter idea, our present far-reaching clause on exemption sprang. In a country where trade is necessarily liquid, and, owing to our division into States, the dangers from diverse exemption laws great, by the express provision of the Federal statute, the State and not the Federal law determines what portion of his estate a bankrupt may retain. The law as to exemptions remains as originally passed. That the result is inequitable is as true as it is that a remedy in the nature of a uniform national exemption law is for the time impossible. Thus, to-day, in some States the law's allow-

1. Compare Massachusetts Insolvency Law, c. 163, Revised Laws of 1901.

ance of bread money is the same as that under the law of 1841; in others, it is so large as often to exhaust the estate.

c. **Constitutionality.**—One ground of attack on the constitutionality of the bankruptcy law of 1867 was that it was not uniform as to exemptions. There was no authoritative determination of this question by the Supreme Court. The lower courts, however, almost without exception, held that the uniformity required by the constitution was geographical only, and that the law was uniform, though, in this particular, giving effect to the local statutes of the debtor's domicile.² The Supreme Court has already settled the question under the present law, by declaring that law constitutional in spite of its want of uniformity as to exemptions,³ and holding that the system is, in a constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to creditors if the bankrupt law had not been passed.⁴

II. JURISDICTION AND GENERAL RULES GOVERNING EXEMPTIONS.

a. **In general.**—It is the purpose of this subdivision to set forth the general principles as found in the numerous cases on the subject. For decisions under the laws of 1867 and 1841, resort should be had to the text books and digests of the periods.⁵

b. **State statutes and decisions control.**—The State law controls and its meaning is fixed by the interpretation of the highest courts of the State.⁶ It

2. In re Everett, Fed. Cas. 4,579, 9 N. B. R. 90; In re Beckerford, Fed. Cas. 1,209; In re Jordan, Fed. Cas. 7,514; In re Smith, Fed. Cas. 12,996; Darling v. Berry, 13 Fed. 659; Dozier v. Wilson, 84 Ga. 301. *Contra*, In re Deckert, Fed. Cas. 3,728; In re Duerson, Fed. Cas. 4,117, 13 N. B. R. 183.

3. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1; In re Richard (D. C., N. C.), 2 Am. B. R. 506, 94 Fed. 633; In re Buelow, 2 N. B. N. Rep. 26, 98 Fed. 286; In re Kean, Fed. Cas. 7,630, 8 N. B. R. 401.

4. **Constitutionality of section as to exemptions.**—The Supreme Court in the case of Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1, 46 L. Ed. 1113, concurs in the view expressed by Chief Justice Waite in In re Deckert, 2 Hughes, 186, where he said: "The power to except from the operation of the law property liable to exception under the exemption laws of the several states, as they were actually enforced, was at one time questioned upon the ground that it was a violation of the constructional requirement of uniformity, but it has thus far been sustained for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a

bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term as used in the Constitution."

5. See for instance American Digest, Century Edition, "Bankruptcy," §§ 656-678.

6. In re Duerson, Fed. Cas. 4,117; In re Camp (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 145; In re Stevenson & King (D. C., N. C.), 2 Am. B. R. 230, 93 Fed. 789; In re Buelow, 98 Fed. 86; In re Tobias (D. C., Va.), 4 Am. B. R. 555, 103 Fed. 68; Richardson v. Woodward (C. C. A., 4th Cir.), 5 Am. B. R. 94, 104 Fed. 873; In re Anderson (D. C., Mass.), 6 Am. B. R. 555, 110 Fed. 141; In re Manning (D. C., Pa.), 7 Am. B. R. 571, 112 Fed. 948; In re Stone (D. C., Ark.), 8 Am. B. R. 416, 116 Fed. 35; Page v. Edmunds, 187 U. S. 596, 9 Am. B. R. 277, 47 L. Ed. 318; In re Wood (D. C., Wis.), 17 Am. B. R. 93, 147 Fed. 877; In re Stein (D. C., Pa.), 12 Am. B. R. 384, 130 Fed. 377; In re Owings (D. C., N. C.), 15 Am. B. R. 472, 140 Fed. 739; In re Paramore v. Bicks (D. C., N. C.), 19 Am. B. R. 130, 156 Fed. 208; In re Pfeiffer (D. C., Pa.), 19 Am. B. R. 230, 155 Fed. 892; In re Burke (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994; In re McCrary Bros. (D. C., Ala.), 22 Am. B. R. 161, 169 Fed. 485; In re Hast-

has always been the policy of Congress, both in general legislation and in bankrupt acts, to give effect to the State exemption laws.⁷ But a court of bankruptcy will not enforce an unconstitutional State law;⁸ for example, where it impairs the obligation of contracts.⁹ Nor will a State court review a determination by the bankruptcy court as to what property is exempt.¹⁰ But if there are no State decisions construing a State law, or such decisions are conflicting, a court of bankruptcy will, if a proper case is presented, construe and apply the law with a view of carrying out the purpose and intent of the bankruptcy act.¹¹ Exemption laws should be liberally construed.¹² If the decisions are interpretations of State statutes they will control; but if they are declarations of general law — mere definitions of property — they may be disregarded.¹³

ings (C. C. A., 6th Cir.), 24 Am. B. R. 360, 181 Fed. 33; In re Baker (C. C. A., 6th Cir.), 24 Am. B. R. 411, 182 Fed. 392; In re Bassett (D. C., Wash.), 26 Am. B. R. 800, 189 Fed. 410; In re Thetford (Ref. Tex.), 28 Am. B. R. 191; People's Natl. Bank v. Maxson (Sup. Ct., Iowa), 168 Iowa 318, 33 Am. B. R. 765, 150 N. W. 601; Matter of Crum (D. C., Ohio), 34 Am. B. R. 686, 221 Fed. 729; Grattan v. Trego (C. C. A., 8th Cir.), 34 Am. B. R. 889, 225 Fed. 705; Matter of Dean (D. C., Cal. Ref.), 34 Am. B. R. 156; Eaton v. Boston Safe Deposit and Trust Co., 240 U. S. 427, 36 Am. B. R. 701, 60 L. Ed. 723; Olmsted-Stevenson Co. v. Miller (C. C. A., 9th Cir.), 36 Am. B. R. 816, 231 Fed. 69; Matter of Malone's Estate (D. C., Idaho), 36 Am. B. R. 364, 228 Fed. 566; Matter of Safady Bros. (D. C., Wis.), 36 Am. B. R. 6, 228 Fed. 538. But not by *obiter dicta*. In re Sullivan (C. C. A., 8th Cir.), 17 Am. B. R. 578, 148 Fed. 115; Matter of Hunter (D. C., N. Y.), 41 Am. B. R. 445; Matter of Lightstone (D. C., N. Y.), 41 Am. B. R. 619, 253 Fed. 456; Matter of Libby (D. C., Fla.), 41 Am. B. R. 630, 253 Fed. 278; Matter of Bitner (C. C. A., 7th Cir.), 42 Am. B. R. 175, 255 Fed. 48; Campbell-Thorp Grocer Co. v. Watkins (Ark. Sup. Ct.), 42 Am. B. R. 894, 205 S. W. 826; Matter of Samuels (C. C. A., 2d Cir.), 42 Am. B. R. 434, 254 Fed. 775; Matter of Solomon & Johnson (D. C., Mich.), 43 Am. B. R. 18, 254 Fed. 503; Peyton v. Farmers Nat. Bank (C. C. A., 5th Cir.), 44 Am. B. R. 285, 261 Fed. 326; Libby v. Beverley (D. C., Fla.), 44 Am. B. R. 605, 263 Fed. 63.

The construction of the highest judicial tribunal of a State of its constitution and of its statutes which establish a rule of property, is controlling authority in the courts of the United States, where no question of right under the constitution and laws of the nation is involved. In re Wood (D. C., Wis.), 17 Am. B. R. 93, 147 Fed. 877. It is well settled that the debtor must comply with the State law in order to claim exemptions. In re Farish, Fed. Cas. 4,657, 2 N. B. R. 168; In re Gaiuey, Fed. Cas. 5,181, 2 N. B. R. 525; In re Jackson, Fed. Cas. 7,127, 2 N. B. R. 508; Guise v. State, 41 Ark. 249; Briggs v. McCullough, 36 Cal. 542; Griffin v. Sutherland, 14 Barb. (N. Y.), 456, as to effect of decisions of State courts, see Am. Bankr. Dig. § 944.

Decisions of territorial courts. — How far the decision of the Supreme Court of the territory is binding on this court may admit of question; but it would seem that the decision of the highest court of the Territory construing a territorial statute should have the same force and effect as a decision of the Supreme Court of the State. This is especially true where the decision establishes or relates to a rule of property. In re Scheir (D. C., Wash.), 26 Am. B. R. 730, 188 Fed. 744.

7. Holden v. Stratton, 198 U. S. 202, 14 Am. B. R. 94, 49 L. Ed. 1018. As to effect of state statutes on exemptions, see Am. Bankr. Dig. § 944.

Force of State exemption laws. — From the organization of the Federal courts under the judiciary act of 1789, the law has been that creditors suing in these courts could not subject to execution property of their debtor, exempt to him by the laws of the State. The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the act of 1867, but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule observed from the creation of our Federal system should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction. Steele v. Buel (C. C. A., 8th Cir.), 5 Am. B. R. 100, 104 Fed. 972.

The Bankruptcy Act does not create any personal or homestead exemptions in favor of the bankrupt, but merely preserves to him the full benefit of such exemptions as at the time of adjudication he is entitled to under the State law. Matter of Star Spring Bed Co. (D. C., N. J.), 40 Am. B. R. 1, 243 Fed. 857.

8. In re Everitt, Fed. Cas. 4,570, 9 N. B. R. 90; In re Dillard, Fed. Cas. 3,912, 2 Hughes, 190.

9. Gunn v. Barry, 15 Wall. 610, 21 L. Ed. 212.

10. Woolfolk v. Murray, 44 Ga. 133; Maxwell v. McCune, 37 Tex. 515.

11. Richardson v. Woodward (C. C. A., 4th Cir.), 5 Am. B. R. 94, 104 Fed. 573, citing Marly v. Lake Shore R. Co., 146 U. S. 162, 38 L. Ed. 925; Provident Sav. Institution v. Massachusetts, 6 Wall. 630, 18 L. Ed. 907; Randall v. Bingham, 7 Wall. 541, 19 L. Ed. 285.

12. Matter of Irving (D. C., Ariz.), 34 Am. B. R. 399, 220 Fed. 969; In re Andrews & Simonds (D. C., Mich.), 27 Am. B. R. 116, 193 Fed. 776; Matter of Radcliffe (D. C., Ohio), 39 Am. B. R. 612, 243 Fed. 716; Matter of Lightstone (D. C., N. Y.), 41 Am. B. R. 619, 253 Fed. 456. The spirit of the Bankruptcy Law in the matter of exemptions is one of liability, and, under facts as presented herein, the bankruptcy court will allow the homestead exemption recognized by the state. In re Culwell (D. C., Mont.), 21 Am. B. R. 614, 165 Fed. 828; Brandt v. Mahew (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

13. Page v. Edmunds, 187 U. S. 596, 9 Am. B. R. 277.

c. **Residence of bankrupt.**—The section provides that the laws of the State where the bankrupt had his domicile “for the six months or the greater portion thereof immediately preceding the filing of the petition” shall control.¹⁴ It makes no difference where the property is situated, if it is exempt under the law of the bankrupt’s domicile.¹⁵ The right of the bankrupt to his exemption will depend upon his place of residence at the time the petition is filed against him.¹⁶

d. **Claiming exemption.**—The time and manner of claiming exemptions are regulated by the bankruptcy act, and the general orders and forms applicable thereto.¹⁷ Where the right exists it must be claimed as prescribed by the act.¹⁸ It was not the intent of the section to enlarge the exemptions available to the bankrupt under the State law; ¹⁹ if exempt property is not subject to levy and sale under a State statute, it cannot be made to respond under the Federal act.²⁰

e. **Jurisdiction of court of bankruptcy.**—(1) **IN GENERAL.**—A court of bankruptcy has jurisdiction to determine the merits of the bankrupt’s claim to exemptions, but, as a rule, has no jurisdiction over the property claimed, except to set it aside for his use²¹ and cannot order its sale,²² or enforce a

14. *In re Grimes* (D. C., N. C.), 2 Am. B. R. 160, 94 Fed. 800; *In re Woodard* (D. C., N. C.), 2 Am. B. R. 339, 95 Fed. 260; *In re Buelow* (D. C., Wash.), 3 Am. B. R. 389, 98 Fed. 86; *In re McCutchen* (D. C., S. C.), 4 Am. B. R. 81, 100 Fed. 779; *In re Lynch* (D. C., Ga.), 4 Am. B. R. 262, 101 Fed. 579; *McCarty v. Coffin* (C. C. A., 5th Cir.), 18 Am. B. R. 148, 150 Fed. 307; *Duncan v. Ferguson-McKinney Co.* (C. C. A., 5th Cir.), 18 Am. B. R. 155, 150 Fed. 269; *In re O’Hara* (D. C., Pa.), 20 Am. B. R. 714, 162 Fed. 325.

15. *In re Stevens*, 2 Biss. 373, Fed. Cas. 12,392; *Campbell-Thorp Grocer Co. v. Watkins*, (Ark. Sup. Ct.), 42 Am. B. R. 394, 205 S. W. 826.

16. *In re Bassett* (D. C., Wash.), 26 Am. B. R. 800, 189 Fed. 410. See cases cited under “*Right of Bankrupt to Exemptions*” post, p. 212.

17. *In re Friedrich* (C. C. A., 2d Cir.), 3 Am. B. R. 801, 100 Fed. 284; *In re Kane* (C. C. A., 7th Cir.), 11 Am. B. R. 533, 127 Fed. 552; *Matter of McClintock* (D. C., Ohio, Ref.), 13 Am. B. R. 606; *Lipman v. Stein* (C. C. A., 3d Cir.), 14 Am. B. R. 30, 134 Fed. 235; *Burke v. Guarantee T. & T. Co.* (C. C. A., 3d Cir.), 14 Am. B. R. 31, 134 Fed. 562. *In re Culwell* (D. C., Mon.), 21 Am. B. R. 614, 165 Fed. 828; *In re Burnham* (D. C., Wash.), 30 Am. B. R. 270, 202 Fed. 762; *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

The rules and forms in regard to exemptions prescribed by the Supreme Court under the bankruptcy act have the force and effect of law, and where a bankrupt fails to make claim for exemption in the manner and within the time legally prescribed therefor, he thereby waives any right to the exemption that he might have. *In re Gerber* (C. C. A., 9th Cir.), 26 Am. B. R. 608, 186 Fed. 693.

18. *In re Kane* (C. C. A., 7th Cir.), 11

Am. B. R. 533, 127 Fed. 552, in which the court says: “Courts of bankruptcy are not controlled as to the time or the manner in which claims for exemptions may be preferred in bankruptcy. The exemptions provided by the law of the state are allowed by the bankruptcy act, but the manner of claiming such exemptions, and of setting them apart and awarding them, is regulated by the bankruptcy act.” *In re Friedrich* (C. C. A., 6th Cir.), 3 Am. B. R. 801, 100 Fed. 284; *Lipman v. Stein* (C. C. A., 3d Cir.), 14 Am. B. R. 30, 134 Fed. 235; *In re Le Vay* (D. C., Pa.), 11 Am. B. R. 114, 125 Fed. 920.

19. *In re Boyd* (D. C., Iowa), 10 Am. B. R. 337, 120 Fed. 999.

20. *Smalley v. Laugenour*, 196 U. S. 93, 49 L. Ed. 400, 13 Am. B. R. 692; *In re Fisher* (D. C., Va.), 15 Am. B. R. 652, 142 Fed. 205.

21. *In re Camp* (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 749; *In re Hatch* (D. C., Iowa), 4 Am. B. R. 349, 102 Fed. 280; *In re Hill* (D. C., Ga.), 2 Am. B. R. 798, 96 Fed. 185; *Woodruff v. Cheeves* (C. C. A., 5th Cir.), 5 Am. B. R. 296, 105 Fed. 601, revg. *In re Woodruff* (D. C., Ga.), 2 Am. B. R. 678, 96 Fed. 317; *In re Little* (D. C., Iowa), 6 Am. B. R. 681, 110 Fed. 621; *Powers Dry Goods Co. v. Nelson* (D. C., N. D.), 10 N. Dak. 580, 86 N. W. 703, 7 Am. B. R. 506, and foot-note; *In re Jackson* (D. C., Pa.), 8 Am. B. R. 594, 116 Fed. 46; *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061; *In re Brumbaugh* (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971; *In re Boyd* (D. C., Iowa), 10 Am. B. R. 337, 120 Fed. 999; *McKenney v. Cheney*, 118 Ga. 387, 11 Am. B. R. 54, 45 S. E. 433; *In re Hartsell* (D. C., Ala.), 15 Am. B. R. 177, 140 Fed. 30; *In re Castleberry* (D. C., Ga.), 16 Am. B. R. 159, 143 Fed. 1,018; *In re*

mortgage against it.²³ This jurisdiction, so far as it goes, is exclusive.²⁴ The Federal courts are not bound to follow the State courts in the matter of the time of filing the declaration of the claim of exemptions and may allow amendment of the claim after the original schedule has been filed.²⁵

(2) ADMINISTRATION OF EXEMPT PROPERTY.—As soon as the right of the bankrupt to the exemption claimed is determined, the court's jurisdiction over the exempt property ceases. The bankruptcy court has no further control over it. The court has no power to administer or distribute it, with the other assets of the bankrupt estate.²⁶ Where the exempt property is commingled

Highfield (D. C., Pa.), 21 Am. B. R. 92, 163 Fed. 784; *In re McCrary Bros.* (D. C., Ala.), 22 Am. B. R. 61, 169 Fed. 485; *In re MacKissic* (D. C., Pa.), 22 Am. B. R. 817, 171 Fed. 219; *Matter of Cheatham* (D. C., Ky.), 31 Am. B. R. 520, 210 Fed. 370; *Matter of Haas* (D. C., Pa.), 32 Am. B. R. 284, 213 Fed. 694. *Bank of Mendon v. Mell* (Kan. City Ct. of App., Mo.), 185 Mo. App. 510, 33 Am. B. R. 777, 172 S. W. 484; *Trust Natl. Bank v. Orten* (Okla. Sup. Ct.), 43 Okl. 325, 33 Am. B. R. 108, 142 Pac. 1096; *Matter of Dean* (D. C., Cal. Ref.), 34 Am. B. R. 156; *Matter of Brown* (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533; *Matter of Dittmar* (C. C. A., 3d Cir.), 41 Am. B. R. 690, 249 Fed. 606; *Matter of Braun* (D. C., Pa.), 43 Am. B. R. 686, 269 Fed. 309.

Exempt property not in possession of court.—Exempt property is never really in the bankruptcy court, nor is the owner divested of his title where he properly urges his claim for exemption. The court has no jurisdiction of it except to set it aside as exempt property. *Bogart v. Cowboy State Bank and Trust Co.* (Tex. Civ. App.), 37 Am. B. R. 387, 182 S. W. 673.

22. *Ingram v. Wilson* (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; *Hughes v. Sebastian County Bank* (Ark. Sup. Ct.), 39 Am. B. R. 866, 195 S. W. 364.

23. *In re Hatch* (D. C., Iowa), 4 Am. B. R. 349, 102 Fed. 280, and note.

24. *In re Overstreet* (D. C., Ark. Ref.), 2 Am. B. R. 486; *In re Bragg*, 2 N. B. N. Rep. 82; *In re Nunn* (Ref. Ga.), 2 Am. B. R. 664; *McGahan v. Anderson* (C. C. A., 4th Cir.), 7 Am. B. R. 641, 113 Fed. 115; *In re Lucius* (D. C., Ala.), 10 Am. B. R. 663, 124 Fed. 455, and cases cited; *Lun v. Henry* (Hawaii Sup. Ct.), 35 Am. B. R. 795, 22 Haw. 160; *Campbell-Thorp Grocer Co.* (Ark. Sup. Ct.), 42 Am. B. R. 394, 205 S. W. 826.

25. *Matter of Irving* (D. C., Ariz.), 34 Am. B. R. 390, 220 Fed. 969.

26. *Bell v. Dawson Grocery Co.*, 12 Am. B. R. 161, 120 Fed. 628; *In re Lucius* (D. C., Ala.), 10 Am. B. R. 663, 124 Fed. 455; *Ingram v. Wilson* (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; *In re Paramore & Ricks* (D. C., N. Car.), 19 Am. B. R. 130, 156 Fed. 208; *In re Blanchard & Howard* (D. C., N. Car.), 20 Am. B. R. 422, 161 Fed. 797; *First National Bank of Cleveland v. Orten* (Okla. Sup. Ct.), 43 Okl. 825, 33 Am. B. R. 108, 142 Pac. 1096; *Matter of Ange* (D. C., Mont.), 39 Am. B. R. 39, 238 Fed. 621.

Bankruptcy court may not administer.—Exempt property never becomes assets in the bankruptcy court for administration. Beyond setting it aside the trustee has no concern with it. *In re Edwards* (D. C., Ala.),

19 Am. B. R. 632, 156 Fed. 794; *In re Seaboldt* (D. C., N. Car.), 8 Am. B. R. 57, 113 Fed. 766; *In re Wells* (D. C., Mo.), 8 Am. B. R. 75, 105 Fed. 762; *In re Seydel* (D. C., Iowa), 9 Am. B. R. 255, 118 Fed. 208; *In re Hill* (D. C., Ga.), 2 Am. B. R. 798, 96 Fed. 185; *Sharp v. Woolslare* (Sup. Ct., Pa.), 25 Pa. Super. Ct. 251, 21 Am. B. R. 88; *In re Culwell* (D. C., Mon.), 21 Am. B. R. 614, 165 Fed. 828; *In re MacKissic* (D. C., Pa.), 22 Am. B. R. 817, 171 Fed. 259.

Control ceases on setting apart exempt property.—In the case of *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061, the court said: "The fact that the Act of 1898 confers upon the court of bankruptcy authority to control exempt property, in order to set aside and thus exclude it from the assets of the bankrupt estate to be administered, offers no ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act in unambiguous language declares shall not pass from the bankrupt or become part of the bankrupt assets. The two provisions of the statute must be construed together and both be given effect. Moreover, the want of power in the court of bankruptcy to administer exempt property, is shown by the context of the act, since throughout its text exempt property is contrasted with property not exempt, the latter alone constituting the assets of the bankrupt estate subject to administration."

The bankruptcy court may exercise jurisdiction over exempt property only to the extent necessary to see that the trustee sets it aside and to dispose of such questions as may arise incident to that process. *In re Jackson* (D. C., Pa.), 8 Am. B. R. 594, 116 Fed. 46. The language in section 6, together with that used in 70-a, leaves no room to doubt that exempt property which has been set apart to the bankrupt is not subject to administration by the trustee or by a court of bankruptcy. *Woodruff v. Cheeves* (C. C. A., 5th Cir.), 5 Am. B. R. 296, 105 Fed. 601; *In re Remmerde* (D. C., Iowa), 30 Am. B. R. 701, 206 Fed. 826.

Jurisdiction of bankruptcy court over exempt property.—The action of the trustee in bankruptcy in setting apart to the bankrupt property exempt under the State law may be excepted to and the propriety of his

and undivided from other property of the bankrupt estate, the bankruptcy court retains jurisdiction of the property until separation is made.²⁷ A court of bankruptcy has no jurisdiction to protect or enforce against exempt property, which has been set apart to the bankrupt liens or other rights of creditors pertaining to such property.²⁸ It cannot enforce even an admitted lien on exempt property,²⁹ or defend such property from adverse claims that may or may not be extinguished by the bankruptcy proceedings.³⁰ Until the bankrupt has established what, if any, of the property belongs to him as exempt, freed from the claim of his trustee in bankruptcy, he is in no position to maintain trover in the State court for the conversion of such property.³¹

(3) EXEMPT PROPERTY NO PART OF BANKRUPT ESTATE.—The cases already cited lead to the conclusion that property set apart to a bankrupt under his claim to exemption forms no part of his estate in bankruptcy.³² Having set

action, either as to whether the exemption was lawful or whether too little of the property of the bankrupt has been set apart is open to final determination by the bankruptcy court; but after the property is set apart as exempt neither the trustee nor the bankruptcy court has any further authority over it. *Matter of Cheatham* (D. C., Ky.), 31 Am. B. R. 520, 210 Fed. 370.

Title to exempt property.—Exempt property does not constitute any part of the estate in bankruptcy. Exemptions are created by the State law, and the function of the bankruptcy court is to sever the property found to be an exemption from the estate of the bankrupt, the title remaining in the bankrupt. *Matter of Elkin* (D. C., N. J.), 34 Am. B. R. 134, 218 Fed. 971.

27. *Bank of Nez Perce v. Pindel* (C. C. A., 9th Cir.), 28 Am. B. R. 69, 193 Fed. 917.

28. *Bogart v. Cowboy State Bank & Trust Co.* (Tex. Civ. App.), 37 Am. B. R. 287, 182 S. W. 678; *Woodruff v. Cheeves* (C. C. A., 5th Cir.), 5 Am. B. R. 296, 105 Fed. 601; *Matter of Anderson* (D. C., Ga.), 35 Am. B. R. 487, 224 Fed. 790; *Hughes v. Sebastian County Bank* (Ark. Sup. Ct.), 39 Am. B. R. 886, 195 S. W. 364; *Matter of Dittmar* (C. C. A., 3d Cir.), 41 Am. B. R. 600, 249 Fed. 606.

Enforcement of liens.—The better opinion is that the bankruptcy court has no jurisdiction either to enforce a lien upon exempt property, nor to determine the rights of creditors asserting a waiver against such property; *In re Hatch* (D. C., Ia.), 4 Am. B. R. 349, 102 Fed. 280; *In re Grimes* (D. C., N. C.), 2 Am. B. R. 730, 96 Fed. 529, holding that when the exempt property has passed out of the possession and control of the bankruptcy court, such court has no longer any jurisdiction to defend the property from adverse claims or liens that may not have been extinguished by the bankruptcy proceedings, nor can it entertain a proceeding to enforce a lien upon such property; *In re Camp* (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 745.

Whether any creditor has, under certain conditions, a superior right in or to the exempt property of a bankrupt is a question to be litigated in the State courts and not in the bankruptcy courts. *Matter of Brown* (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

Sale of a homestead, which has been set aside as exempt, cannot be ordered by a bankruptcy court. Exempt property constitutes no part of the bankrupt's assets. *Matter of Yungbluth* (C. C. A., 9th Cir.), 34 Am. B. R. 299, 220 Fed. 110.

29. *In re Hartsell* (D. C., Ala.), 15 Am. B. R. 177, 140 Fed. 30; *In re Castleberry* (D. C. Ga.), 16 Am. B. R. 159, 143 Fed. 1,018; *First National Bank of Portal v. Lee* (N. Dak. Sup. Ct.), 25 N. Dak. 197, 34 Am. B. R. 555, 141 N. W. 716, holding that an attachment lien against exempt property is not affected by bankruptcy.

30. *Jeffries v. Bartlett*, 20 Fed. 496; *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061.

31. *Lun v. Henry* (Hawaii Sup. Ct.), 35 Am. B. R. 795, 22 Haw. 160.

32. *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061; *In re Brumbaugh* (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971; *In re Le Vay* (D. C., Pa.), 11 Am. B. R. 114, 125 Fed. 990; *Jewett v. Huffman*, 14 N. Dak. 110, 13 Am. B. R. 738, 103 N. W. 408; *In re Edwards* (D. C., Ala.), 19 Am. B. R. 632, 156 Fed. 794; *Matter of Snyder* (D. C., Pa.), 32 Am. B. R. 500, 210 Fed. 989; *First National Bank v. Orten* (Okla. Sup. Ct.), 43 Okla. 325, 28 Am. B. R. 108, 142 Pac. 1006. See *Am. Bankr. Dig.* § 950.

In re Yager (D. C., Pa.), 25 Am. B. R. 51, 182 Fed. 951, the court holds that property set apart to a bankrupt under his claim to exemptions, forms no part of the estate, and the referee had no right to diminish it by allowing therefrom among other things, his own commissions and expenses, the trustee's commissions and counsel fees of the attorneys, both for the bankrupt and the trustee.

A homestead is not an asset of a bankrupt estate, and is beyond the reach of creditors and likewise of the trustee who represents them. A voluntary conveyance of a homestead is not fraudulent as to creditors, who cannot take the homestead and have no concern about what the grantor receives. *Seig v. Greene* (C. C. A., 8th Cir.), 35 Am. B. R. 150, 225 Fed. 955.

it aside for his use any creditor desiring to subject the property to the payment of a debt must pursue his remedy in the State court.³³ A decree of the Federal court setting aside to a bankrupt and his wife certain land as a homestead is not binding upon a creditor who was not a party to the bankruptcy proceeding.³⁴ The trustee has no title to the exempt property, but only a qualified right to possession.³⁵ The title to such property is in the bankrupt,³⁶ and descends to his heirs or legal representatives upon his death.³⁷ For instance, a policy of life insurance for the benefit of the wife of the insured, which is protected from the creditors of her husband by a State

33. *Newberry Shoe Co. v. Collier* (Sup. Ct. Va.), 111 Va. 288, 25 Am. B. R. 130, 68 S. E. 974; *Matter of Ballard* (D. C., Tex.), 41 Am. B. R. 661; *In re Bass*, Fed. Cas. 1,091, in which Judge Bradley said: "In other words it is made as clear as anything can be, that such exempted property constitutes no part of the assets in bankruptcy. The exemption is created by the state law and the assignee acquires no title to the exempt property. If the creditor has a claim against it, he must prosecute that claim in the court which has jurisdiction over the property which the bankrupt court has not." See *In re Remmerde* (D. C., Iowa), 30 Am. B. R. 701, 206 Fed. 826; *Matter of Elkin* (D. C., N. J.), 34 Am. B. R. 134, 218 Fed. 971.

Enforcement of chattel mortgage against exempt property.—Where a debtor within four months of bankruptcy executed a chattel mortgage on a stock of merchandise which was declared to be an unlawful preference and an act of bankruptcy and the property placed in the possession of the trustee but the bankrupt allowed under the State law to select \$300 worth of the merchandise as an exemption, the property selected remained unaffected by the bankruptcy proceeding and consequently subject to the mortgage. *Bank of Mendon v. Mell* (Kan. City, Ct. of App. Mo.), 185 Mo. App. 510, 33 Am. B. R. 777, 172 S. W. 484.

34. *Bogart v. Cowboy State Bank & Trust Co.* (Tex. Civ. App.), 37 Am. B. R. 387, 182 S. W. 678.

35. See § 70-a; *In re Hill* (D. C., Ga.), 2 Am. B. R. 798, 96 Fed. 185; *In re Durham* (D. C., Ark.), 4 Am. B. R. 760, 104 Fed. 231; *In re Wells* (D. C., Ark.), 5 Am. B. R. 308, 105 Fed. 762; *In re Mayer* (C. C. A., 7th Cir.), 6 Am. B. R. 117, 108 Fed. 699; *In re Seabolt* (D. C., N. C.), 8 Am. B. R. 57, 113 Fed. 768; *In re Nye* (C. C. A., 8th Cir.), 13 Am. B. R. 142, 133 Fed. 33; *Lockwood v. Exchange Bank*, 100 U. S. 204, 10 Am. B. R. 107, 47 L. Ed. 1061; *In re Edwards* (D. C., Ala.), 19 Am. B. R. 632, 156 Fed. 794; *Pincus v. Meinhard & Bro.* (Ga. Sup. Ct.), 139 Ga. 365, 32 Am. B. R. 123, 77 S. E. 82; *Matter of French* (D. C., N. Y.), 37 Am. B. R. 280, 231 Fed. 255; *Matter of Auge* (D. C., Mont.), 39 Am. B. R. 39, 238 Fed. 621; *Hughes v. Sebastian County Bank* (Ark. Sup. Ct.), 39 Am. B. R. 866, 195 S. W. 364.

36. *Schlitz v. Schatz*, Fed. Cas. 12,459, 2 Biss. 248; *In re Hester*, Fed. Cas. 6,427, 5 N. B. R. 285; *In re Hunt*, Fed. Cas. 6,883, 5 N. B. R. 493; *Bush v. Lester*, 55 Ga. 579, 15 N. B. R. 36; *Simpson v. Houston*, 97 N. C. 344; *Wilkinson v. Waite*, 44 Vt. 508;

Bank of Nes Perce v. Pindel (C. C. A., 9th Cir.), 28 Am. B. R. 69, 193 Fed. 917.

The title to property of the bankrupt, which is generally exempted by the law of the State of domicile of the bankrupt, remains in the bankrupt and does not pass to the trustee. *Ingram v. Wilson* (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; *In re Nye* (C. C. A., 8th Cir.), 13 Am. B. R. 142, 133 Fed. 33; *In re Orear* (C. C. A., 8th Cir.), 26 Am. B. R. 521, 189 Fed. 888; *The Gregory Co. v. Bristol* (C. C. A., 8th Cir.), 26 Am. B. R. 938, 191 Fed. 31; *Pincus v. Meinhard & Bro.* (Ga. Sup. Ct.), 139 Ga. 365, 32 Am. B. R. 123, 77 S. E. 82.

Right to alienate before property set apart.—A bankrupt may alienate the property set apart by the bankruptcy court before such time as he applies for and obtains a homestead or exemption under and by virtue of the constitution and laws of Georgia. *Pincus v. Meinhard & Bro.* (Ga. Sup. Ct.), 139 Ga. 365, 32 Am. B. R. 123, 77 S. E. 82.

Homestead, transfer by bankrupt.—A bankrupt's homestead exemption when set apart by the trustee is inchoate and not fully fixed in him so that he can transfer title, until approved by the referee, or until at least twenty days have elapsed without any objections being filed to the allowance. A bankrupt, to whom a homestead exemption has been set apart, will not be permitted to immediately, before the approval of the referee, transfer the amount received to one of several creditors to whom he had given notes with a waiver of homestead attached. *Matter of Anderson* (D. C., Ga.), 35 Am. B. R. 487, 224 Fed. 790.

Right of bankrupt to assign exemptions prior to expiration of time to file exceptions.

—As soon as property is set aside to a bankrupt he has an assignable interest therein and he may assign the property in good faith, for application to pre-existing debts, although the assignment is made before the expiration of the twenty days allowed, under General Order No. 17, within which to file exceptions. *Taylor v. Williams* (Ga. Sup. Ct.), 139 Ga. 581, 32 Am. B. R. 131, 77 S. E. 386.

37. *In re Hester*, Fed. Cas. 6,427, 5 N. B. R. 285; *In re Lambert*, Fed. Cas. 8,026, 2 N. B. R. 426; *Rix v. Bank*, Fed. Cas. 11,862, 2 Dill. 367; *Bullymore v. Cooper*, 46 N. Y. 936; *Fehley v. Barr*, 66 Penn. 196.

statute, never passes to the trustee in bankruptcy of the husband.³³ The fact that property was subject to certain claims of creditors, does not make such property assets, to pass to the trustee and to be administered by him with the other assets of the estate.³³

(4) DETERMINATION AS TO WAIVER OF CLAIM.—The jurisdiction of the bankruptcy court to determine a claim that the bankrupt has waived his exemption has been declared in a number of cases, notwithstanding the principles hereinbefore annunciated.⁴⁰ As the law now stands, however, the court of bankruptcy has no jurisdiction, save by consent, to determine the claim of a creditor under a waiver contained in a note or other instrument; such creditor must pursue his remedy in the State courts.⁴¹ This principle may not be applied to its full extent in a case where the question of the validity or priority of a lien on both exempt and nonexempt property is involved.⁴²

33. *In re Orear* (C. C. A., 8th Cir.), 26 Am. B. R. 521, 189 Fed. 888, in which the court says: "The trustee is seeking to obtain property, the title to which he never took. This is not an ordinary claim of exemption. The trustee, it is true, is seeking to obtain exempt property, but the trouble with his claim is that he has no title to the property he seeks to hold. That, of course, ends his contention. The property is not only exempt, but never passed to him and is not his. The statute, while in the nature of the exemption law, is more than that; it declares that this property shall inure to the separate benefit of the wife. Ordinary exemption laws leave the full right and title to the property in the debtor."

39. *In re Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 990, holding that the title to homestead property did not pass to the trustee because it was mortgaged to certain creditors together with non-exempt property belonging to the bankrupt, which mortgage constituted an unlawful preference; a mortgage constituting an unlawful preference, covering both exempt and nonexempt property, is only voidable as to nonexempt property and remains valid as to exempt property; *In re Wells* (D. C., Kan.), 5 Am. B. R. 308, 105 Fed. 762; *In re Rammerde* (D. C., Iowa), 30 Am. B. R. 701, 206 Fed. 826; *Bank of Mendon v. Mell* (Mo., Kan. City Ct. of App.), 185 Mo. App. 510, 33 Am. B. R. 777, 172 S. W. 484; *Matter of Auge* (D. C., Mont.), 39 Am. B. R. 30, 238 Fed. 621.

40. *In re Boyd* (D. C., Ia.), 10 Am. B. R. 337, 120 Fed. 999; *In re Campbell* (D. C., Va.), 10 Am. B. R. 723, 124 Fed. 417; *In re Gordon* (D. C., Vt.), 8 Am. B. R. 255, 115 Fed. 445; *In re Garden* (D. C., Ala.), 1 Am. B. R. 582, 93 Fed. 423; *In re Woodruff* (D. C., Ga.), 2 Am. B. R. 678, 96 Fed. 317; *In re Sisler* (D. C., Va.), 2 Am. B. R. 760, 96 Fed. 402.

41. *Woodruff v. Cheeves* (C. C. A., 5th Cir.), 5 Am. B. R. 296, 105 Fed. 601, *rev'd*. *In re Woodruff* (D. C., Ga.), 2 Am. B. R. 678, 96 Fed. 317; *In re Black* (D. C., Pa.), 4 Am. B. R. 776, 104 Fed. 28; *Sellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 94 Fed. 801; *In re Ogilvie* (Ref., Ga.), 5 Am. B. R. 374; *In re Little* (D. C., Iowa), 6 Am.

B. R. 681, 110 Fed. 621; *In re Swords* (D. C., Ga.), 7 Am. B. R. 436, 112 Fed. 661; *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061; *Ingram v. Wilson* (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; *Bell v. Dawson* (Ga. Sup.), 120 Ga. 623, 12 Am. B. R. 159, 48 S. E. 150; *Brandt v. Hofmayer Dry Goods Co.* (Ga. Sup. Ct.), 39 Am. B. R. 382, 92 S. E. 54. A valuable contribution to the discussion of this question will be found in *re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906.

Jurisdiction in respect to waive-notes.—A Federal trustee in bankruptcy is not entitled to the bankrupt's exemption against a creditor who has attached the same by an attachment execution issued and served within four months prior to bankruptcy on a judgment waiving exemption. *Sharp v. Woolshire*, 25 Pa. Super. Ct. 251, 12 Am. B. R. 396. Money allowed a bankrupt "in lieu of his exemption" may be attached in the hands of the trustee on a judgment rendered against a bankrupt on a note wherein the bankrupt waived his exemption. *Zumpfe v. Schultz*, 35 Pa. Super. Ct. 106, 20 Am. B. R. 916. In the case of *In re Edwards* (D. C., Ala.), 19 Am. B. R. 632, 156 Fed. 794, it was held that a bankruptcy court had no jurisdiction to compel the return of money received by a judgment creditor as the proceeds of an execution sale of exempt property under a judgment on a promissory note secured prior to adjudication in which note the bankrupt waived all claim of exemption.

A judgment creditor of a bankrupt, who holds a waiver of exemption, may have the sheriff levy upon and sell the exempt property of the bankrupt at any time before his final discharge. *First Nat. Bank v. Bartlett* (Sup. Ct., Pa.), 35 Pa. Super. Ct. 593, 21 Am. B. R. 88.

The amendment of 1910 to section 47a (3) of the bankruptcy act does not affect the provision of section 6, in which the intention of Congress is plainly expressed, that the bankruptcy act shall not affect the allowance to bankrupts of the exemptions which are prescribed by State laws. *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

42. *In re Soper* (D. C., Neb.), 22 Am. B. R. 868, 173 Fed. 924.

(5) JURISDICTION IN RESPECT TO EXEMPT PROPERTY AND CLAIMS THEREON.

— When the exemption has been set apart by the trustee, and he has reported it to the court for its approval, and when approved and the bankrupt's right to it has been finally determined, the property embraced in the exemption ceases to be a part of the assets to be administered by the court in connection with the bankrupt's estate, and the bankrupt court would have no jurisdiction to entertain a plenary suit in equity by a creditor of the bankrupt to reach and subject such exempt property to his claim.⁴³ So where property claimed to be exempt is attached in a State court, such property may be held under the attachment until it is determined in bankruptcy proceedings what part of the attached property has passed to the trustee, freed from the claim of exemption,⁴⁴ and the court may not restrain the suit in which the property was attached; nor determine whether such property was within a waiver contract which is the subject of the suit.⁴⁵ A voluntary bankrupt cannot abandon his bankruptcy proceeding after receiving all of his property as an exemption, and prevent his creditor from procuring that property, where he does not have the exemption allowed in the bankruptcy court set apart as a homestead in the State court.⁴⁶ Where after a court of bankruptcy has set apart to a bankrupt his exemptions, including a note due the bankrupt, the trustee, without authority, "by mistake or oversight," as he claims, proceeds to collect it, the State court has jurisdiction of a garnishment proceeding by a judgment creditor of the bankrupt against the trustee.⁴⁷ Prior to *Bardes v. Bank*,⁴⁸ it was thought in some districts that the still more general power conferred on courts of bankruptcy to "determine controversies" gave the Federal courts jurisdiction to pass on the validity of liens on the exempt property; that case, however, clearly negated such a view.⁴⁹ And it has not been superseded by the amendment of § 23-b,⁵⁰ which even now has only to do with suits to recover property.⁵¹

f. Trustees; rights and duties.— The rights and duties of trustees in respect to exemptions of bankrupts are indicated in § 47-a (11) as supplemented by General Order XVII.⁵² In brief, if the bankrupt has duly asserted his claim to exemptions,⁵³ the trustee must estimate and determine the value of the

43. *In re Lucius* (D. C., Ala.), 10 Am. B. R. 653, 124 Fed. 455; *Woodruff v. Cheeves* (C. C. A., 5th Cir.), 5 Am. B. R. 296, 105 Fed. 601; *In re Seydel* (D. C., Iowa), 9 Am. B. R. 255, 118 Fed. 207; *Vitzthum v. Large* (D. C., Iowa), 20 Am. B. R. 666, 162 Fed. 685; *Peyton v. Farmers Nat. Bank* (C. C. A., 5th Cir.), 44 Am. B. R. 295, 261 Fed. 326.

Waiver of objection to jurisdiction.— *Mat-ter of Drag* (D. C., Mich.), 43 Am. B. R. 59, 254 Fed. 474.

44. *Jewett v. Huffman* (Sup. Ct., N. Dak.), 14 N. Dak. 110, 13 Am. B. R. 738, 103 N. W. 498.

45. *Roden Grocery Co. v. Bacon* (C. C. A., 5th Cir.), 13 Am. B. R. 251, 133 Fed. 515.

46. Liability to execution of property exempted in bankruptcy but not set aside by State court.— A bankrupt on his own petition was adjudicated a bankrupt, and had all of his property, consisting of a stock of merchandise, exempted in bankruptcy. The property was turned over to the bankrupt, who did not have it set apart as a homestead to him and his family in the State court. More than three years after the adjudication in bankruptcy, and after the exemption of the property in the bankruptcy court, a creditor whose claim was listed in the bankruptcy application brought suit on his claim. There was no plea or suggestion of bankruptcy.

The suit eventuated in a judgment, and an execution based thereon was levied on the property exempted in the bankruptcy court, and a claim was interposed by the bankrupt as head of the family. No discharge has been granted to the bankrupt. *Held*, that the property is subject to the *fi. fa.* *Baltimore Bargain House v. Busby* (Ga. Sup. Ct.), 143 Ga. 734, 35 Am. B. R. 119, 85 S. E. 875.

47. *Barker-Bond Lumber Co. v. Whaley* (Va. Sup. Ct.), 117 Va. 642, 35 Am. B. R. 331, 86 S. E. 160.

48. 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175. For an exceptional case, see *In re Gordon* (D. C., Vt.), 8 Am. B. R. 255, 115 Fed. 445.

49. *In re Hartsell* (D. C., Ala.), 15 Am. B. R. 177, 140 Fed. 30.

50. See discussion under Section Twenty-three of this work.

51. *In re Brumbaugh* (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971.

52. See "Practice" under this section, *post*; and also under § 47 of this work. See also "Supplementary Forms," *post*.

53. § 7-a (8), Form 1, Schedule B (5).

exemptions claimed,⁵⁴ and make an itemized report setting them off, within twenty days,⁵⁵ whereupon any creditor⁵⁶ may except, and the exceptions will be argued before the referee. It has been held that the trustee may set apart the bankrupt's exemption as a ministerial act and then except to the allowance of the claim under General Order XVII.⁵⁷ Since he has no title, he may not retain exempt property and deprive the bankrupt of his exemption on the ground that assets have been withheld.⁵⁸ The right of exemption will depend upon conditions existing at the time the petition in bankruptcy is filed.⁵⁹ The trustee has no title to the exempt property of the bankrupt, but it remains in the bankrupt. Where property has been set off to the bankrupt as a homestead it cannot be sold by the bankruptcy court, nor has a trustee any equity therein that can be made the subject of sale.⁶⁰ Appraisers cannot therefore fix the value of the exemptions claimed;⁶¹ their services will, however, often be availed of by the trustee. Indeed, this practice is sometimes sanctioned by district rules. Until the exemptions are fixed, the trustee has the right to possession of the property claimed, and the bankrupt will not be allowed compensation for caring for it.⁶² The trustee may not deduct therefrom the costs and expenses incurred by the bankrupt prior to bankruptcy, on account of the bankruptcy proceedings.⁶³ As soon as the claim is determined in favor of the bankrupt, the trustee should at once surrender possession, for an exemption is a matter of right and the trustee may not withhold it from him.⁶⁴ The duties imposed upon the trustee in respect to the allotment of exemption may not be neglected, or their discharge postponed until an issue of fraud in regard to the disposition of the property is determined.⁶⁵ A trustee may, however, retain possession of the fund which has been allowed to the bankrupt as an exemption for a reasonable time, so as to give opportunity to creditors claiming liens against the fund to take steps to enforce such liens.⁶⁶ The mere act of the

54. *In re Friedrich* (C. C. A., 7th Cir.), 3 Am. B. R. 801, 100 Fed. 284; *In re Finklestein* (D. C., Pa.), 27 Am. B. R. 229, 192 Fed. 738.

55. General Order XVII, Form 47. See *In re Manning* (D. C., Pa.), 7 Am. B. R. 571, 112 Fed. 948; *In re Reese* (D. C., Ala.), 8 Am. B. R. 411, 115 Fed. 993.

56. *In re White* (D. C., Vt.), 4 Am. B. R. 613, 103 Fed. 774.

57. The trustee is a creditor, within the meaning of the provision to General Order 17, that "any creditor may except to the determination of the trustee" in allowing the claim of exemption on the ground of the bankrupt's fraud. *In re Rice* (D. C., Pa.), 21 Am. B. R. 202, 164 Fed. 589.

58. *Matter of Elkin* (D. C., N. J.), 34 Am. B. R. 134, 218 Fed. 971.

59. *Matter of Crum* (D. C., Ohio), 34 Am. B. R. 586, 221 Fed. 729.

60. *Sullivan v. Mussey* (C. C. A., 5th Cir.), 25 Am. B. R. 781, 184 Fed. 60, affg. 25 Am. B. R. 91, 179 Fed. 1,007.

61. *In re Grimes* (D. C., N. Car.), 2 Am. B. R. 735, 96 Fed. 529. *Contra*: *In re McCutchen* (D. C., S. Car.), 4 Am. B. R. 81, 100 Fed. 779.

62. *In re Groves* (Ref., Ohio), 6 Am. B. R. 728.

63. *Matter of Humphreys* (D. C., N. Car.), 34 Am. B. R. 655, 221 Fed. 997.

64. *In re Brown* (D. C., Pa.), 4 Am. B. R. 46, 100 Fed. 441.

65. *Matter of Harrell* (D. C., N. Car.), 34 Am. B. R. 809, 222 Fed. 160.

To set apart exempt property.—One of the first concerns of the trustee should always be promptly to set aside to the bankrupt any exempt property. *Matter of Brown* (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533. It is the duty of the trustee in bankruptcy to set apart the bankrupt's exemptions from his property as soon as practicable, but it is improper where the bankrupt's goods have been sold for about twenty-five per cent. of their invoice to pay \$500 in cash from this amount on account of exemptions, thus absorbing about \$2,000 of the invoice value of the property. *Matter of Shrimer* (D. C., N. Car.), 36 Am. B. R. 404, 228 Fed. 794.

66. Retention of fund.—*Matter of Barnett* (D. C., Ga.), 32 Am. B. R. 585, 214 Fed. 263.

In the case of *In re Maynard & Co.* (D. C., Ga.), 25 Am. B. R. 732, the court said: "The exemption being in cash, and it appearing that there will be creditors with claims which they will desire an opportunity to enforce against the fund, notwithstanding its being set apart as an exemption under the constitution and laws of Georgia, the fund will be held by the trustee for a reasonable time, to give opportunity to creditors

trustee in setting apart exempt property has not been given the force of an adjudication. He is required to report the items of exempt property, with the estimated values thereof, to the court. This report may be contested, and, as between the creditor and the bankrupt, does not become final and conclusive until the court shall have acted thereon.⁶⁷ The requirements of the State law in respect to claiming the exemption must be complied with, or the property will pass to the trustee freed from the exemption.⁶⁸ But where the bankrupt made claim to a share of the proceeds of the sale of a homestead prior to the approval by the State court, it was held that he had not waived his rights to the exemption.⁶⁹ Where a bankrupt has clearly indicated his intention not to waive his exemption, and has also specified the particular class of property owned by him, from which he claims his exemption, it then becomes the duty of the trustee to select and sever the exemption from the mass of property, belonging to the estate, of the character and the class indicated.⁷⁰ Where a trustee in good faith sells all the bankrupt's property, including the articles which a bankrupt has claimed as exempt, upon the assumption that the property would bring a better price when sold as a whole than when sold in parcels, he is justified in turning over to the bankrupt or his assignee the full amount allowed as an exemption by the State law.⁷¹

III. RIGHT OF BANKRUPT TO EXEMPTIONS.

a. Domicile; time and place.—Domicile as used in this section means what it would mean were the question one affecting jurisdiction to adjudge.⁷² Thus, the law of the domicile may be different from the law of the forum; as, where the place of business is in one State and the residence in another. Domicile usually connotes personal presence in a fixed and permanent abode.⁷³ A person must have a legal domicile,⁷⁴ and the old one always remains until a new one is acquired.⁷⁵ Where a man leaves his family to avoid arrest his

having such claims, to take steps to enforce the same. This the court did in the case of *In re Castlebury* (D. C., Ga.), 16 Am. B. R. 430, 143 Fed. 1,018, and I think it is in line with the views of the Supreme Court in the case of *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061."

67. *Seedig v. First Nat'l Bank* (Tex. Cir. App.), 33 Am. B. R. 99, 168 S. W. 445, holding that where in an action by a former bankrupt to recover damages for an alleged wrongful levy on property claimed as exempt, the plaintiff alleges that his duly appointed trustee in bankruptcy had set aside the property described in his petition as being exempt and not subject to be administered as part of the bankrupt estate, such allegation, standing alone, does not charge that the fact that the property is exempt is *res adjudicata*, since the report of a trustee in bankruptcy setting aside exemptions, in compliance with section 47 (11) of the bankruptcy act, does not become final and conclusive as between creditors and the bankrupt until acted upon by the court.

68. *In re Stephens* (D. C., Ga.), 8 Am. B. R. 53, 114 Fed. 192; *In re Boorstin* (D. C., Ga.), 8 Am. B. R. 89, 114 Fed. 696; *In re West* (D. C., Ga.), 8 Am. B. R. 564,

116 Fed. 767; *In re Wunder* (D. C., Pa.), 13 Am. B. R. 701, 133 Fed. 821.

Failure to comply.—Where a bankrupt makes a claim for exemptions in his schedules, but in doing so does not comply with the requirements of the State law in regard to the manner of making such claim and fails to designate the specific articles claimed as exempt, his claim will not be allowed. *In re Matthews* (Ref., Okl.), 20 Am. B. R. 369.

69. *In re Eash* (D. C., Iowa), 19 Am. B. R. 738, 157 Fed. 996.

70. *In re Andrews & Simonds* (D. C., Mich.), 27 Am. B. R. 116, 193 Fed. 776.

71. *In re Hutchinson* (D. C., Mich.), 28 Am. B. R. 405, 197 Fed. 1021.

72. Bankr. Act, § 2 (1).

73. *Mitchell v. U. S.*, 21 Wall. 352-353, 22 L. Ed. 584; *Morris v. Gilmer*, 129 U. S. 328, 32 L. Ed. 690; *In re Dinglehoef Bros.* (D. C., N. Car.), 6 Am. B. R. 242, 109 Fed. 866.

74. *Deamare v. U. S.*, 93 U. S. 610, 23 L. Ed. 959.

75. *Mitchell v. U. S.*, 21 Wall. 353, 22 L. Ed. 584; *Morris v. Gilmer*, 129 U. S. 328, 32 L. Ed. 690; *In re Schulz* (D. C., Or.), 14 Am. B. R. 317, 135 Fed. 228.

domicile does not change.⁷⁶ The domicile of a corporation is in the State of its organization, and cannot be changed.⁷⁷ The burden of proving a change of domicile by the bankrupt lies unquestionably upon the party who asserts the change.⁷⁸ The time of residence, both as to existing State statutes and the property claimed, is the time when, under the statute, he is required to assert his claim of exemption.⁷⁹ His right to such exemptions as are permitted by State laws, is referable to the condition of things as they existed at the time of the filing of the petition.⁸⁰

b. Assertion of claim.—(1) **NECESSITY OF ASSERTION.**—While an exemption is a matter of right,⁸¹ it, being personal to the bankrupt, must be asserted or he will be deemed to have waived it.⁸² What he does not claim for himself and his family, he leaves in the general fund for distribution.⁸³

(2) **COMPLIANCE WITH STATE STATUTE.**—Whether an exemption is a mere personal privilege which must be claimed by the bankrupt, or is a property interest accruing from the statute itself, will determine the necessity of claiming the exemption. If the exemption is of the former class it must be asserted with the formality required by the State statute; if it is of the latter class, the statute executes itself.⁸⁴ This only pertains to the necessity of complying

76. *In re Filer* (D. C., N. Y.), 5 Am. B. R. 332, 108 Fed. 209.

77. *Bank of Augusta v. Earl*, 13 Pet. 585, 10 L. Ed. 274; *Lafayette Ins. Co. v. French*, 18 How. 484, 15 L. Ed. 451; *Shaw v. Quincy Mining Co.*, 145 U. S. 450, 36 L. Ed. 758.

78. *In re Grimes* (D. C., N. C.), 2 Am. B. R. 160, 94 Fed. 800.

Burden of proving change of residence.—In the case of *In re Bassett* (D. C., Wash.), 26 Am. B. R. 800, 189 Fed. 410, the court said: "Under this testimony I am of the opinion that the referee properly found that the bankrupt was a resident of this State. He was unquestionably a resident of the State for a considerable period of time preceding the filing of the petition in bankruptcy, and the burden of proving a change of residence is upon those asserting the change."

79. See *Bankr. Act*, § 7 (8); *In re Groves* (Ref., Ohio), 6 Am. B. R. 728; *In re Miller* (Ref., Mo.), 1 Am. B. R. 64. But see *Latter of Fletcher* (Ref., Ohio), 16 Am. B. R. 491; *In re Fisher* (D. C., Va.), 15 Am. B. R. 652, 142 Fed. 205; *In re O'Hara* (D. C., Pa.), 20 Am. P. R. 714, 162 Fed. 325, holding that a bankrupt's right to exemption must be determined as of the date when claimed; if he is not then a resident of the State his claim for exemption will be denied, even though he was a resident of the State, before and since; *In re Donahey* (D. C., Pa.), 23 Am. B. R. 796, 176 Fed. 458, holding that a bankrupt's claim of an exemption is to be determined as of the date when it is asserted, and his absence thereafter from the State as a fugitive from justice is immaterial.

80. *Mullinix v. Simon* (C. C. A., 8th Cir.) 28 Am. B. R. 1, 196 Fed. 775; *Matter of Crum* (D. C., Ohio), 34 Am. B. R. 586, 221 Fed. 729; *In re Bassett* (D. C., Wash.), 26

Am. B. R. 800, 189 Fed. 410. See *Am. Bankr. Dig.*, § 945.

81. *In re Brown* (D. C., Pa.), 4 Am. B. R. 46, 100 Fed. 441.

82. *In re Bolinger* (D. C., Pa.), 6 Am. B. R. 171, 108 Fed. 374.

Necessity to claim exemption.—In the case of *In re Baughman* (D. C., Pa.), 25 Am. B. R. 167, 183 Fed. 668, the court said: "It is said that the bankruptcy court has no jurisdiction over exempt property except to set it aside. No doubt, to a qualified extent, that is true, but it does not apply here. In order to get the benefit of the exemption, it must be claimed. And until it is, and specific property has been set off under it, the court has full authority to consider and dispose of what is involved. It may deny the bankrupt his exemption, where he has waived or forfeited it, or for any reason it cannot be rightly claimed. It is only after the bankrupt has been found, entitled to it and it has been set off to him, that the court loses its hold." Citing *In re Highfield* (D. C., Pa.), 21 Am. B. R. 92, 163 Fed. 924.

83. *In re Sloan* (D. C., Pa.), 14 Am. B. R. 435, 135 Fed. 873.

84. *Moran v. King*, 7 Am. B. R. 176, 111 Fed. 730; *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 299, 231 Fed. 255, citing text.

Filing claim in probate court under Alabama civil code.—Section 4168 of the Alabama civil code, requiring a claim of exemption to be filed in the probate court of the proper county, only applies where selection of the exemption is made essential by the bankrupt's ownership of property in excess of the amount allowed him as exempt. *Matter of Ziff* (D. C., Ala.), 35 Am. B. R. 83, 225 Fed. 323.

with the provisions of the State statute relative to asserting a claim of exemption.⁸⁵

(3) **TIME OF ASSERTION.**—He must assert his claim to exemptions in a court of bankruptcy before his discharge,⁸⁶ and he will not be entitled to such a claim in a State court after his discharge.⁸⁷ It has been held that he may claim his exemptions at any time before the sale of the property.⁸⁸ An extension of the time for filing a bankrupt's schedules extends his time to claim his exemption.⁸⁹

(4) **MANNER OF ASSERTION.**—If a voluntary bankrupt, he should assert it in the first instance in Schedule B (5) attached to his petition; if an involuntary bankrupt, in the same schedule when filed after his adjudication.⁹⁰ If the claim of the bankrupt as contained in his schedules, does not describe or designate any particular property, such claim is invalid.⁹¹ But under a State statute allowing a certain sum in lieu of homestead, a claim need not specify articles amounting to the sum allowed, but may ask for a deduction to that amount from a stock of merchandise or its equivalent in cash out of the proceeds of the estate.⁹² A claim for exemption is sufficient if made generally under the State exemption laws, and it is not necessary to refer precisely to a particular statute.^{92a} The manner in which the claim for exemption shall be made is a mere matter of procedure, and, as in other cases, amendments may be allowed to effect justice between the parties.⁹³

c. **Waiver of claim.**—(1) **IN GENERAL.**—The principle that a debtor may

⁸⁵ In the case of *In re Fisher* (D. C., Va.), 15 Am. B. R. 652, 142 Fed. 205, the court stated: "In a laudable effort to follow the supposed views of this court, the referee has, it appears, been misled by the opinion in *In re Garner* (D. C., Va.), 8 Am. B. R. 263, 115 Fed. 200. By that opinion, nothing more was intended than was expressed. The state law makes the execution and filing for record of a homestead deed, a condition precedent to the right of such exemption. In that case no such deed had been executed, and the only claim to homestead was that made in the bankruptcy schedules."

⁸⁶ *In re Kean*, Fed. Cas. 7,630, 2 Hughes, 322.

⁸⁷ *Steel v. Moody*, 53 Ala. 418; *Gayle v. Randall*, 71 Ala. 469; *Woolfolk v. Murray*, 44 Ga. 133; *Maxwell v. McCune*, 37 Tex. 515.

The proper time to claim an exemption is at the time the bankrupt's schedules are filed. In a voluntary case it should be a part of the schedules accompanying the application, and in an involuntary case it should be made at the time he filed his schedule. *Matter of Webb* (D. C., Ga.), 34 Am. B. R. 204, 219 Fed. 349.

⁸⁸ *Bartholomew v. West*, Fed. Cas. 1,071, 2 Dill. 290; *Toenes v. Moog*, 78 Ala. 558; *McClusky v. McNeely*, 8 Ill. 578; *Slaughter v. Detney*, 15 Ind. 49; *Shepherd v. Murrill*, 90 N. C. 208; *Weaver's Appeal*, 13 Pa. St. 307; *Yost v. Heffner*, 69 Pa. St. 68.

⁸⁹ *In re O'Hara* (D. C., Pa.), 20 Am. B. R. 714, 162 Fed. 325.

⁹⁰ See Bankr. Act, § 47 (11); *In re Friedrich* (C. C. A., 7th Cir.), 3 Am. B. R. 801,

100 Fed. 284; *In re Groves* (Ref., Ohio), 6 Am. B. R. 728; *In re Lucius* (D. C., Ala.), 10 Am. B. R. 653, 124 Fed. 455; *Matter of Webb* (D. C., Ga.), 34 Am. B. R. 204, 219 Fed. 349. Under the Virginia statute this is not enough. *In re Garner* (D. C., Va.), 8 Am. B. R. 263, 116 Fed. 200.

A bankrupt's schedules must contain his claim to exemptions, and the trustee must set them apart and report to the court. Whether a specific item of property shall go to creditors or be reserved by the bankrupt, as exempt, is not for him to constitute himself the judge; but it is his duty to disclose the transaction, that the bankruptcy court may determine the right. *Matter of Brincab* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811. See Am. Bankr. Dig., § 986.

When bankrupt need not itemize claim in schedules.—Where a bankrupt owns personal property of a value less than the amount to which he is entitled as an exemption, he need not file with his schedules an itemized list of the property claimed by him as exempt. This because he is entitled to all the property. *Matter of Ziff* (D. C., Ala.), 35 Am. B. R. 83, 225 Fed. 323.

⁹¹ *In re Baughman* (D. C., Pa.), 25 Am. B. R. 167, 183 Fed. 668; *In re Pfeiffer* (D. C., Pa.), 19 Am. B. R. 230, 155 Fed. 592.

⁹² *Smith v. Thompson* (C. C. A., 8th Cir.), 32 Am. B. R. 165, 218 Fed. 335.

^{92a} *Matter of Dittmar* (C. C. A., 3d Cir.), 41 Am. B. R. 690, 249 Fed. 608.

⁹³ *In re Maxson* (D. C., Ia.), 22 Am. B. R. 424, 170 Fed. 356; *Matter of Stitt* (C. C. A., 6th Cir.), 41 Am. B. R. 777, 232 Fed. 1. Claims may be amended if reasonably made; but it is too late if the bankrupt wait until after his discharge. *Matter of Webb* (D. C., Ga.), 34 Am. B. R. 204, 219 Fed. 349. See discussion post, subtitle, "Practice."

waive his right to exemptions is well settled,⁹⁴ and a waiver may arise either from the bankrupt's failure to claim exemptions,⁹⁵ or by a general⁹⁶ or specific surrender of them. If the latter, the usual method is by a waive-note. In such cases, the waiver is personal to the creditor thus favored, and, if not asserted by him, inures to the benefit of the bankrupt.⁹⁷ A waiver cannot inure to the benefit of a general creditor.⁹⁸ A bankrupt is not entitled to an exemption in the proceeds arising from the sale of property over the objection of a creditor, where more than four months before filing his petition in bankruptcy, he gave a note and mortgage to secure the creditor's claim, containing an express waiver of his homestead exemptions.⁹⁹ But a bankrupt may assert his right against a seeming but not actual waiver prior to the bankruptcy.¹⁰⁰ If a note containing a waiver is void for usury or other cause, the bankrupt's exemption is not affected, and a judgment for the amount of such note may not be enforced against exempt property.¹⁰¹ A waiver of homestead rights in favor of all creditors cannot be worked out through a waiver made to one creditor only, nor can the latter form of waiver entitle all creditors to a right to marshal securities or funds.¹⁰²

94. *Spitley v. Frost*, 15 Fed. 304, *revd.* on other grounds 121 U. S. 552; *People v. Palmer*, 46 Ill. 398; *Green v. Blunt*, 59 Iowa 79, 12 N. W. 762; *Pond v. Kimball*, 101 Mass. 105; *Brackett v. Watkins*, 21 Wend. 68; *Louck's Appeal*, 24 Pa. St. 426; *Matter of Liby* (D. C., Pa.), 33 Am. B. R. 312, 218 Fed. 90. See Am. B. R. Dig. § 975.

95. *In re Nunn* (D. C., Ga.), 2 Am. B. R. 664; *In re Haskin* (D. C., Pa.), 6 Am. B. R. 485, 109 Fed. 789; *In re Manning* (D. C., Pa.), 7 Am. B. R. 571, 112 Fed. 949; *In re Prince & Walter* (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546; *In re Wunder* (D. C., Pa.), 13 Am. B. R. 701, 133 Fed. 821; *In re Von Kerm* (D. C., Pa.), 14 Am. B. R. 403, 135 Fed. 447. In Georgia a head of a family cannot waive the statutory homestead exemption for the benefit of a creditor. *In re Reinhart* (D. C., Ga.), 12 Am. B. R. 78, 129 Fed. 510.

Where a bankrupt filed no exception to an order of the referee, as to his right of exemptions, he cannot be heard to object to any of its provisions on certificate of review upon exceptions of a creditor to the order. *In re Cohn* (D. C., N. Dak.), 22 Am. B. R. 761, 171 Fed. 568.

96. Compare *In re Mayer* (C. C. A., 7th Cir.), 6 Am. B. R. 117, 108 Fed. 599.

97. *In re Black* (D. C., Pa.), 4 Am. B. R. 776, 104 Fed. 28; *In re Nye* (C. C. A., 6th Cir.), 13 Am. B. R. 142, 133 Fed. 33, holding in the case of a waiver of homestead in a mortgage that the rights of other creditors are subordinate to both the mortgage lien and the payment of the bankrupt's exemption allowance; *In re Baughman* (D. C., Pa.), 25 Am. B. R. 167, 183 Fed. 668.

98. *In re Camp* (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 745; *In re Osborn* (D. C., N. Y.), 5 Am. B. R. 111, 104 Fed. 780; *In re Bolinger* (D. C., Pa.), 6 Am. B. R. 171, 108 Fed. 374. But see *contra*: *In re Garner* (D. C., Va.), 8 Am. B. R. 263, 115 Fed. 200.

99. *Matter of Hargraves* (D. C., Ga., Ref.),

19 Am. B. R. 238, distinguishing *In re Reinhart* (D. C., Ga.), 12 Am. B. R. 78, 129 Fed. 510; *Citizens' Bank v. Hargraves* (C. C. A. 5th Cir.), 21 Am. B. R. 323, 164 Fed. 613.

Waiver by chattel mortgage.—Since under section 1391 of the New York Code of Civil Procedure, an election is necessary in order to have the exemption applied where the property mentioned exceeds \$250 in value, a bankrupt waives his right of exemption as to all such property mentioned and described in chattel mortgages executed by him, and it is immaterial that one of the mortgages was executed more than four months before the filing of the petition in bankruptcy. *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255.

Waiver contained in financial statement.—Where a person on a request for a financial statement furnished the same, together with a waiver of homestead and exemptions, and partly on the faith of such waiver the creditor accepted an order for goods which he thereafter delivered, the waiver of homestead was held to be contemporaneous with the offer to buy and its acceptance and was a valid contract of waiver. *Pincus v. Meinhard & Bro.* (Ga. Sup. Ct.), 139 Ga. 365, 32 Am. B. R. 123, 77 S. E. 82.

100. *In re Osborn* (D. C., N. Y.), 5 Am. B. R. 111, 104 Fed. 780.

101. *Floyd v. Johnson* (Ga. Sup. Ct.), 142 Ga. 833, 34 Am. B. R. 431, 83 S. E. 943.

102. A waiver of exemption rights contained in a mortgage of real property is solely for the benefit of the mortgagee and for the security of his debt alone. Where a mortgagor waives his exemptions the mortgagee is not thereby confined, in case of bankruptcy of the mortgagor, to enforcing his security against the exemption only but may enforce his mortgage against the entire property. *Matter of Brown* (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

(2) **EFFECT OF WAIVER.**—If a bankrupt waives his claim to an exemption he thereby leaves the property and the proceeds thereof in the general fund for distribution among the general creditors.¹⁰³ An execution creditor whose judgment is based upon a waiver of exemption may not proceed by execution against the property of the bankrupt where the bankrupt has waived his exemption and the property has not been set off to him as exempt; the exemption having been waived the property passes to the trustee to be administered for the benefit of all the bankrupt's creditors.¹⁰⁴ But it has been held that a bankrupt who has, under a State statute authorizing it, transferred his claim of exemption as security for a debt and therein authorized the transferee to select the exempt property, may not defeat the transfer by an express waiver of exemption in his petition for adjudication in bankruptcy.¹⁰⁵

(3) **EFFECT OF WAIVE-NOTE.**—The fact that a bankrupt has given a waive-note does not affect his right to have his exempt property set apart.¹⁰⁶ The decisions are not uniform as to the remedy of a creditor holding a waive-note.¹⁰⁷ It has been held that the claim may not be asserted until the note is reduced to judgment;¹⁰⁸ also that such a creditor must look to the exempt property before asserting his claim against the general estate.¹⁰⁹

(4) **WITHHOLDING DISCHARGE.**—The bankrupt's discharge should be withheld until a creditor claiming under a waiver has had time to resort to remedies allowable in State courts.¹¹⁰ Exempt property, or the proceeds thereof, do not

103. *In re Sloan* (D. C., Pa.), 14 Am. B. R. 435, 135 Fed. 873.

104. **Right of execution creditor holding waiver.**—In the case of *In re Baughman* (D. C., Pa.), 25 Am. B. R. 167, 183 Fed. 668, it appeared that at the time the petition in bankruptcy was filed, the goods of the bankrupt were under levy by the sheriff on an execution in which the \$300 State exemption was waived. The bankrupt amended his schedules by withdrawing the claim therein made. The court said: "The claim of the bankrupt, as made in his schedules, was invalid, no particular property having been designated or set out. And while this was amendable, it was insufficient as it stood, and without amendment was not in shape to be allowed. But instead of amending the claim the bankrupt abandoned it, after which it was the same as if it had never been made. The execution creditor could not prevent this. He had no right by virtue of his waiver to proceed against the goods of the bankrupt which he had seized, even though they amounted to less than the law allowed; but only against the specific property, within that amount, which the bankrupt selected and had set off to him; and this designation never having been made, and all that was done by the bankrupt in that connection having been recalled, the execution creditor was left without anything on which his writ could take effect. . . . It may be that, by withdrawal of the claim, he was able to defeat the waiver. But however it may stand under the state law, there is no particular reason in bankruptcy why a waiver should be favored. The \$300 exemption is allowed to the unfortunate debtor

for the benefit of himself and his dependent family. And if he is authorized to waive the right to it in favor of one creditor over others, he certainly is authorized to make no claim to it after bankruptcy, so that all may fare alike." Compare *Matter of Goldberg* (D. C., Pa.), 42 Am. B. R. 299, 254 Fed. 440.

105. *In re Hastings* (C. C. A., 6th Cir.), 24 Am. B. R. 360, 181 Fed. 33, which arose under a Michigan statute which authorizes the selection of exemptions to be made by the debtor "or his authorized agent," and in which it appeared that the bankrupt had mortgaged all his exempt property and authorized the mortgagee to "demand, receive and select such exemptions in my name or otherwise from any persons from whom I might have demanded them."

106. *In re Goodman* (C. C. A., 5th Cir.), 23 Am. B. R. 504, 174 Fed. 644.

107. The Ray bill of 1902, as amended on the floor of the House, would have settled the question in favor of any person claiming under a waiver, but the Senate struck out the provision.

108. *In re Brown* (D. C., Pa., Ref.), 1 Am. B. R. 256; *In re Moore* (D. C., Ala.), 7 Am. B. R. 285, 112 Fed. 289. See also *In re Tume* (D. C., Ala.), 8 Am. B. R. 285, 116 Fed. 906.

109. *In re Sisler* (D. C., Va.), 2 Am. B. R. 760, 96 Fed. 402. Compare *In re Hopkins* (D. C., Ala., Ref.), 1 Am. B. R. 209.

110. *Ingram v. Wilson* (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; *In re Brumbaugh* (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971; *Bell v. Dawson*, 120 Ga. 628, 12 Am. B. R. 159, 48 S. E. 150; *McKenney v. Cheney*, 118 Ga. 387, 395, 45 S. E. 433; *In re Allen* (D. C., Va.), 13 Am. B. R. 518, 526, 134 Fed. 620.

belong to the creditors, nor may the trustee recover the same for their benefit.¹¹¹ But it has been held that an opportunity should be given to creditors to enforce their debts or liens against the exempt property in a court of competent jurisdiction, and in the meantime the bankrupt's discharge may be withheld.¹¹² The creditor has an equity entitling him to a reasonable postponement of the discharge of the bankrupt to enable him to bring such proceedings in the State court as may be necessary to assert his rights.¹¹³ Where the exempt property consists of money in the hands of the trustee, the bankruptcy court will hold the fund, until it can be placed where it will be available to the benefit of parties in interest.¹¹⁴ If the discharge is not withheld it will operate as a release of the debt and bar a proceeding based thereon against the exempt property.¹¹⁵

d. Parties entitled to exemptions.—(1) RIGHT IS PERSONAL.—The right to an exemption is a matter personal to the bankrupt.¹¹⁶ It may not be claimed by an assignee.¹¹⁷ Nor may it be claimed by a mortgagee of exempt property,¹¹⁸ unless under the statutes of the State it is authorized to transfer the right to claim an exemption.¹¹⁹ But it has been held that a husband has the right to

111. *Vitshum v. Large* (D. C., Iowa), 20 Am. B. R. 666, 102 Fed. 685; *In re Eash* (D. C., Iowa), 19 Am. B. R. 738, 157 Fed. 996.

112. *In re Castleberry* (D. C., Ga.), 16 Am. B. R. 159, 143 Fed. 1,018; *In re Allen* (D. C., Va.), 13 Am. B. R. 518, 134 Fed. 620; *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061; *In re Maynard & Co.* (D. C., Ga.), 25 Am. B. R. 732, 183 Fed. 823; *Meinhard & Bro. v. Pincus* (C. C. A., 5th Cir.), 29 Am. B. R. 619, 200 Fed. 736.

113. *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061; *In re Weaver* (D. C., Ga.), 16 Am. B. R. 265, 144 Fed. 229; *Roden Grocery Co. v. Bacon* (C. C. A., 5th Cir.), 13 Am. B. R. 251, 133 Fed. 515; *Bowen & Thomas v. Keller*, 130 Ga. 31, 22 Am. B. R. 727, 69 S. E. 174 (citing *Collier*, 6th Ed. 96).

114. *In re Castleberry* (D. C., Ga.), 16 Am. B. R. 159, 143 Fed. 108.

115. Effect of this charge on claim of creditor.—In the case of *Bowen & Thomas v. Keller* (Sup. Ct., Ga.), 130 Ga. 31, 22 Am. B. R. 727, 69 S. E. 174, the court said: "Nor does the bankruptcy act prevent the creditor from enforcing a lien superior to the exemption under the state law, if such lien be fastened on the exempt property at any period of the bankruptcy proceedings prior to the final discharge of the debtor. But if the debtor succeeds in obtaining his discharge and pleads it prior to the fastening of a specific lien on such property, the effect is to release the debtor from the payment of the debt upon which the proceedings are based, and the creditor's right of action is destroyed." Citing *Jewett Bros. v. Huffman*, 14 N. D. 110, 13 Am. B. R. 738, 103 N. W. 408; *Claster v. Soble*, 22 Pa. Super. Ct. 631, 10 Am. B. R. 446; *Groves v. Osborn*, 46 Ore. 173, 79 Pac. 500.

116. Bankrupt only entitled to exemption.—The court has no right to order a

personal property exemption to any one except the bankrupt. *In re Blanchard & Howard* (D. C., No. Car.), 20 Am. B. R. 422, 161 Fed. 797. The right of exemption is personal, which he can exercise or waive, and unless otherwise provided by statute, it cannot be exercised by any other person. *In re Schuller* (D. C., Wis.), 6 Am. B. R. 278, 108 Fed. 591. Who entitled to exemptions, see Am. Bankr. Dig. §§ 947, 948.

117. *Mitchell v. Mitchell* (D. C., No. Car.), 17 Am. B. R. 382, 147 Fed. 280; *In re Sloan* (D. C., Pa.), 14 Am. B. R. 435, 135 Fed. 873; *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255.

118. *Edmondson v. Hyde*, Fed. Cas. 4,285, 7 N. B. R. 1; *In re Blanchard & Howard* (D. C., No. Car.), 20 Am. B. R. 422, 161 Fed. 797; *Mitchell v. Mitchell* (D. C., No. Car.), 17 Am. B. R. 382, 147 Fed. 280; *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255, holding that a bankrupt may not mortgage property which is not *per se* exempt, and thereby authorize the mortgagee to thereafter take and hold same on the theory that the bankrupt himself might have and, of right, could have, designated same as exempt; and that a mortgagee of property of a bankrupt unqualifiedly exempt under the State law, has the right to take and sell such property, although the mortgage was given within the four months' period and constitutes a preference.

Purchaser at mortgage foreclosure.—Exemptions in stock in trade, tools and fixtures are personal and cannot be claimed by a purchaser on the foreclosure of a chattel mortgage covering such property and constituting a voidable preference. *Feilbach Co. v. Russell* (C. C. A., 6th Cir.), 37 Am. B. R. 285, 233 Fed. 412.

119. Assignment of exemptions as security.—In the case of *In re Hastings* (C. C. A., 6th Cir.), 24 Am. B. R. 360, 181 Fed. 33, it appeared that the bankrupt had mortgaged all his exempt property, then

transfer exempt property prior to his bankruptcy, regardless of a present indebtedness, and his wife, not as the head of the family, but as vendee, is entitled to the protection which the exemption laws would have afforded the husband had he retained the property; and such property cannot be recovered by the trustee in bankruptcy of the husband.¹²⁰ Where by State statute a bankrupt's claim of exemption is not assignable, an attempted assignment operates as an abandonment of the right.¹²¹ In Pennsylvania a debtor may waive but not assign his right to exemptions and will not be permitted to withdraw a waiver thereof in favor of a creditor to whom he had assigned his claim.¹²² The bankrupt may claim his exemption through his attorney or agent, if within the statute under which it exists.¹²³ A voluntary bankrupt may not retain his exemption as against the actual and necessary costs of the bankruptcy proceeding, notwithstanding his affidavit of inability to pay.¹²⁴

(2) CLAIM BY OR FOR BENEFIT OF WIFE OR CHILDREN.—An exemption may be claimed by the bankrupt's wife and children, when the State law permits it,¹²⁵ the law being intended as much to protect them as the husband. Thus, the husband cannot deprive the family of the right to an exempt homestead merely by absconding, so long as he leaves his family in it.¹²⁶ The right to an exemption accrues when the proceedings are instituted against the bankrupt, and if he subsequently dies before the exempt property is set apart to him, his administrator will take such property, and if authorized by the State law, it may be administered for the benefit of his widow and children; it would seem to reasonably follow that in such a case the exemption may properly be claimed for their benefit.¹²⁷ If the exemption accrues by the State law to the benefit of husband and wife and the children, a failure to assert the claim by the husband in bankruptcy should not deprive the wife and children of the benefits of the law, and their right will be protected by the bankruptcy court;¹²⁸ but the wife in such case will be required to exercise the same degree of diligence in making her claims as the bankrupt.¹²⁹ Under the laws of Ohio, a divorced

owned or thereafter to be acquired by him, and had vested in the mortgagee the privilege of selecting the exempt property covered by the mortgage; it was held that it could not be said that the delegation of the right to select exempt property was against public policy and void, since, under the Michigan statute, the selection is permitted to be made by the debtor "or his authorized agent," and the authority to select, given upon a valuable consideration and coupled with an interest, could not be revoked by the failure of the bankrupt to claim the exemptions in his own name, or even by his express waiver thereof, the assignor being estopped so to do.

120. *Jackson v. Jetter* (Iowa, Sup. Ct.), 160 Ia. 571, 32 Am. B. R. 667, 142 N. W. 431.

121. *In re Sloan* (D. C., Pa.), 14 Am. B. R. 435, 135 Fed. 873.

122. *In re Pfeiffer* (D. C., Pa.), 19 Am. B. R. 230, 155 Fed. 892.

123. *Wilson v. McElroy*, 32 Pa. St. 82; *Regan v. Zeeb*, 28 Ohio St. 483.

124. *In re Hines* (D. C., W. Va.), 9 Am. B. R. 27, 117 Fed. 790; *In re Bean* (D. C., Vt.), 4 Am. B. R. 53, 100 Fed. 262.

125. *Smith v. Kehr*, Fed. Cas. 13,071, 2 Dill. 50, *affd.* 20 Wall, 31, 22 L. Ed. 313; *In re Pratt*, Fed. Cas. 11,370, 1 Flip. 353.

126. *In re Pratt*, 7 Pac. L. R. 202.

127. *In re Seabolt* (D. C., N. Car.), 8 Am. B. R. 57, 113 Fed. 766.

128. *In re Luby* (D. C., Ohio), 18 Am. B. R. 801, 155 Fed. 659; *In re Maxson* (D. C., Iowa), 22 Am. B. R. 424, 170 Fed. 356, which case arose under the Iowa statute, providing that the homestead of every family, whether owned by husband or wife, is exempt from judicial sale, and no conveyance thereof is valid unless they both join therein, and it was held that the adjudication of the wife as a bankrupt does not defeat the right of the husband to have the homestead occupied by the family set apart as exempt, although the bankrupt made no claim for any exemption from her schedules; *In re Youngstrom* (C. C. A., 8th Cir.), 18 Am. B. R. 572, 153 Fed. 98. See also *In re Griffith*, 1 N. B. N. 546; *In re Pope* (D. C., Iowa), 3 Am. B. R. 525, 98 Fed. 722.

129. *In re Burnham* (D. C., Wash.), 30 Am. B. R. 270, 202 Fed. 762.

woman who has the care of her own children, is entitled to an exemption in real estate, in lieu of a homestead.¹³⁰

(3) **HOUSEHOLDER OR HEAD OF A FAMILY.**—As to the meaning of "householder" and "head of a family," as used in State statutes, distinctions are frequently made which seem to have no difference.¹³¹ A married woman doing business in her own name, and living with her husband, is not the head of a family and as such entitled to a householder's exemption.¹³² But the wife of a bankrupt who has deserted her, or has separated and is living apart, may be the "head of a family" so as to entitle her to exemptions.¹³³ But if the husband is in fact the support of the family the wife is not a "householder" and entitled to a homestead exemption;¹³⁴ but it has been held otherwise where the wife owned the fee and carried on business in her own name.¹³⁵ And an unmarried woman, having the actual care and support of her aged and infirm paternal grandmother, may be entitled to an exemption in kind;¹³⁶ so also as to a widower who maintains a homestead for his family consisting of three minor children and his mother-in-law.¹³⁷ An unmarried bankrupt living alone is not entitled to a homestead exemption as a "head of a family," because he pays the board and tuition of his sister at a boarding school whose home was with her parents.¹³⁸ Under a statute giving an exemption to a person having the care or support of dependent females, a bankrupt son who lives alone with his mother is entitled to a homestead exemption although she is not solely dependent upon him in a financial sense.¹³⁹

(4) **CLAIM OF PARTNERS.**—Whether the members of a bankrupt firm can claim exemptions from its partnership assets depends on the decisions of the State courts.¹⁴⁰ Thus, in certain States where partners are allowed exemptions out of the firm property, the bankruptcy courts have granted similar exemptions.¹⁴¹ On principle, they cannot claim exemptions therefrom, the partnership being an entity, and the partners having no interest in the assets until all

130. *Matter of Giles* (C. C. A., 6th Cir.), 19 Am. B. R. 306, 158 Fed. 596.

131. *In re Morrison* (D. C., Ark.), 6 Am. B. R. 488, 110 Fed. 734 (and foot-note); *In re Stokes* (Ref., N. Y.), 4 Am. B. R. 560; *In re Jamieson* (Ref., R. I.), 6 Am. B. R. 601; *In re Rafferty* (D. C., Iowa), 7 Am. B. R. 415, 112 Fed. 512; *In re Hostin* (Ref., Mo.), 7 Am. B. R. 362. See Am. Bankr. Dig. § 948.

"Householder."—A farmer who rents a farm, occupies the house thereon, has it kept and managed by a hired woman, who cooks the meals and keeps and cares for the table, sleeping rooms, etc., for the accommodation of the farmer and his hired help, is a "householder," within the meaning and intent of sections 1390 and 1391 of the New York Code of Civil Procedure. *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255. See Am. B. R. Digest, § 948.

132. *Matter of Herbold* (Ref., Wash.), 14 Am. B. R. 116.

133. *In re Youngstrom* (C. C. A., 8th Cir.), 18 Am. B. R. 572, 153 Fed. 98; *In re Finklea* (D. C., S. C.), 18 Am. B. R. 738, 153 Fed. 492.

134. *In re Jamieson* (D. C., R. I.), 6 Am. B. R. 60.

135. *Richardson v. Woodward* (C. C. A., 4th Cir.), 5 Am. B. R. 94, 104 Fed. 783; *In re McCutcheon* (D. C., S. Car.), 4 Am. B. R. 81, 100 Fed. 779; *In re Hastings* (Ref., Mo.), 7 Am. B. R. 362.

136. *Matter of Jackson* (Ref., Ga.), 18 Am. B. R. 216.

137. *In re Mussey* (D. C., Tex.), 25 Am. B. R. 91, 179 Fed. 1007.

138. *In re McGowan* (D. C., S. Car.), 22 Am. B. R. 469, 170 Fed. 493; *Matter of Rainwater* (D. C., Miss.), 25 Am. B. R. 419, holding that exemptions will not be allowed a bankrupt merely because he has two sisters to whose support he contributes; they must reside with him as a part of his domestic circle before his exemption will be allowed.

139. *In re Ghason* (D. C., Ga.), 25 Am. B. R. 911, 182 Fed. 287.

140. *In re Camp* (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 745; *In re Stevenson & King* (D. C., N. Car.), 2 Am. B. R. 230, 93 Fed. 789. See as to partnership exemptions, Am. Bankr. Dig. § 966.

141. *Georgia.*—*In re Camp* (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 745.

North Carolina.—*In re Stevenson* (D. C., N. Car.), 2 Am. B. R. 230, 93 Fed. 789; *In re Grimes* (D. C., N. Car.), 2 Am. B.

its creditors are paid.¹⁴² Such claims have, under the present law, been denied in Alabama, Arkansas, New Jersey, Maryland, Mississippi, Pennsylvania, Oklahoma and South Dakota.¹⁴³ On the other hand, it has been held that such

R. 160, 94 Fed. 800; *In re Duguid* (D. C., N. Car.), 3 Am. B. R. 794, 100 Fed. 274; *In re Wilson* (D. C., N. Car.), 4 Am. B. R. 260, 101 Fed. 571; *In re Seabolt* (D. C., N. Car.), 8 Am. B. R. 57, 113 Fed. 766; *In re Gartner Hancock Lumber Co.* (D. C., N. Car.), 22 Am. B. R. 898, 173 Fed. 153.

Wisconsin.—*In re Friedrich* (C. C. A., 7th Cir.), 3 Am. B. R. 801, 100 Fed. 284, affg. 95 Fed. 292.

Michigan.—By virtue of the law of Michigan, a member of a bankrupt partnership, who owns no property of the character specified in the exemption statute, except his interest in the stock of goods belonging to the firm, is entitled to \$250 worth of such stock as his exemption. *In re Andrews & Simonds* (D. C., Mich.), 27 Am. B. R. 116, 193 Fed. 776.

142. *In re Beauchamp* (D. C., Md.), 4 Am. B. R. 151, 101 Fed. 106; *In re Mosier* (D. C., Vt.), 7 Am. B. R. 268, 112 Fed. 138; *Matter of Abrams* (D. C., So. Dak.), 34 Am. B. R. 552, 193 Fed. 271, holding that a surviving member of an insolvent partnership is not entitled to exemptions out of the firm property, and that a dissolution of a partnership, with the "sole purpose and object of placing the bankrupt partner . . . in a position to claim his individual exemptions" from the firm property, is fraudulent and ineffective, as against creditors of the partnership, to pass ownership of the firm property to the bankrupt.

Right of partner to exemption.—In the case of *Jennings v. Stannus & Son* (C. C. A., 9th Cir.), 27 Am. B. R. 384, 386, 191 Fed. 347, the court says: "The strong reason in support of this view rests upon the innate difference between the individual and a copartnership as it relates to their respective property rights. Each is a distinct entity. The former holds, by the exclusive right, subject only to the right of his creditors to have his property applied to their legitimate demands. Exemption statutes are enacted to meet this express condition, to relieve the debtor in a measure against the demands of his creditors, that he may yet enjoy the necessary comforts of life. The latter holds by right of the individual members, whose respective interests in the property depend upon mutual agreement between them; the whole being subject to the debts of the firm. The individual interest in the partnership property is joint, and each partner has the right to have the property applied first to the partnership debts before either is entitled to a segregation of his own interest. Levy and execution, it is true, may proceed against the individual interest; but, when made, the sale is of the interest subject to the debts of the concern, and a settlement of the copartnership af-

fairs is necessary in the end to determine what the purchaser has really acquired. So that it seems illogical to say that exemption in favor of a partner is within the purview of the statute, unless specially mentioned and declared. *Pond v. Kimball*, 101 Mass. 105; *In re Demarest* (D. C., N. J.), 6 Am. B. R. 232, 110 Fed. 638. Other adjudications of the federal courts sustaining this view, following the courts of the states in which they were rendered, are: *In re Novak* (D. C., S. D.), 18 Am. B. R. 236, 150 Fed. 602; *In re Beauchamp's et al.* (D. C., Md.), 4 Am. B. R. 151, 101 Fed. 106; *In re Meriwether* (D. C., Ark.), 5 Am. B. R. 435, 107 Fed. 102; *In re Prince and Walker* (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546."

143. *In re McCrary Bros.* (D. C., Ala.), 22 Am. B. R. 161, 169 Fed. 485; *In re Meriwether* (D. C., Ark.), 5 Am. B. R. 435, 107 Fed. 102; *In re Demarest* (D. C., N. J.), 6 Am. B. R. 232, 110 Fed. 638; *In re Beauchamp* (D. C., Md.), 4 Am. B. R. 151, 101 Fed. 106; *In re Prince & Walker* (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546; *Matter of Golden Rule Merc. Co.* (Ref., Okl.), 21 Am. B. R. 397; *In re Lentz* (S. Dak.), 2 N. B. N. Rep. 190, 97 Fed. 486; *In re Novak* (D. C., S. Dak.), 18 Am. B. R. 236, 150 Fed. 602; *In re Vickerman & Co.* (D. C., S. Dak.), 29 Am. B. R. 298, 199 Fed. 589; *Matter of Bundy & Co.* (D. C., Miss.), 33 Am. B. R. 289, 218 Fed. 711; *Amundson v. Folsom* (C. C. A., 8th Cir.), 33 Am. B. R. 318, 219 Fed. 122, holding that a homestead right will not be upheld where it appears that the assets of a partnership, not entitled to exemptions by law, were fraudulently turned over to one of its members, for the purpose of enabling him to claim exemptions.

Right of partner to claim exemptions out of partnership property.—By the great weight of authority individual partners cannot claim exemptions in the partnership property as against a partnership debt. This is held on different grounds: (1) On the well-known ground that partnership property is subject to the payment of partnership debts before all other claims; (2) the impracticability or even inequity of allowing an exemption out of the property; (3) that, under the theory of the civil law that a partnership is an entity—a theory not generally recognized by the common law and one which is inconsistent with its principles—and that the partnership property does not belong to the individual partners, but to the firm, that is, to the legal entity; (4) that the different exemption statutes contemplate only individuals and have no reference to partnerships. 18 Cyc. 1383.

A different rule obtains in Georgia, Michigan, North Carolina, New York, Wisconsin and perhaps one or two other States; but

claims may be asserted, if each partner shall consent thereto,¹⁴⁴ especially where there are no individual estates from which exemptions may be taken.¹⁴⁵ Even where exemptions are permitted out of partnership assets, it must appear that the partner seeking the exemption had an interest in such assets to the extent and the amount of the exemption sought.¹⁴⁶ It has been held that, fraud being absent, partners may before bankruptcy so sever the joint estate as to permit each of them to claim their exemptions, though on appeal this severance was not approved or even thought necessary.¹⁴⁷ But where there is no transfer,

the Federal courts sitting in bankruptcy have never adopted or followed the minority rule outside of the particular States in which that rule prevails. In *re Scheier* (D. C., Wash.), 26 Am. B. R. 739, 188 Fed. 744.

144. In *re Grimes* (D. C., N. C.), 2 Am. B. R. 160, 94 Fed. 806; In *re Floyd & Co.* (D. C., N. C.), 18 Am. B. R. 827, 154 Fed. 757; In *re Monroe & Co.* (D. C., N. C.), 19 Am. B. R. 525, 156 Fed. 216; In *re Nelson* (D. C., Wis.), 2 Am. B. R. 556, 98 Fed. 76; *Matter of McConnell v. Williams* (D. C., Cal.), 32 Am. B. R. 589.

It has been held that the partner must affirmatively show that he is entitled to the exemption, and, when it is asked out of firm assets, that he had no personal property exemption independent of the firm property, and the other members of the firm consent that he shall have it out of the firm assets. In *re Friedrich* (D. C., Wis.), 95 Fed. 282.

Where an involuntary proceeding against a partnership and its individual members was dismissed as to one of the partners, at his instance on the ground that being a minor he could not become a debtor and therefore not a bankrupt, his status as a debtor could not thereafter be asserted merely to claim exemptions. In *re Ellenbecker* (D. C., Wis.), 30 Am. B. R. 537, 205 Fed. 396.

145. In *re Stevenson* (D. C., N. Car.), 2 Am. B. R. 230, 93 Fed. 789; In *re Duguid* (D. C., N. Car.), 3 Am. B. R. 794, 100 Fed. 274; In *re Wilson* (D. C., N. Car.), 4 Am. B. R. 260, 101 Fed. 572; In *re Steed* (D. C., N. Car.), 6 Am. B. R. 73, 107 Fed. 682; In *re Seabolt* (D. C., N. Car.), 8 Am. B. R. 57, 113 Fed. 766; In *re Monroe & Co.* (D. C., N. Car.), 19 Am. B. R. 255, 156 Fed. 216.

146. In *re Rutland Grocery Co.* (D. C., Ga.), 26 Am. B. R. 942, 189 Fed. 765.

Extent of exemption.—In the case of *In re Camp* (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 745, it is said: "But conceding, in view of what has been stated, that the bankrupt court, sitting in Georgia, and passing upon an exemption of a citizen of Georgia, would feel bound to allow an exemption to one partner out of the partnership assets, it is nevertheless perfectly clear that the partner seeking the exemption should have an interest in the partnership assets to the extent and the amount of the exemption sought. If, on an accounting between the partners, the partner applying for an exemption would have no interest in the partnership effects as against the other partners,

he would hardly be allowed to claim such an interest as against the creditors of the partnership."

147. In *re Friedrich* (D. C., Wis.), 3 Am. B. R. 800, 100 Fed. 284, mod. s. o., 95 Fed. 282; In *re Lockerby* (Minn.), 3 N. B. N. Rep. 7.

Payment from assets of dissolved partnership.—Bankrupt and his partner, fourteen days before bankruptcy, severed the partnership relation by written agreement whereby the assets of the dissolved partnership were vested in bankrupt and its liabilities assumed by him. There was no fraud in the transaction, and during the period preceding bankruptcy, bankrupt continued the business in his own name. The liabilities in the bankruptcy proceedings consisted of firm debts, and the assets those which were assigned to bankrupt under the dissolution agreement. Nothing appeared as to the insolvency of the firm at its dissolution, nor concerning the state of accounts between the partners. Held, that the firm assets were validly transformed into individual assets of bankrupt, so as to entitle him to be allowed his exemptions therefrom. In *re Kolber* (D. C., Pa.), 27 Am. B. R. 414, 193 Fed. 281.

Rule in Indiana.—Where members of a firm, all residents of Indiana, with knowledge of insolvency consented to a dissolution for the express purpose of enabling each of them to claim exemptions, and the firm property was divided among them, and thereafter one of them filed a voluntary petition in bankruptcy and an involuntary petition was filed to have the firm adjudged bankrupt, no exemptions can be claimed out of the property in the hands of the trustee, and specifically identified as part of the former firm property, because in Indiana no exemptions are allowed out of partnership assets. Firm property in the possession of a partner at the time of the filing of a petition in bankruptcy must be deemed firm and not individual assets for all purposes. *Matter of Turnock & Sons* (C. C. A., 7th Cir.), 36 Am. B. R. 316, 230 Fed. 985.

Conversion of firm property into exempt property.—As it is not fraudulent for an individual debtor to convert property which is not exempt into that which is, it is not fraudulent for individuals constituting a partnership to sever the joint interest in partnership property, which is not yet in the custody of the law, and thereafter to hold their exemptions out of such property. *Crawford v.*

but a mere abandonment by one partner of his interest, an exemption will not be allowed out of partnership assets to the other member of the firm.¹⁴⁸ Where a partner has parted with his interest in the assets of the firm prior to bankruptcy, he cannot claim an exemption therein, although he continued in the employ of the firm as a clerk.¹⁴⁹ Where the right to a homestead exemption out of partnership assets is doubtful, the claim must be asserted reasonably and in conformity with the practice in bankruptcy, or it will not be considered.¹⁵⁰ An infant who, although he contributed to the capital stock of a partnership, assented to being ignored in all firm transactions, is not entitled to a personal property exemption out of the assets of the firm.¹⁵¹ Several of the cases cited in the foot-notes under this paragraph contain summaries of decisions both in the Federal and in the highest State courts, in particular *In re Camp*.¹⁵²

(5) EXEMPTIONS TO PERSONS IN CERTAIN OCCUPATIONS.— Especial exemptions are sometimes given to persons engaged in certain occupations, as farming, mechanical trades, mercantile pursuits and the like. An exemption to farmer is not defeated by temporarily engaging in a different pursuit.¹⁵³ And a "laborer" is entitled to the exemption allowed by law if he is engaged in a toilsome occupation requiring the use of the exempt articles.¹⁵⁴ A retail druggist is not a "mechanic, miner, or other person" within the meaning of a statute exempting necessary tools and implements.¹⁵⁵ The conducting of a business under a company name does not affect the right to exemptions.¹⁵⁶

e. Effect of fraud on right to exemptions.— (1) IN GENERAL.— If a debtor is guilty of fraud against his general creditors, he may, under the law in many states, be denied his exemptions. This rule does not depend upon the bankruptcy act, but exists because of some express statutory provision or the decisions of the courts of the State under the laws of which the bankrupt makes his claim.¹⁵⁷ But a court of bankruptcy proceeds upon equitable principles, and

Sternberg (C. C. A., 8th Cir.), 33 Am. B. R. 677, 220 Fed. 73.

148. *In re Bergman* (Ill.), 2 N. B. N. Rep. 806. See also *In re Mosier* (D. C., Vt.), 7 Am. B. R. 268, 112 Fed. 238; *Matter of Abrams* (D. C., So. Dak.), 34 Am. B. R. 552, 193 Fed. 271, citing text.

149. *In re Kowler* (D. C., N. Car.), 16 Am. B. R. 580, 145 Fed. 270. See *In re Wolcott* (D. C., N. Car.), 15 Am. B. R. 386, 140 Fed. 460, holding that the bankrupt must own the personal property out of which he claims an exemption.

150. *In re Jennings & Co.* (D. C., Ga.), 22 Am. B. R. 160, 106 Fed. 639.

151. *In re Floyd & Co.* (D. C., N. Car.), 18 Am. B. R. 827, 154 Fed. 757.

152. *In re Camp* (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 745.

153. *In re Fly* (D. C., Cal.), 6 Am. B. R. 550, 110 Fed. 141.

154. *In re Hindman* (C. C. A., 9th Cir.), 5 Am. B. R. 20, 104 Fed. 331.

155. *In re Lynde* (Ref., Kan.), 17 Am. B. R. 906.

156. *In re Carpenter* (C. C. A., 5th Cir.), 6 Am. B. R. 465, 109 Fed. 558.

157. *McDowell v. McMurria*, 107 Ga. 812, 73 Am. St. Rep. 155, 33 s. c. 709; *In re*

Waxelbaum (D. C., Ga.), 4 Am. B. R. 120, 101 Fed. 228; *In re Tollett* (D. C., Tenn.), 5 Am. B. R. 305, 105 Fed. 425, *revd. s. c.* (C. C. A., 6th Cir.), 5 Am. B. R. 404, 106 Fed. 866; *In re Long* (D. C., Pa.), 8 Am. B. R. 591, 116 Fed. 113; *In re Duffy* (D. C., Pa.), 9 Am. B. R. 358, 118 Fed. 926; *In re Yost* (D. C., Pa.), 9 Am. B. R. 153, 117 Fed. 792; *In re Allen* (D. C., Va.), 13 Am. B. R. 519, 134 Fed. 620; *Matter of Alex.* (D. C., Pa.), 15 Am. B. R. 450, 141 Fed. 483; *Matter of Humphreys* (D. C., N. Car.), 34 Am. B. R. 655, 221 Fed. 997 (citing text); *Matter of Ziff* (D. C., Ala.), 35 Am. B. R. 83, 225 Fed. 323; *Matter of Hadden* (D. C., Ga.), 40 Am. B. R. 24, 242 Fed. 284; *Matter of Libby* (D. C., Fla.), 41 Am. B. R. 630, 263 Fed. 278. See as to matters affecting right to exemptions, Am. Bankr. Dig. §§ 968-973.

Failure to keep books.— In the case of *In re Leverton* (D. C., Pa.), 19 Am. B. R. 428, 155 Fed. 925, it was held that where a merchant did not keep any books and failed to account for \$3,000 during a period of three months, and the evidence showed that he had either made away with his goods or their proceeds, he will be refused his exemption because of a fraudulent concealment of assets.

Where the bankrupt has removed a greater part of his property from the jurisdiction of the court, a claim for an exemption from the balance will be disallowed.

will no more sustain a positive fraud than will a court of equity,¹⁵⁸ so that if it appears that the bankrupt has by some fraudulent device, with the purpose of creating an exemption, diverted funds that would rightfully have been distributed among his creditors, his claim of exemption will not be allowed.¹⁵⁹ A bankrupt who is guilty of false swearing upon an examination as to his assets may be denied his exemption.¹⁶⁰ Where the bankrupt acquires the property by fraud, he can have no exemption thereon.¹⁶¹

(2) FRAUDULENT CONCEALMENT OF ASSETS.—The effect of fraudulent concealment of assets by a bankrupt on his right to exemptions will depend largely upon the statutes of the State.^{161a} In Georgia it is provided by statute that a debtor who is guilty of wilful fraud in the concealment of part of his property from his creditors loses his exemption.¹⁶² In Pennsylvania a bankrupt, who

Matter of Taylor (D. C., Col.), 7 Am. B. R. 410, 114 Fed. 607; In re Denson (D. C., Ala.), 28 Am. B. R. 162, 195 Fed. 857.

Under the statute and decisions of Alabama, the fraud of a bankrupt in making false financial statements to mercantile agencies does bar his claim to exemptions. Matter of Ziff (D. C., Ala.), 35 Am. B. R. 83, 225 Fed. 323.

Not forfeited for violation of bankruptcy act.—A bankrupt does not forfeit his right to claim the exemptions secured to him by the State law, by doing some act prohibited, or omitting to discharge some duty enjoined by the Bankruptcy Act, as for instance, by conveying property in fraud of his creditors, or failing to schedule portions of his property, especially in a State where it is settled that a fraudulent disposition of property by a debtor does not work a forfeiture of exemptions. Matter of Harrell (D. C., N. C.), 34 Am. B. R. 800, 222 Fed. 180.

Business under assumed name.—In the case of In re McUita (D. C., Pa.), 26 Am. B. R. 490, 189 Fed. 250, it was contended by the creditor of a bankrupt that he was transacting business under an assumed name and that he could not obtain title to goods which he claimed as exempt where he had obtained such goods by fraud, in that he did not inform his creditors of his right name; it was held that at common law a man may lawfully change his name and there was no statute in Pennsylvania prohibiting such change, the bankrupt and those with whom he dealt were bound by the name assumed by him and as the assumption of such name was not, of itself, a fraud upon creditors dealing with him, the bankrupt was entitled to his exemption.

158. In re Gerber (C. C. A., 9th Cir.), 26 Am. B. R. 608, 186 Fed. 693.

159. McGahan v. Anderson (C. C. A., 4th Cir.), 7 Am. B. R. 641, 113 Fed. 115, 51 C. C. A. 92; In re Cochran (D. C., Ga.), 26 Am. B. R. 459, 185 Fed. 913; Matter of Majors (D. C., Ore.), 39 Am. B. R. 642, 241 Fed. 538.

160. Matter of Rainwater (D. C., Miss.), 25 Am. B. R. 419, 191 Fed. 738.

161. In re Huake, Fed. Cas. 5,883, 2 Sawy. 231; In re Wolcott (D. C., N. Car.), 15 Am. B. R. 336, 140 Fed. 460; In re Peacock (D. C., Ga.), 30 Am. B. R. 179, 203 Fed. 191.

161a. In Florida a debtor who conceals or removes beyond the reach of his creditors, a part of his personal property as a preliminary to claiming the exemption will, when the property so remains concealed or removed, be held to have selected such concealed or removed property *pro tanto* as his exemption. Matter of Libby (D. C., Fla.), 41 Am. B. R. 630, 253 Fed. 278; Libby v. Beverly (D. C., Fla.), 44 Am. B. R. 605, 263 Fed. 68.

162. Ga. Code, § 2830; In re Thompson (D. C., Ga.), 8 Am. B. R. 283, 115 Fed. 924; In re West (D. C., Ga.), 8 Am. B. R. 564, 116 Fed. 767; In re Williamson (D. C., Ga.), 8 Am. B. R. 43, 114 Fed. 190, holding that in Georgia the exemption provided by statute will not be allowed unless the person claiming the same comes into court with clean hands; In re Stephens (D. C., Ga.), 8 Am. B. R. 53, 114 Fed. 192; In re Boorstin (D. C., Ga.), 8 Am. B. R. 89, 114 Fed. 696; In re Castleberry (D. C., Ga.), 16 Am. B. R. 159, 143 Fed. 1018; Matter of Anderson (D. C., Ga.), 35 Am. B. R. 487, 224 Fed. 790. See Am. Bankr. Dig., § 971.

Under the Georgia statute it has been held that a bankrupt, who sought to get his property out of the reach of his creditors just before and at the time of his bankruptcy and apparently succeeded in doing so, was not entitled to such constitutional exemption under the decisions of the State court construing § 2830 of Ga. Civil Code, 1895 (Hopkins Code, 1910, § 3380), to require a bankrupt who seeks such exemption to deal with perfect fairness with his creditors and to disclose and deliver up everything he has except this exemption and that a failure to do this would defeat his application. In re Cochran (D. C., Ga.), 26 Am. B. R. 459, 185 Fed. 913; Matter of Hardy (D. C., Ga.), 36 Am. B. R. 358, 229 Fed. 825.

Under the Georgia statute, the transfer of real estate by the bankrupts to their wives more than four months prior to the filing of the petition in bankruptcy does not deprive them of their exemptions, nor does the making of false statements in writing to their creditors to obtain credit constitute a valid objection. In re Cotton & Preston (D. C., Ga.), 25 Am. B. R. 532, 183 Fed. 190; Matter of Powell (D. C., Ga.), 36 Am. B. R. 367, 230 Fed. 316.

In the case of In re Dobbs (D. C., Ga.), 22 Am. B. R. 801, 173 Fed. 682, the bankrupt was denied his exemptions, where it appeared that he had made a statement to a commercial agency, in which his assets and indebtedness were specified as a certain amount and about a year thereafter the schedules filed by him showed a great depre-

deliberately and wilfully conceals or denies the ownership of property, in order to prevent it from being subjected to the payment of his debts, forfeits his right to exemptions.¹⁶³ The fraudulent concealment must be proved to a reasonable certainty, and the bankrupt is entitled to the benefit of the doubt; fraud is not presumed or imputed to the bankrupt.¹⁶⁴ Where the exact amount of personal property concealed by a bankrupt cannot be ascertained, he may not be allowed his exemptions until all his personal property is accounted for, or until the further order of the court.¹⁶⁵ The failure of a bankrupt to schedule property, which was in possession of his wife, is not a concealment for which his claim for exemptions will be denied.¹⁶⁶ But under a State law, providing that a person forfeits his right to exemption by fraudulent concealment of his property, a failure of the bankrupt to schedule life insurance policies, the possession of which he at first denied upon his examination, but was subsequently compelled to admit, justifies the denial of his exemptions.¹⁶⁷

(3) **FRAUDULENT TRANSFER.**—If there had been a fraudulent transfer of property by a bankrupt, which amounts to a concealment or withholding of property from his creditors, under a State statute making such an act sufficient to deprive the bankrupt of his exemptions, such a transfer will preclude the allowance to him of his exemptions. The mere fact that a fraudulent transfer has been made is not sufficient to justify the denial of the bankrupt's exemptions; it must ordinarily be made to appear that the fraud was directly connected with the claim of exemptions.¹⁶⁸ The rule, independent of statute,

elation in the value of his assets, and the bankrupt having kept no books of account, failed to satisfactorily explain what he had done with his property, or what had caused so great a change in his financial condition.

Under the law of Alabama a referee in bankruptcy, upon the contest of bankrupt's claim to exemptions, has the right to charge the exemptions with any property shown to have been in bankrupt's possession when bankruptcy intervened and not disclosed by his inventory or surrendered to his trustee; but property fraudulently transferred or parted with by bankrupt in any way, prior to bankruptcy, in order to prevent its application to the payment of his debts, cannot be treated as part of his exempt property; nor can his exemptions be deemed as a punishment for any conduct on bankrupt's part, however reprehensible it might be as to his creditors. *In re Denson* (D. C., Ala.), 28 Am. B. R. 162, 195 Fed. 857.

Failure to surrender.—A referee may charge a bankrupt's exemption with the value of goods in his possession, upon the eve of bankruptcy, which he failed to surrender to his trustee, in the absence of a reasonable explanation of the failure. *Matter of Aronson* (D. C., Ala.), 37 Am. B. R. 385, 233 Fed. 1022.

^{163.} *In re Schafer* (D. C., Pa.), 18 Am. B. R. 361, 151 Fed. 505; *Matter of Liby* (D. C., Pa.), 33 Am. B. R. 312, 218 Fed. 90.

Failure to account.—A bankrupt who fails to satisfactorily account for assets in excess of \$50,000 which disappeared during the year prior to the bankruptcy, may be denied his right of exemption upon the ground that

there was a concealment of property in fraud of creditors. *In re Rice* (D. C., Pa.), 21 Am. B. R. 202, 164 Fed. 589.

^{164.} *In re Cotton & Preston* (D. C., Ga.), 25 Am. B. R. 532, 183 Fed. 190.

^{165.} *In re Ansley Bros.* (D. C., N. Car.), 18 Am. B. R. 457, 153 Fed. 983.

^{166.} *In re Diamond* (D. C., Ala.), 19 Am. B. R. 811, 158 Fed. 370.

^{167.} *In re Sussman* (D. C., Pa.), 24 Am. B. R. 909, 183 Fed. 331. See *In re Royal* (D. C., N. Car.), 7 Am. B. R. 106, 112 Fed. 135.

^{168.} *In re Thompson* (D. C., Ga.), 8 Am. B. R. 283, 115 Fed. 924, where it appeared that the bankrupt a long time prior to bankruptcy had made a transfer of his homestead to his wife in an attempt to evade liability as surety on a bond, and the wife subsequently reconveyed the land to the bankrupt. It was held that the bankrupt was entitled to a homestead exemption since the bankruptcy court could not inquire into the initial fraud attending the conveyance to the wife.

Ordinary creditors have no interest in exempt property. Its transfer, even with a purpose to hinder, delay or defraud them, is not an act of which they can complain. *Matter of Ziff* (D. C., Ala.), 35 Am. B. R. 83, 225 Fed. 323, see Am. Bankr. Dig. § 972.

Reconveyance to bankrupt after fraudulent transfer.—A bankrupt within four months of bankruptcy being advised that his homestead tract was exempt and could be conveyed at his pleasure, conveyed the same to a third party with the purpose that such third party should convey to the bankrupt's

is, however, that exemptions, being a matter of right, should not be denied, even if asserted in property fraudulently transferred or concealed and later recovered by the trustee.¹⁶⁹ If a bankrupt has transferred property which is subject to an exemption, he, by his act, has placed his exemption beyond his own reach.¹⁷⁰ A transfer or disposition of property for a fair consideration, and with an honest motive, will not prejudice the bankrupt's right to exemption.¹⁷¹ A transfer in good faith by a bankrupt of all his property to an assignee for the benefit of creditors does not deprive him of his right to exemptions in subsequent bankruptcy proceedings.¹⁷² If a bankrupt transfers property in which he is entitled to an exemption prior to his bankruptcy, it would not operate as a fraud against the creditors since they would not be entitled in any event, to subject the property to the payment of his debts.¹⁷³ A different question arises where a bankrupt has made a fraudulent transfer of his property and the trustee recovers the property transferred. The courts have not agreed upon this question. The conflict is more apparent, however, than real. In many of the cases where the fraud in the conveyance has been held to deprive the bankrupt of his exemption, State statutes have been applied, which either directly or impliedly permit the denial of an exemption because of fraud. In the absence of statutory provision the correct rule seems to be that where a fraudulent transfer has been set aside, the property may be subjected to the bankrupt's exemptions.¹⁷⁴ For the same reason it has been usually held

wife; after filing his petition in bankruptcy he was advised that under the Tennessee law, his creditors had a right to a remainder in his homestead, and he procured the third party to reconvey such homestead tract to him; he thereupon applied and obtained leave to amend his schedules by adding this property as an asset in which he claimed a homestead; it was held that in the absence of actual fraud, that the homestead should be set aside to him as exempt. *In re Tollett* (C. C. A., 6th Cir.), 5 Am. B. R. 404, 106 Fed. 866.

The Virginia constitution, section 191, provides in effect that exemptions shall not be claimed in property, the conveyance of which "has been set aside on the ground of fraud or want of consideration." It was held that where, pending a suit by creditors to set aside a deed of land, the debtor obtains a reconveyance thereof and executes a proper deed of homestead under the State law, and is adjudicated a bankrupt, prior to a decree of the State court setting aside the conveyance, the bankruptcy court has jurisdiction to determine the bankrupt's claim to a homestead exemption in the property, and the claim should be allowed. *In re Allen & Co.* (D. C. Va.), 13 Am. B. R. 518, 134 Fed. 620.

169. *In re Park* (D. C., Ark.), 4 Am. B. R. 492, 102 Fed. 602; *Wilcox v. Hawley*, 31 N. Y. 648; *In re Noll*, 2 N. B. N. Rep. 789; *In re Buckingham*, 2 N. B. N. Rep. 617; *In re Rothschild* (Ref., Ga.), 6 Am. B. R. 43. Thus, even in Georgia, where the "good faith" rule is in the local statute; *In re Talbott* (D. C., Ga.), 8 Am. B. R. 427, 116 Fed. 417, *aff'd., sub nom. Bashinski v. Talbott* (C. C. A., 5th Cir.), 9 Am. B. R. 513, 119 Fed.

337, 56 C. C. A. 241; *In re Neal* (Ref., Ohio), 14 Am. B. R. 550.

170. *Bashinski v. Talbott* (C. C. A., 5th Cir.), 9 Am. B. R. 513, 119 Fed. 337; *McDowell v. McMurria*, 107 Ga. 812, 73 Am. St. Rep. 153, 33 S. E. 709; *In re Tollett* (C. C. A., 6th Cir.), 5 Am. B. R. 404, 106 Fed. 866.

171. *In re Duffy* (D. C., Pa.), 9 Am. B. R. 358, 118 Fed. 926, in which case it was held that while a bankrupt will forfeit his right to exemption by fraudulent disposition of his property, it cannot be said that such a disposition has been made, where he has sold it for a fair consideration and with an honest motive, even though it may have the effect of leaving nothing for his creditors; *In re Yost* (D. C., Pa.), 9 Am. B. R. 153, 117 Fed. 792.

172. *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

173. *Cowan v. Birchfield* (D. C., Ala.), 25 Am. B. R. 293, 180 Fed. 614.

174. *Exemption in property recovered.*—In the case of *In re Thompson* (D. C., Wash.), 15 Am. B. R. 287, 115 Fed. 924, the court said: "The attempted transfer being void as to creditors, the property still remains that of the bankrupt for the purpose of paying his debts; otherwise we would have the anomaly of the debts of the bankrupt being paid out of the property of a third person. The property being subject to the debts of the bankrupt, could not be so upon any other theory than that of ownership by him. While it is true some courts have held that where a bankrupt commits fraud in the conveyance of his property which is recovered at the suit of creditors, he is precluded from

that where an assignment for the benefit of creditors has been nullified by the subsequent bankruptcy of the assignor, the bankrupt may claim his exemptions in the property assigned.¹⁷⁵

(4) **PREFERENTIAL TRANSFER.**—Where property is preferentially transferred to a creditor and subsequently recovered by the trustee, it has been held that after the trustee has been put to the expense and inconvenience of recovering the property conveyed, the bankrupt should not be permitted to claim his exemption.¹⁷⁶ A distinction has been made between the right of a bankrupt to claim his exemption out of fraudulently conveyed property recovered by a trustee and the claim of an exemption out of property which had been voluntarily transferred by the bankrupt to a creditor.¹⁷⁷ There is not much reason for this distinction. The effect of the surrender or recovery of preferences received by creditors is to restore the property of the bankrupt to his estate as if such preference had not been given. When a preferential transfer is set aside it has the same effect as the setting aside of a fraudulent transfer. The property then becomes restored to the bankrupt's estate and is subject to his exemptions. This doctrine seems to be sustained at the present time by the weight of authority.¹⁷⁸ It has been held that where the bankrupt has scheduled property out of which he claims exemptions, and the trustee later recovers other property which had been preferentially transferred, the

making claim to exemptions, yet the weight of authority is the other way. Those authorities which hold that an act of fraud is sufficient to deprive one of exemptions, in my opinion, confound fraudulent transfers generally, with statutory rights. There can be no such thing as fraud, in claiming that which the law allows."

Upon the restoration of the property fraudulently transferred to the bankrupt's estate, it becomes subject to his exemption. *Bashinski v. Talbott* (C. C. A., 5th Cir.), 9 Am. B. R. 513, 119 Fed. 337; *In re Falconer* (C. C. A., 8th Cir.), 6 Am. B. R. 557, 110 Fed. 111; *In re Schuller* (D. C., Wis.), 6 Am. B. R. 278, 108 Fed. 591. In the case of *In re Tollett* (C. C. A., 6th Cir.), 5 Am. B. R. 404, 106 Fed. 866, it was held that the conveyance of property without fraud in fact, even though there was constructive legal fraud, does not bar the right of the bankrupt to claim a homestead in the property, when it is recovered by the trustee.

Under the bankruptcy act of 1867, a similar doctrine prevailed. It was uniformly held in controversies arising under that act that if the assignee recovered property which had been conveyed in fraud of the provisions of the act, the bankrupt could successfully assert any homestead right which he originally possessed in the property recovered by the assignee, and that the right was not forfeited by the debtor's fraudulent conduct. *Cox v. Wilder*, Fed. Cas. 3,308, 2 Dill. 45; *In re Detert*, Fed. Cas. 3,829; *McFarland v. Goodman*, Fed. Cas. 8,789; *Penny v. Taylor*, Fed. Cas. 10,957; *In re Poleman*, Fed. Cas. 11,247.

^{175.} *In re Tilden* (D. C., Iowa), 1 Am. B. R. 300, 91 Fed. 501; *Bashinski v. Talbott* (C. C. A., 5th Cir.), 9 Am. B. R. 513, 119 Fed. 337; *In re Falconer* (C. C. A., 8th

Cir.), 6 Am. B. R. 557, 110 Fed. 111; compare *In re Staunton*, 9 Am. B. R. 79, 117 Fed. 507.

^{176.} *In re Coddington* (D. C., Pa.), 11 Am. B. R. 122, 126 Fed. 891; *In re Evans* (D. C., N. Car.), 8 Am. B. R. 730, 116 Fed. 909; *In re Long* (D. C., Pa.), 8 Am. B. R. 591, 116 Fed. 113; *In re White* (D. C., Mo.), 6 Am. B. R. 451, 109 Fed. 635.

^{177.} *In re Neal* (Ref., Ohio), 14 Am. B. R. 550.

Deduction from exemptions.—It has been held that it is not proper to deduct from the amount of exemptions to which the bankrupt is entitled, property which he has preferentially transferred, unless he conceals the fact of such preferential transfer. *Libby v. Beverley* (D. C., Fla.), 44 Am. B. R. 605, 263 Fed. 63.

^{178.} *In re Falconer* (C. C. A., 8th Cir.), 6 Am. B. R. 557, 110 Fed. 111; *Bashinski v. Talbott* (C. C. A., 5th Cir.), 9 Am. B. R. 513, 119 Fed. 337, affg. *In re Talbott* (D. C., Ga.), 8 Am. B. R. 427, 116 Fed. 417, Contra, *In re White* (D. C., Mo.), 6 Am. B. R. 451, 109 Fed. 635; *In re Long* (D. C., Pa.), 8 Am. B. R. 591, 116 Fed. 113. *In re Evans* (D. C., N. Car.), 8 Am. B. R. 730, 116 Fed. 909; *First Nat. Bank of Lake Charles v. Lang* (C. C. A., 5th Cir.), 29 Am. B. R. 247, 202 Fed. 117.

Effect of surrender of preferences.—*In re Soper* (D. C., Nebr.), 22 Am. B. R. 868, 173 Fed. 924, in which case the court said: "The effect of the surrender of preferences received by the creditors was to restore the property of the bankrupt to his estate, as if no mortgage had ever been made upon the property. The bankrupt has not lost his right to claim his exemptions, unless it is because of the mortgage given by him. The trustee did not obtain the property under this mortgage, but in hostility to it. It came into his hands unburdened by the mortgage and as if the mortgage had never been given. Therefore neither the trustee nor the bankrupt are estopped by the terms of the mortgage. From the time the trustee took the property until such time as the bankrupt

former will not be permitted to abandon his previous claim and assert it against such property.¹⁷⁹

(5) ACQUISITION OF PROPERTY TO SECURE EXEMPTIONS.—There is a conflict of authority as to whether the purchase of exempt property on the eve of bankruptcy is fraudulent. It has been held that if a bankrupt purchases exempt property on the eve of bankruptcy, so as to secure the exemption, he commits a fraud upon his creditors which will give to the trustee a right to take the property from him, free from any claim of exemption.¹⁸⁰ But there are cases to the contrary.¹⁸¹ Where, however, the alleged fraudulent transaction involves the sale of non-exempt property, and the use of the proceeds in reducing an incumbrance against an exempt homestead, it will not avail.¹⁸² And where, pending suit in a State court to set aside a deed of land, the debtor obtains a reconveyance of the land and executes a proper deed of homestead under the State law, and is adjudicated a bankrupt prior to a decree setting aside the conveyance, the bankruptcy court may determine the claim of homestead exemption in the land.¹⁸³ A general assignment is not sufficiently fraudulent to come within the rules previously stated.¹⁸⁴

f. Exemptions out of incumbered property.—All valid liens are preserved by the statute.¹⁸⁵ Under principles already discussed, a court of bankruptcy has

should assert his claim to exemptions, the trustee had the title to all of the property and the mortgage was no lien upon any portion of it. Upon the assertion of the right of the bankrupt to his exemptions the mortgage was not revived upon the articles selected as exempt. The title of the bankrupt is a new title in effect antedating the mortgage, because the mortgage was given within four months of the bankruptcy. Upon the restoration of his property to the bankrupt's estate, it was subject to the exemption of the bankrupt."

A bankrupt may claim an exemption in property, which he has made the subject of a preferential transfer. The giving of waiver notes by a bankrupt in excess of the value of his exempt property thereby preferring the note holders cannot defeat the bankrupt's right to exemptions. *Matter of Ziff* (D. C., Ala.), 35 Am. B. R. 83, 225 Fed. 323.

179. In re White (D. C. Mo.), 6 Am. B. R. 451, 109 Fed. 635; In re Coddington (D. C., Pa.), 11 Am. B. R. 122, 126 Fed. 801. *Contra*, In re Falconer (C. C. A., 8th Cir.), 6 Am. B. R. 567, 110 Fed. 111. See also In re Evans (D. C. N. Car.), 8 Am. B. R. 730, 116 Fed. 909; In re Neal (Ref., Ohio), 14 Am. B. R. 550.

180. In re Boothroyd, Fed. Cas. 1,652, 14 N. B. R. 223; In re Lammer, Fed. Cas. 8,031, 7 Biss. 269; In re Parker, Fed. Cas. 10,724, 5 Sawy. 58; Pratt v. Burr, Fed. Cas. 11,372, 5 Biss. 36; In re Southoff, Fed. Cas. 17,380, 9 Biss. 35; In re Wright, Fed. Cas. 18,607, 3 Biss. 359; Long v. Murphy, 27 Kan. 375; Brackett v. Watkins, 21 Wend. 68; *Matter of Majors* (D. C., Ore.), 39 Am. B. R. 642, 241 Fed. 538; Kangas v. Robie (C. C. A., 8th Cir.), 45 Am. B. R. 209, 264 Fed. 92. See also *Peyton v. Farmers National Bank* (C. C. A., 5th Cir.), 44 Am. B. R. 295, 261 Fed. 326. See Am. Bankr. Dig., § 974.

181. In re Henkel, Fed. Cas. 6,362, 2 Sawy. 305; Kelly v. Sparks, 54 Fed. Rep. 70; Huennergardt v. Brittain Dry Goods Co. (C. C. A., 8th Cir.), 8 Am. B. R. 341, 116 Fed. Rep.

31; In re Irwin (C. C. A., 8th Cir.), 9 Am. B. R. 689, 120 Fed. Rep. 733, affg. In re Stone (D. C., Ark.), 8 Am. B. R. 416, 116 Fed. 35; O'Donnell v. Segar, 25 Mich. 366; Jacoby v. Distilling Co., 41 Minn. 227, 230, 43 N. W. 52; Comstock v. Bechtel, 63 Wis. 656, 24 N. W. 465; In re Hammond (D. C., Ky.), 28 Am. B. R. 811, 198 Fed. 574; *Matter of McConnell & Williams* (D. C., Cal.), 32 Am. B. R. 589; Crawford v. Sternberg (C. C. A., 8th Cir.), 33 Am. B. R. 677, 220 Fed. 73.

Homestead in Virginia; "Shifting stock of merchandise"—A merchant who, two days before his adjudication in bankruptcy, in contemplation thereof, separates from his stock numerous articles of merchandise and places them, together with his store fixtures and household goods in boxes, for the purpose of enabling him to claim that they had ceased to be a part of a shifting stock of merchandise and could be claimed as exempt under the constitution and statutes of Virginia, which provide for a homestead exemption, but do not allow it to be claimed in a "shifting stock of merchandise," cannot by such acts defeat the rights of creditors and secure a homestead exemption in such property. *Laderburg v. Miller* (C. C. A., 4th Cir.), 31 Am. B. R. 335, 210 Fed. 614.

182. In re Boston (D. C., Nebr.), 3 Am. B. R. 388, 98 Fed. 587.

183. In re Allen (D. C., Va.), 13 Am. B. R. 518, 134 Fed. 620.

184. In re Tilden (D. C., Iowa), 1 Am. B. R. 300, 91 Fed. 500.

185. Bankr. Act, § 67-d; In re Thomas (D. C., Wash.), 3 Am. B. R. 90, 96 Fed. 828; Gray v. Bank of Hartford (Ark. Sup. Ct.), 43 Am. B. R. 166, 208 S. W. 302.

Effect of setting aside mortgaged property.—While bankruptcy courts have jurisdiction to determine all claims of bankrupts to exemptions, it is well settled that the setting aside of a homestead to a bankrupt does not relieve the property from the operation of a mortgage or vendor's lien thereon obtained before bankruptcy. *Pace v. Berry* (Ky. Ct. of App.), 40 Am. B. R. 53, 195 S. W. 131. Where, in an action to foreclose a real estate mortgage in a State court, the defendant, who has been discharged as a bankrupt, claims the property as a homestead, and it

no jurisdiction to determine either the existence or priority of liens on exempt property, unless such property is worth more than the exemption allowed by the State statute.¹⁸⁶ In many States the bankrupt has an absolute right to selection in specie; and, it seems, he can insist on it even though he thereby destroys the surplus value belonging to the trustee.¹⁸⁷ Where the lien is dissolved by the bankruptcy as that of an execution following a judgment recovered within four months, the bankrupt is entitled to his exemption in the property which was affected by such lien,¹⁸⁸ or, if it has been sold, from the proceeds of the sale. There seems some reason for the rule laid down in some courts that liens procured through legal proceedings during the four months' period are not annulled so far as they affect property claimed by the bankrupt as exempt,¹⁸⁹ but in that jurisdiction where property is sold at a receiver's sale the right to exemptions is transferred from the property to the proceeds and the bankrupt may claim his exemption in money,¹⁹⁰ since, by § 67-f, the annulment of such liens is apparently for the purpose of passing over the property affected to the trustee for the benefit of the estate, freed from all such incumbrances. On the other hand the provision referred to is absolute in its effect; all liens, etc., acquired through legal proceedings during the four months' period are annulled absolutely and there seems no good reason why the provision should not inure to the benefit of the bankrupt as well as his creditors.¹⁹¹ As between incumbered and unincumbered property exempt in specie, the bankrupt will be given the unincumbered. But where the debtor, within four months of the bankruptcy, gave a mortgage on his stock in trade, otherwise exempt, but without specifying the exemption, the mortgage is a preference and will not be declared good to the extent of the exemption allowance, because a claim to exemption is personal to the bankrupt and must be

appears that, in the bankruptcy proceedings, the debt of the plaintiff secured by said mortgage was duly scheduled, that plaintiff had notice and appeared, and that the property described in his mortgage was, upon a hearing of plaintiff's exceptions thereto, set apart and adjudged to be the homestead of defendant, such judgment of the bankruptcy court is conclusive as to the parties therein. *McCurry v. Sledge* (Okla. Sup. Ct.), 35 Am. B. R. 122, 149 Pac. 1124.

Effect of setting aside homestead on lien for purchase price.—The setting aside of a homestead to a bankrupt does not impair a purchase money lien on the property, but it does present a question of marshalling the property so that the homestead may be preserved to the bankrupt if possible. *Sheridan State Bank v. Rowell* (D. C., Ore.), 32 Am. B. R. 747, 212 Fed. 529.

186. *In re Hopkins* (Ref., Ala.), 1 Am. B. R. 209; *In re Grimes* (D. C., N. Car.), 2 Am. B. R. 730, 96 Fed. 529; *In re Hatch* (D. C., Iowa), 3 Am. B. R. 349, 102 Fed. 280; *In re Wells* (D. C., Ark.), 5 Am. B. R. 308, 105 Fed. 762; *In re Durham* (D. C., Ark.), 4 Am. B. R. 760, 104 Fed. 231. But see *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906.

187. *In re Grimes* (D. C., Ala.), 2 Am. B. R. 730, 96 Fed. 529.

188. *In re Tune* (D. C., Ala.), 8 Am. B.

R. 285, 115 Fed. 906; *Matter of Downing* (D. C., Ky.), 15 Am. B. R. 423, 139 Fed. 590; *In re Arnold* (D. C., Ky.), 2 Am. B. R. 180, 94 Fed. 1,001.

189. *McKenney v. Cheney*, 118 Ga. 387, 11 Am. B. R. 54, 45 S. E. 433; *In re Durham* (D. C., Ark.), 4 Am. B. R. 760, 104 Fed. 231; *Powers Dry Goods Co. v. Nelson*, 10 N. Dak. 580, 7 Am. B. R. 506, 88 N. W. 703; *Jewett Bros. v. Huffman*, 14 N. Dak. 110, 13 Am. B. R. 738, 103 N. W. 408; *Matter of Snyder* (D. C., Pa.), 33 Am. B. R. 311, 216 Fed. 989.

190. *Matter of Haas* (D. C., Pa.), 32 Am. B. R. 284, 213 Fed. 694.

191. *In re Beals* (D. C., Ind.), 8 Am. B. R. 639, 116 Fed. 530; *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906.

Annulment of liens.—In the case of *In re Forbes* (C. C. A., 9th Cir.), 26 Am. B. R. 355, 186 Fed. 79, the court said: "But the provisions of section 67 (f) are not limited to the annulment of liens on property that passes to the trustee. They are general and sweeping and apply to liens acquired through legal proceedings against the bankrupt during the four months' period prior to his filing his petition in bankruptcy." Citing *Collier on Bankruptcy*, 8th ed., p. 161. The court held that upon the filing of the petition in bankruptcy an attachment lien which had been acquired during the four months' period

made by him.¹⁹² It has even been held, on a strict construction of § 64-a, that taxes on an exempt homestead must be paid out of the general fund.¹⁹³

g. Kinds of property exempt.—(1) **IN GENERAL.**—The cases referable to this subdivision are very numerous. Where a bankrupt bought goods, agreeing to give security for the same, and filed his petition before doing so, he is not entitled to exemptions in property so obtained.¹⁹⁴ In Pennsylvania the exemption to a debtor, under the act of 1849, of "property to the value of \$300," may not be allowed out of the proceeds of property to be subsequently sold.¹⁹⁵ As has already been said the State law governs as to exemptions, and this is especially so as to the kind and amount of property which is exempt.¹⁹⁶

(2) **WATCHES, WEARING APPAREL, IMPLEMENTS OF TRADE, AND THE LIKE.**—A watch is or is not exempt according to the circumstances of the bankrupt. Thus it has been held to be exempt where it was necessary for the bankrupt to know the time.¹⁹⁷ It has been held to be both wearing apparel,¹⁹⁸ and an

against property claimed by the bankrupt as a homestead was dissolved, and that the bankrupt was entitled to his exemption.

Failure to claim in prior deed of trust.—The fact that a bankrupt had made a deed of trust for the benefit of creditors, in which he did not claim exemptions, is not a valid objection to his claim in the bankruptcy court. *Matter of Gorman* (D. C., Md.), 35 Am. B. R. 638, 226 Fed. 361.

192. *In re Schuller* (D. C., Wis.), 6 Am. B. R. 278, 108 Fed. 591.

Rights of mortgagee.—Where a mortgagee of property of a bankrupt exempt *per se*, prior to the filing of the petition in bankruptcy, asserted his rights as mortgagee and reduced the property to possession, title passed to him, and no subsequent act or declaration of the bankrupt, or refusal or failure on his part to assert the exemption can affect the mortgagee's title, and the trustee in bankruptcy cannot recover the proceeds of the exempt property, although the mortgage may be avoided as preferential as to other property. *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255. See also cases under note 118, *ante*.

193. *In re Tilden* (D. C., Iowa), 1 Am. B. R. 300, 91 Fed. 500; *In re Baker* (Ref., Tex.), 1 Am. B. R. 526.

194. *Matter of Hennis* (Ref., N. Car.), 17 Am. B. R. 889.

195. *In re Pfeiffer* (D. C., Pa.), 19 Am. B. R. 230, 155 Fed. 892.

196. *In re Pfeiffer* (D. C., Pa.), 19 Am. B. R. 230, 155 Fed. 892; *In re Sullivan* (C. C. A., 8th Cir.), 17 Am. B. R. 578, 148 Fed. 816; *Duncan v. Ferguson-McKinney Dry Goods Co.* (C. C. A., 5th Cir.), 18 Am. B. R. 155, 150 Fed. 269; *In re Wood* (D. C., Wis.), 17 Am. B. R. 93, 147 Fed. 877; *McCarty v. Coffin* (C. C. A., 5th Cir.), 18 Am. B. R. 152, 150 Fed. 307; *In re Mullen* (D. C., Me.), 15 Am. B. R. 275, 140 Fed. 208. *Matter of Star Spring Bed Co.* (D. C., N. J.), 40 Am. B. R. 1, 243 Fed. 957; *Matter of French* (D. C., Wash.), 41 Am. B. R. 470, 250 Fed. 644. See Am. B. R. Dig. § 962.

Right under New York Code of Civil Procedure, § 1391.—The exemption created by section 1391 of the New York Code of Civil

Procedure is a qualified one, inasmuch as it is limited and indefinite, and where a debtor has property of that character of greater value than \$250, the exemption of any particular property and what property is dependent upon his election as to the particular property that may be retained by him. *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255.

Earnings; proceeds of milk.—The proceeds of milk delivered to a condensary by an unmarried farmer working a rented farm are not "earnings" and exempt under section 2463 of the Code of Civil Procedure which provides that proceedings supplementary to execution cannot reach "the earnings of the judgment debtor for his personal services, rendered within the sixty days, next before the institution of the special proceeding," etc. *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255.

197. *Sellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 94 Fed. 801; *In re Osborn* (D. C., N. Y.), 5 Am. B. R. 111, 104 Fed. 780; *In re Collier* (D. C., Mass.), 7 Am. B. R. 131, 111 Fed. 503; *In re Everleth* (D. C., Vt.), 12 Am. B. R. 236, 129 Fed. 620. In the above case it was held that the bankrupt's watch was not exempt where he had a clock in his barber shop.

198. *In re Jones* (D. C., Wis.), 3 Am. B. R. 259, 97 Fed. 773; *In re Caswell* (Ref., R. I.), 6 Am. B. R. 718. *Contra:* *In re Turnbull* (Ref., Mass.), 5 Am. B. R. 231; *In re Everleth* (D. C., Vt.), 12 Am. B. R. 236, 129 Fed. 620; *Matter of Henry* (Ref., Ohio), 14 Am. B. R. 62.

But in Delaware a gold watch, a watch chain, cuff links, two watch fobs, a gold ring, a gold ring with diamond setting, a gold ring with sapphire setting, a pearl scarf pin, a ruby scarf pin, and a set of shirt studs of the aggregate value of \$444.50, have been held to be wearing apparel. *In re Evans & Co.* (D. C., Del.), 19 Am. B. R. 752, 158 Fed. 153.

Under the Massachusetts statute, a watch is not part of the necessary wearing apparel

implement of trade.¹⁹⁹ Even a diamond stud has been declared exempt, though this case would seem treacherous authority.²⁰⁰ The question of whether or not jewelry will be regarded as wearing apparel will depend upon whether or not it was acquired and used as ornamental apparel or was acquired and kept as an investment of values, as a matter of business.²⁰¹ The tools and implements of a bankrupt's trade are exempt in most of the States;²⁰² so are his household furniture and wearing apparel to limited amounts.²⁰³ A seat in a stock exchange is not exempt unless made so by statute.²⁰⁴ In Vermont, an unbroken horse is so far a domestic animal as to be exempt;²⁰⁵ but a race horse is not.²⁰⁶ In Pennsylvania the proceeds of the sale of a liquor license have been held to be exempt.²⁰⁷ Under an exemption statute which exempts to every family one carriage or buggy, it has been held that an automobile is exempt, especially where

of the debtor, and is not exempt. *In re Turnbull* (D. C., Mass.), 5 Am. B. R. 549, 106 Fed. 667, affg. 5 Am. B. R. 231.

^{199.} *In re Collier* (D. C., Mass.), 7 Am. B. R. 131, 111 Fed. 508, in which case the watch of a cabinet maker, who, when working outside of the factory of his employer, was required to keep the time of himself and other workmen, was held exempt as a tool or implement of his trade.

^{200.} *In re Smith* (D. C., Tex.), 3 Am. B. R. 140, 96 Fed. 832.

Diamond ring.—In Florida a diamond finger ring, worth \$650, which the bankrupt owned and wore, is not exempt. *Rivas v. Noble* (C. C. A., 5th Cir.), 39 Am. B. R. 735, 241 Fed. 673.

^{201.} *In re Leech* (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; *In re Evans & Co.* (D. C., Del.), 19 Am. B. R. 752, 153 Fed. 153.

^{202.} *In re Peterson* (D. C., Cal.), 2 Am. B. R. 630, 95 Fed. 417; *In re Osborn* (D. C., N. Y.), 5 Am. B. R. 111, 104 Fed. 780; *In re Robinson* (D. C., Idaho), 30 Am. B. R. 686, 206 Fed. 176. See Am. B. R. Dig., § 956.

In Vermont a candy stove and tools, etc. *In re Trombly* (Ref., Vt.), 16 Am. B. R. 598,

In Maryland the tools and appliances used by an undertaker have been held to be exempt. *Steiner v. Marshall* (C. C. A., 4th Cir.), 15 Am. B. R. 496, 140 Fed. 710.

In Maine the canoe of a registered guide was held exempt, but not his rifle. *Matter of Mullen* (D. C., Me.), 15 Am. B. R. 275, 140 Fed. 206.

In Nebraska the conveyances and equipment of a poultry dealer have been held to be exempt. *Matter of Ellsworth Conley* (D. C., Nebr.), 19 Am. B. R. 200, 162 Fed. 806.

In Idaho, a bankrupt actually using tools or implements pertaining to different trades but within one class may claim them as exempt to the value of \$500. *In re Robinson* (D. C., Idaho), 30 Am. B. R. 686, 206 Fed. 176.

In California under subdivision 6 of section 690 of the Code of California, exempting "one dray or truck . . . by the use of

which a . . . drayman . . . truckman . . . habitually earns his living," an auto truck should not be exempted where it does not appear that the petitioner habitually used the same in earning his living. *Matter of Schumm* (D. C., Cal.), 36 Am. B. R. 427, 232 Fed. 414.

"Working tools."—Milk cans, plows, harrows, cultivators, buzz saws, ice racks, hay racks, harness for team and team blankets are necessary "working tools" for a farmer, within the meaning of section 1391 of the New York Code of Civil Procedure. *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255.

The machinery of a grain mill which is operated by power does not come within a statute exempting tools or apparatus of trade. *Peyton v. Farmers' Nat. Bank* (C. C. A., 5th Cir.), 44 Am. B. R. 285, 261 Fed. 326.

203. Goods and furniture exempt under Washington statute.—Under section 563, paragraph 3, of Rem. & Bal. Statutes of Washington, exempting "To each householder, one bed and bedding, and one additional bed and bedding for each additional member of the family, and other household goods, utensils and furniture not exceeding \$500.00, coin, in value," the particular articles of property exempt, being named, excludes additional property of the same class. Hence, the householder in selecting other goods, etc., to the value of \$500.00 may not include beds and bedding. *Matter of Robinson* (D. C., Wash.), 33 Am. B. R. 27, 215 Fed. 662.

^{204.} *Page v. Edmunds*, 187 U. S. 596, 9 Am. B. R. 277, 47 L. Ed. 318; *In re Neimann* (D. C., Wis.), 10 Am. B. R. 739, 124 Fed. 738.

^{205.} *In re Alfred* (Ref., Vt.), 1 Am. B. R. 243; *In re Grady* (D. C., Vt.), 14 Am. B. R. 738, 138 Fed. 935.

^{206.} *In re Libby* (D. C., Vt.), 4 Am. B. R. 615, 103 Fed. 776.

^{207.} *In re Olewine* (D. C., Pa.), 11 Am. B. R. 40, 125 Fed. 840. But see *In re Meyers* (D. C., Pa.), 4 Am. B. R. 536, 102 Fed. 869.

the family has no other carriage.²⁰⁸ Hard and fast rules are not deducible from the cases. Each claim will be determined on its own facts.²⁰⁹

(3) **HOMESTEADS.**—Here again resort must be had to the decisions of the State court.²¹⁰ Exemptions or freedom from liability granted in favor of homesteads given by the federal government are not exemptions within the meaning of the bankruptcy Act.^{210a} A homestead set off under the State law may be adopted by a court of bankruptcy,²¹¹ but a new allotment will sometimes be ordered.²¹² A bankrupt is not precluded from claiming a homestead as exempt from the operation of the bankruptcy law merely because, prior to the adjudication, he had failed to designate a homestead under the laws of the State, provided that, after claiming it, he proceed under the State law to perfect his right within a reasonable time.²¹³ It is a common rule that actual designation and occupancy are essential to the right;²¹⁴ but it seems a homestead may be abandoned and one more valuable be occupied even within the four months' period.²¹⁵

^{208.} *Patten v. Sturgeon* (C. C. A., 8th Cir.), 32 Am. B. R. 250, 214 Fed. 65. See also *Peyton v. Farmers Nat. Bank* (C. C. A., 5th Cir.), 44 Am. B. R. 295, 261 Fed. 326.

Automobile.—Under the bankruptcy act and section 1391 of the New York Code of Civil Procedure providing that "working tools and team, professional instruments," etc., not exceeding in value \$250, are exempt when owned by a householder, an automobile owned by a bankrupt stonecutter and not used wholly in his business, is not a team or a working tool, within the meaning of the statute, and, therefore, is not exempt. *Matter of Mills* (D. C., N. Y.), 35 Am. B. R. 758.

A **taxicab** is not exempt under section 690 of the Code of Civil Procedure of California. *Matter of Wilder* (D. C., Cal.), 35 Am. B. R. 319, 227 Fed. 843.

^{209.} Thus see *In re Thompson* (D. C., Ga.), 8 Am. B. R. 283, 115 Fed. 924.

^{210.} *In re Rhodes* (D. C., Ohio), 6 Am. B. R. 173, 109 Fed. 117; *In re Tollett* (C. C. A., 6th Cir.), 5 Am. B. R. 404, 106 Fed. 866; *In re Carmichael* (D. C., Ky.), 5 Am. B. R. 551, 108 Fed. 789; *In re Stone* (D. C., Ark.), 8 Am. B. R. 416, 116 Fed. 35; *In re Manning* (D. C., S. Car.), 10 Am. B. R. 498, 123 Fed. 180; *In re Willson* (C. C. A., 9th Cir.), 10 Am. B. R. 522, 123 Fed. 20; 50 C. C. A. 100, as to the effect of the payment of a mortgage upon a homestead from the proceeds of the sale of the bankrupt's grocery business shortly before bankruptcy; *Matter of Baker* (C. C. A., 6th Cir.), 24 Am. B. R. 411, 182 Fed. 392; *Patten v. Sturgeon* (C. C. A., 8th Cir.), 32 Am. B. R. 250, 214 Fed. 65; *Morrow v. Zane* (Mo. Ct. of App.) 185 Mo. App. 111, 33 Am. B. R. 431, 170 S. W. 918; *People's Nat'l Bank v. Maxson* (Iowa Sup. Ct.), 168 Iowa, 318, 33 Am. B. R. 765, 150 N. W. 601; *Matter of Dean* (D. C., Cal., Ref.), 34 Am. B. R. 156; *Matter of Johnson* (D. C., Ga.), 40 Am. B. R. 687, 247 Fed. 135.

Rights of mortgagee.—The right existing under the provision of section 2976 of the Iowa Code, that a homestead even where validity mortgaged may be sold "Only for a deficiency remaining after exhausting all other property" covered by the same mortgage, is not strictly personal to the mortgagors, but may be asserted by one to whom they have transferred an interest in the homestead, such as a mortgagee, and a waiver of homestead rights by the mortgagor after the subsequent mortgage, cannot prejudice the mortgagee in the exercise of this right, which may be invoked in a suit to marshal the assets as to several mortgage liens. *Moody & Son v. Century Savings Bank*, 239 U. S. 374, 38 Am. B. R. 95, 60 L. Ed. 336.

^{210a.} **Federal Act.**—Property held by a bankrupt under the Federal Homestead Act, while passing to the trustee in bankruptcy, should be turned over by him or reconveyed to the bankrupt when it is determined that there are no debts to which it is subject, or if subject to debts, as soon as the bankrupt pays said

debts. *Matter of Auge* (D. C., Mont.), 39 Am. B. R. 39, 238 Fed. 621.

When a person who has taken a homestead makes final proof before her death, and becomes entitled to a patent, her heirs under section 2448 of the U. S. Revised Statutes, take as such heirs and not directly from the government under section 2291 or as beneficiaries. Hence, the husband and sole heir of the owner of such homestead is entitled to have it exempted upon his becoming a bankrupt. *Parmeter v. Butler* (C. C. A., 8th Cir.), 36 Am. B. R. 124, 228 Fed. 668.

^{211.} *In re Hall*, Fed. Cas. 5,921, 2 Hughes, 411; *In re Volger*, Fed. Cas. 16,988, 2 Hughes 297; *In re Rhodes* (D. C., Ohio), 6 Am. B. R. 173, 109 Fed. 117.

^{212.} *In re McBryde* (D. C., N. Car.), 3 Am. B. R. 729, 99 Fed. 686.

Business homestead in Texas.—Where a bankrupt makes a general assignment for the benefit of creditors and thereafter fails to use or occupy his former place of business, as such, but merely expresses an intention of going into business at his former location, which intention is unsupported by other testimony, such place of business may not be exempted as a business homestead under the laws of Texas. *Matter of Martin* (D. C., Texas), 32 Am. B. R. 460, 214 Fed. 1012.

The appurtenances of a mill which were on the mill lot at the time of the adjudication in bankruptcy, but were not in the building, are not exempt as a part of the business homestead under the Texas exemption laws. *Peyton v. Farmers Nat. Bank* (C. C. A., 5th Cir.), 44 Am. B. R. 295, 261 Fed. 326.

^{213.} *Brandt v. Mayhew* (C. C. A., 9th Cir.), 83 Am. B. R. 845, 218 Fed. 422.

^{214.} *In re Buelow* (D. C., Wash.), 3 Am. B. R. 380, 98 Fed. 86; *In re Gibbs* (D. C., Vt.), 4 Am. B. R. 619, 105 Fed. 782; *In re Colen* (D. C., N. Dak.), 22 Am. B. R. 761, 171 Fed. 568; *Matter of Robinson* (D. C., Wash.), 33 Am. B. R. 27, 215 Fed. 662; *Peyton v. Farmers Nat. Bank* (C. C. A., 5th Cir.), 44 Am. B. R. 295, 261 Fed. 326.

Purchase subject to existing lease.—Where a bankrupt purchased a dwelling property, with the declared purpose of occupying it as a home for himself and wife, and said property was in area and value within the provisions of the Oklahoma Constitution as to homesteads, he is entitled to have said property set off as exempt, although he was unable to obtain possession after reasonable efforts because of an existing lease. *Gregory v. Pritchard* (C. C. A., 8th Cir.), 39 Am. B. R. 415, 240 Fed. 414.

^{215.} *Huenergardt v. Britain Dry Goods Co.* (C. C. A., 8th Cir.), 8 Am. B. R. 341, 116 Fed. 31; *In re Johnson* (D. C., Iowa), 9 Am. B. R. 319, 9 Am. B. R. 689, 120 Fed. 733.

^{257.} 118 Fed. 312; *In re Irvin* (C. C. A., 8th Cir.).

Under South Dakota statute.—Where it appeared that bankrupt, long prior to bank-

But a bankrupt is not entitled to a second homestead.²¹⁶ Under the laws of some States, the owner of a homestead may change it, and acquire a new one equal to it in value, if he does so in good faith.²¹⁷ Homestead exemptions cannot be allowed in vacant property,²¹⁸ or in a house built with funds derived from goods not paid for.²¹⁹ Where a person is adjudicated a bankrupt in one State the court may not set apart to him a homestead in lands of another State, not occupied by him.²²⁰ To constitute a valid claim of homestead, there must be an occupancy in fact, or something equivalent to it; there must be some positive indication of an intent to actually occupy the premises; an undefined floating intention to occupy at some future time is insufficient.²²¹ Although occupancy is essential under most statutes to create a homestead right, such occupancy may be constructive as well as actual, and a homestead being once established, absence therefrom is not sufficient to indicate abandonment, unless it is shown to be the intent of the parties.²²² A homestead is not abandoned by the removal of a husband with his family to another State, when there is an intention to return and make it their home.²²³ Where the owner of a homestead, while indebted, deeds it to a third person who agrees to reconvey to the wife of the owner upon payment by her of certain debts and permits her to remain in possession, the deed and the contract to reconvey constitute but one transaction, and under the laws of Iowa the homestead

ruptcy, had determined to build a home on and occupy certain lands other than the home which he then occupied, and, about two weeks before the filing of an involuntary petition against him, moved upon the property with his family, in entire good faith, without any intent to defraud his creditors and, upon bankruptcy intervening, turned his old homestead over to the trustee, held that he was entitled to have his new home set apart as exempt under the exemption statutes of South Dakota, which confer upon the debtor the right to select the property which he will retain as a homestead. *In re Carlson* (D. C., S. Dak.), 27 Am. B. R. 18, 189 Fed. 815.

^{216.} *Matter of Jeffers* (Ref., Ga.), 17 Am. B. R. 368.

^{217.} *In re Remmerde* (D. C., Iowa), 30 Am. B. R. 701, 206 Fed. 826.

^{218.} *In re Duerson*, Fed. Cas. 4,117; *In re Hatch* (Ref., Mich.), 2 Am. B. R. 36. As to effect of fire destroying house on farm, see *In re Thompson* (D. C., Wash.), 15 Am. B. R. 283, 140 Fed. 251.

^{219.} *McGahan v. Anderson* (C. C. A., 4th Cir.), 17 Am. B. R. 641, 113 Fed. 115; *Cannon v. Dexter, etc., Co.* (C. C. A., 4th Cir.), 9 Am. B. R. 724, 120 Fed. 659; *In re Schechter* (D. C., Col.), 9 Am. B. R. 729; *In re Butler* (D. C., Ga.), 9 Am. B. R. 539, 120 Fed. 100; *In re Campbell* (D. C., Va.), 10 Am. B. R. 723, 124 Fed. 417.

^{220.} *In re Owings* (D. C., N. Car.), 15 Am. B. R. 472, 140 Fed. 739.

^{221.} *Cowan v. Birchfield* (D. C., Ala.), 25 Am. B. R. 293, 180 Fed. 614.

^{222.} *In re Malloy* (C. C. A., 8th Cir.), 26 Am. B. R. 31, 188 Fed. 788; *Matter of Crocker* (D. C., Iowa), 33 Am. B. R. 293, 217 Fed. 173.

Acquiring other residence temporarily; renting homestead property.—Under the law of Texas, where property has been appropriated as a homestead, it will remain such until the owner voluntarily changes its character by disposing of it or leaving it with the intention of not further using it for that purpose, and although the fact that another residence has been acquired may be taken into consideration in determining one's intention in leaving a homestead, the acquisition of another residence for temporary occupancy will not operate as a forfeiture of the original homestead; nor will the temporary renting of it destroy its character as a homestead. *In re Thedford* (D. C., Tex.), 28 Am. B. R. 191.

Homestead in part of building; Iowa statute.—Under the Code of Iowa and the State decisions construing the same, a bankrupt, who six years before had purchased a two-story and basement house, 22 feet wide and 90 feet long for \$14,000, in which she and her children had since lived, is entitled to the entire building and lot as her homestead, although at times she had rented the first floor and taken some roomers in the second floor which she occupied as a residence, where it appears that the building is neither so arranged or constructed that it can be partitioned among separate owners without disadvantage to all. *Matter of Coles* (D. C., Iowa), 35 Am. B. R. 339, 224 Fed. 170.

^{223.} *In re Schulz* (D. C., Or.), 14 Am. B. R. 317, 135 Fed. 228; *In re Thompson* (D. C., Wash.), 15 Am. B. R. 283, 140 Fed. 251; *Porter v. Chapman*, 65 Cal. 365, 4 Pac. 237; *In re Presnell* (D. C., Tex.), 21 Am. B. R. 905, 167 Fed. 406.

right was never extinguished and there was no time when creditors could intervene and claim a right prior to the homestead.²²⁴ A bankrupt may have his homestead in a store, but will not be permitted to claim a homestead where he merely stores his goods.²²⁵ And a person may have a homestead in a hotel building where the statute merely limits the value of the homestead and not the area.²²⁶ A woman, doing business as a *feme sole*, though living with her husband, has been allowed a homestead,²²⁷ and it has been held that a homestead set apart as alimony for the benefit of a wife and child cannot be distributed among her creditors in bankruptcy.²²⁸ Where a State law exempts the homestead of every family from judicial sale and prevents a conveyance thereof unless both husband and wife join therein, the adjudication of the wife as a bankrupt does not defeat the right of the husband to have the homestead set apart to him, although the bankrupt made no claim of exemption in her schedules.²²⁹ Under some statutes a wife may, after bankruptcy of her husband, claim a homestead exemption.²³⁰ A tenant by the curtesy has sufficient possession to sustain a homestead,²³¹ but not a mere remainderman.²³² A homestead claim may attach to the undivided interest of a tenant in common.²³³ A leasehold interest in land, together with a storebuilding and dwelling house combined, constructed upon the land and occupied by the bankrupt and his family, may be claimed as a homestead.²³⁴ A bankrupt's homestead is exempt though it was paid for with the proceeds of non-exempt property.²³⁵ Crops on a homestead are or are not exempt according to circumstances.²³⁶ Where a bankrupt's homestead is sold under foreclosure, and a surplus remains after paying the mortgage debt, the bankrupt is entitled to an exemption therein up to the statutory limit.²³⁷ Money realized from insurance arising from exempt property is exempt.²³⁸ It would seem that the jurisdiction of a court of bankruptcy over homestead property extends even to the sale of it

²²⁴. *People's Nat'l Bank v. Moxson* (Iowa Sup. Ct.), 168 Iowa, 318, 33 Am. B. R. 765, 150 N. W. 601.

²²⁵. *In re Dawley* (D. C., Vt.), 2 Am. B. R. 496, 94 Fed. 795.

²²⁶. *Matter of Robinson* (D. C., Wash.), 33 Am. B. R. 27, 215 Fed. 662.

²²⁷. *Richardson v. Woodward* (C. C. A., 4th Cir.), 5 Am. B. R. 94, 104 Fed. 873.

²²⁸. *In re Le Claire* (D. C., Iowa), 10 Am. B. R. 733, 124 Fed. 654.

²²⁹. *In re Maxson* (D. C., Iowa), 22 Am. B. R. 424, 170 Fed. 356.

²³⁰. *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

²³¹. *In re Marquette* (D. C., Vt.), 4 Am. B. R. 623, 103 Fed. 117; *In re Kaufmann* (D. C., Wis.), 16 Am. B. R. 118, 142 Fed. 808.

²³². *In re Fitzsimmons*, 2 N. B. N. Rep. 453; *In re Sale* (C. C. A., 6th Cir.), 16 Am. B. R. 235, 143 Fed. 310.

²³³. *Sieg v. Greene* (C. C. A., 8th Cir.), 35 Am. B. R. 150, 225 Fed. 955.

²³⁴. *Matter of Irving* (D. C., Ariz.), 34 Am. B. R. 399, 220 Fed. 969.

²³⁵. *In re Wood* (D. C., Wis.), 17 Am. B. R. 93, 147 Fed. 877; *In re Letson* (C. C.

A., 8th Cir.), 19 Am. B. R. 506, 157 Fed. 78, holding that in Oklahoma the purchase of a homestead with non-exempt funds or assets does not subject it to claims of creditors in bankruptcy.

²³⁶. *In re Coffman* (D. C., Tex.), 1 Am. B. R. 530, 93 Fed. 422; *In re Hoag* (D. C., Wis.), 3 Am. B. R. 290, 97 Fed. 543; *In re Daubner* (D. C., Or.), 3 Am. B. R. 368, 96 Fed. 805. In Iowa crops grown, though not reaped, are not exempt. *In re Sullivan* (D. C., Iowa), 16 Am. B. R. 87, 142 Fed. 620, *affd.* 17 Am. B. R. 578, 148 Fed. 115.

Growing crops.—When an order is made setting aside a homestead to a bankrupt, whether the homestead be exempt under the laws of the State or under the laws of the United States, the order of necessity carries with it all growing and unmaturing crops, although they were not scheduled. *Olmsted-Stevenson Co. v. Miller* (C. C. A., 9th Cir.), 36 Am. B. R. 816, 231 Fed. 69.

²³⁷. *In re Barret* (D. C., Or.), 16 Am. B. R. 46, 132 Fed. 362.

²³⁸. *First Nat'l Bank v. Orten* (Okla. Sup. Ct.), 43 Okla. 325, 33 Am. B. R. 108, 142 Pac. 1096.

for certain purposes.²³⁹ Where the real estate in which a homestead exemption is claimed is indivisible steps should be taken to have it sold.²⁴⁰ But since the title to real estate of a bankrupt, exempt under the State law as a homestead, does not vest in the trustee, a bankruptcy court has no jurisdiction to sell such property upon the petition of a creditor who may have a claim or lien thereon.²⁴¹ Where the statute authorizes a sale and an application of excess proceeds to the payment of debts, the bankrupt may retain possession until such sale.²⁴² A bankrupt by accepting personal property set off to him as exempt does not waive his right to appeal from the order of the referee on a claim for a homestead exemption.²⁴³ For cases on what constitutes in different States an abandonment of a homestead, see the foot-note.²⁴⁴

(4) **INSURANCE POLICIES.**—Insurance policies are not always exempt under the laws of the States. Where they are, the question at once arises: How far is § 6 of the law limited by § 70-a (5)? The cases seem to turn on whether the policy is of such a nature as to have a present cash surrender value. If it has no such value, or if the wife must consent to its transfer, it seems that it is not an asset that passes to the trustee, and may be exempt.²⁴⁵ The circuit court of appeals for the eighth circuit has even held that the only test is whether the policy is exempt by the State law; in other words, that the provisions of § 70-a (5) are not a limitation of § 6.²⁴⁶ The same court in the ninth circuit has held the opposite, provided the policy is payable to the bankrupt;²⁴⁷ the rule in the seventh circuit is much the same.²⁴⁸ In Pennsylvania, a policy of insurance upon a bankrupt's life, taken out for the benefit

239. *In re Gibbs* (D. C., Vt.), 4 Am. B. R. 619, 103 Fed. 782; *In re Oderkirk* (D. C., Vt.), 4 Am. B. R. 617, 103 Fed. 779.

In Georgia, where the assets of a bankrupt estate have been reduced to cash, the bankruptcy court may order an allowance to the bankrupt sufficient to supply him household and kitchen furniture in the amount secured to him by the exemption laws of the State. *In re Hargraves* (D. C., Ga.), 20 Am. B. R. 186, 160 Fed. 758.

240. *Matter of Brown* (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

241. *Ingram v. Wilson* (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; *In re Little* (D. C., Iowa), 6 Am. B. R. 681, 110 Fed. 62; *In re Wells* (D. C., Ark.), 5 Am. B. R. 308, 105 Fed. 762; *Norwood v. Watson* (C. C. A., 4th Cir.), 39 Am. B. R. 348, 242 Fed. 885.

242. *In re Nye* (C. C. A., 8th Cir.), 13 Am. B. R. 142, 133 Fed. 33.

243. *In re Letson* (C. C. A., 8th Cir.), 19 Am. B. R. 506, 157 Fed. 78; *Duncan v. Ferguson-McKinney Dry Goods Co.* (C. C. A., 5th Cir.), 18 Am. B. R. 155, 150 Fed. 269.

A bankrupt, to whom personal property has been set apart as exempt, may thereafter execute and file for record a declaration of homestead, as required by the State law, and have the same set apart as exempt. *Matter of Lehfeldt* (D. C., Conn.), 35 Am. B. R. 716, 225 Fed. 681.

244. *In re Harrington* (D. C., Tex.), 3 Am. B. R. 639, 99 Fed. 390. *In re Pope* (D. C.,

Iowa), 3 Am. B. R. 525, 98 Fed. 722; *In re Lynch* (D. C., Mo., Ref.), 1 Am. B. R. 245; *In re Mayer* (C. C. A., 7th Cir.), 6 Am. B. R. 117, 108 Fed. 599; *In re Flannagan* (D. C., Tex.), 9 Am. B. R. 140, 117 Fed. 695; *In re Allen* (D. C., Va.), 13 Am. B. R. 518, 134 Fed. 620; *In re Nye* (C. C. A., 8th Cir.), 13 Am. B. R. 142, 133 Fed. 33; *Burrow v. Grand Lodge* (C. C. A., 5th Cir.), 13 Am. B. R. 542, 133 Fed. 542; *Matter of Downing* (D. C., Ky.), 15 Am. B. R. 423, 139 Fed. 590; *Woodward v. Sanger Bros.* (C. C. A., 5th Cir.), 40 Am. B. R. 578, 246 Fed. 777; *Dunn v. Eckhardt* (C. C. A., 5th Cir.), 43 Am. B. R. 437, 256 Fed. 315.

The burden of proof rests upon one asserting the abandonment of a homestead. *Bogart v. Cowboy State Bank* (Tex. Civ. App.), 37 Am. B. R. 387, 182 S. W. 678. See Am. B. R. Dig. § 976.

245. *In re Lange* (D. C., Iowa), 1 Am. B. R. 189, 91 Fed. 361; *In re Buelow* (D. C., Wash.), 3 Am. B. R. 389, 98 Fed. 86; *In re Hernich* (Ref. Md.), 1 Am. B. R. 718; *Matter of Hunter* (D. C., N. Y.), 41 Am. B. R. 445. Compare *In re Shingluff* (D. C., Md.), 5 Am. B. R. 76, 106 Fed. 154.

246. *Steele v. Buel* (C. C. A., 8th Cir.), 5 Am. B. R. 165, 104 Fed. 968. See also *Pulsifer v. Hussey*, 97 Me. 434, 9 Am. B. R. 657, 54 Atl. 1076; *In re Johnson* (D. C., Minn.), 24 Am. B. R. 277, 176 Fed. 501; *Eldredge v. Mutual Life Ins. Co.* (Mass. Sup. Jud. Ct.), 217 Mass. 444, 32 Am. B. R. 530, 105 N. E. 361; *Matter of Bonvillain* (D. C., Pa.), 36 Am. B. R. 761, 232 Fed. 370; *Frederick v. Metropolitan Life Insurance Co.* (D. C., Pa.), 37 Am. B. R. 737, 235 Fed. 639; *Matter of Hunter* (D. C., N. Y.), 41 Am. B. R. 445. See also *Kellogg v. King* (Miss. Sup. Ct.), 39 Am. B. R. 762, 75 So. 134. See Am. B. R. Dig. § 959.

247. *In re Scheld* (C. C. A., 9th Cir.), 5 Am. B. R. 102, 104 Fed. 870.

248. *In re Welling* (C. C. A., 7th Cir.), 7 Am. B. R. 340, 113 Fed. 189.

of, or *bona fide* assigned to, his wife or children, vests in them free of all claims of the creditors of the bankrupt, and is exempt.²⁴⁹ Where a State statute exempts a policy payable to the wife of the insured, the policy is exempt from the claims of the creditors of the husband in bankruptcy proceedings, although he has reserved the right to change the beneficiary,²⁵⁰ unless it appears that the policy provides for the payment to the insured of a fixed, definite sum at the end of a stated period.²⁵¹ And this protection extends to a policy assigned by the husband to the wife on the eve of the husband's bankruptcy with full knowledge by both of his insolvent condition.²⁵² If the bankrupt has a valuable interest in the policy independent of that of the beneficiary, as where there is a cash surrender value accruing to him, the interest such as he has passes to the trustee, freed from the exemption; this would be the rule in those States like New York where the exemption is only applied in case the policy is payable absolutely to the wife.²⁵³ The United States Supreme Court has held, under a statute exempting from liability for debts the proceeds of a life insurance policy, that the proceeds of a semi-tontine or paid up policy

249. *In re Booss* (D. C., Pa.), 18 Am. B. R. 658, 154 Fed. 494.

An ordinary life insurance policy payable only on the death of the insured to his wife, with power in the insured to change the beneficiary, and with a cash surrender value is exempt under the Pennsylvania statute and hence, the trustee in bankruptcy of the insured has no interest therein, the proceeds having been paid to the wife after due proof of death. *Frederick v. Metropolitan Life Ins. Co.* (D. C., Pa.), 37 Am. B. R. 737, 235 Fed. 639.

250. *Allen v. Central Wisconsin Trust Co.* (Sup. Ct., Wis.), 143 Wis. 381, 25 Am. B. R. 126, 127 N. W. 1008; *In re Scheld* (C. C. A., 9th Cir.), 5 Am. B. R. 102, 104 Fed. 870.

Maryland statute.—Where a policy on the bankrupt's life was payable to his wife at the time of the filing of the petition in bankruptcy, but it reserved the right to change the beneficiary, and had a cash surrender value, he is entitled, under section 8 of article 83 of the Maryland Code and section 44 of article 3 of the State Constitution, upon payment to the trustee in bankruptcy of a sum \$500 less than the surrender value of the policy, to hold it free of all claims of the trustee, but in full satisfaction of all exemptions to which he is entitled under section 8 of article 83 of the Code. *Matter of Jones* (D. C., Md.), 41 Am. B. R. 467, 249 Fed. 487.

Missouri statute.—Under section 6944 of the Revised Statutes of Missouri for 1909 providing that every policy of insurance "expressed to be for the benefit of the wife of the insured, shall inure to her separate benefit independently of the creditors . . . of the husband," the fact that policy of insurance, in which the wife is named as beneficiary, states that the insured may have the right to change the beneficiary or enjoy certain collateral rights in his lifetime does not place the policy beyond the exemption of the statute. *In re Orear* (C. C. A., 8th Cir.), 26 Am. B. R. 521, 189 Fed. 888, followed in *Matter of Young* (D. C., Ohio), 31 Am. B. R. 29, 208 Fed. 373, applying Ohio statute.

South Dakota statute.—By virtue of section 728 of the Civil Code and section 348 of the Code of Civil Procedure of South Dakota, the former section exempting a policy of insurance in the hands of an individual in any sum less than \$5,000 and the latter exempting the avails of any such policy after death, policies of insurance, not exceeding the statutory amount, upon the life of a bankrupt, a resident of that

State, for benefit of his wife, are not assets of his estate in bankruptcy. *In re Carion* (D. C., S. Dak.), 27 Am. B. R. 18, 189 Fed. 815.

Louisiana statute.—The test of exemption of a life insurance policy under the Louisiana statute, adopted July 9, 1914, is not whether the policy had a cash surrender value at the moment of adjudication, but whether the debts scheduled and the cash surrender value both antedated the exemption statute. As to the debts that did not come into existence before its passage, the statute is valid. And creditors cannot complain as to its exemption of the policy was not property to which they might have looked for payment prior to the change in the law. *Matter of Rosenberg, Oldstein Co.* (D. C., La.), 37 Am. B. R. 608.

251. *Matter of White* (C. C. A., 2d Cir.), 23 Am. B. R. 90, 174 Fed. 333, holding that where a wife's interest in a life insurance policy on the life of her husband is contingent upon his surviving her, and in case of her predecease the policy is payable to his estate or any beneficiary designated by him, and he may at any time surrender the policy for paid up insurance or other value, the policy is not exempt; *In re Hettling* (C. C. A., 2d Cir.), 23 Am. B. R. 161, 175 Fed. 65; *In re Wolff* (D. C., N. Y.), 21 Am. B. R. 452, 165 Fed. 984.

252. *Eldredge v. Mutual Life Ins. Co.* (Mass. Sup. Jud. Ct.), 217 Mass. 444, 32 Am. B. R. 530, 105 N. E. 361.

253. *In re Wolff* (D. C., N. Y.), 21 Am. B. R. 452, 165 Fed. 984; *In re Coleman* (C. C. A., 2d Cir.), 14 Am. B. R. 461, 136 Fed. 818; *In re Phelps* (Ref., N. Y.), 15 Am. B. R. 170, holding that under § 22 of the N. Y. Domestic Relations Law, a semi-tontine policy, payable to the wife of the insured in case of his death before the tontine period is not exempt under § 6 of the bankruptcy act; *In re Boardman* (D. C., N. Y.), 4 Am. B. R. 620, 103 Fed. 783; *In re Diack* (D. C., N. Y.), 3 Am. B. R. 723, 100 Fed. 770; *Matter of Samuels* (C. C. A., 2d Cir.), 42 Am. B. R. 434, 254 Fed. 975.

Ohio statute.—Where a policy of insur-

are exempt, although it has a cash surrender value.²⁵⁴ This determination of the Supreme Court seems definitely to establish the rule that if a life insurance policy, or any rights under it, are exempt under a State law, such part thereof as is subject to the exemption remains to the bankrupt notwithstanding the provisions of § 70-a.^{254a}

(5) PENSION MONEY.—The Federal law protects pension money from seizure by levy and sale;²⁵⁵ and the States sometimes protect it after it has been transformed into other property.²⁵⁶ It is exempt everywhere while in transit from the government to the pensioner, or in the form in which it was paid to him;²⁵⁷ and probably if it could be traced into some other kind of property and identified, such property would be exempt.²⁵⁸ The opposite rule pertains, however, where the pensioner has embarked it in business, or where it has been invested in land from which at the time of his bankruptcy he has, through a mortgage thereon, already withdrawn more than the land cost.²⁵⁹

(6) UNPAID PURCHASE MONEY.—It is sometimes provided by State law that an exemption from execution shall not extend to a process issued upon a demand for the purchase price of the estate claimed as exempt.²⁶⁰ Any creditor of a bankrupt may avail himself of this exception.²⁶¹ This decision rests on a strict construction of the law. The rule seems well settled in those States that grant exemptions in specie, provided the property with taxes paid, is not worth the amount allowed.

IV. PRACTICE.

a. Exemptions set off where no trustee is appointed.—A difficulty arises when

once provides that if the insured survive for more than twenty years from the date of the policy he shall receive an annuity of \$60 during the remainder of his life, and, further, that upon the death of the insured at any time during the continuance of the policy \$1,000 shall be paid to the wife, and the law of the State in which the insured resides exempts from any claim of the husband's creditors policies of insurance for the benefit of the wife, although paid for by the husband, the wife has a vested interest in such policy and upon the insured becoming bankrupt his trustee is entitled only to the value of the annuity provided for and not to the entire present value of the policy as against the wife. In *re Schaeffer* (D. C., Ohio), 26 Am. B. R. 340, 188 Fed. 187.

A straight life insurance policy, issued to a bankrupt for the benefit of his wife payable only at his death, but reserving to the insured the right to change the beneficiary without his wife's consent, and providing that upon default in the payment of any premium, after two full annual premiums have been paid, the policy may be surrendered "with the written assent of the person to whom it is made payable," is exempt from the demands of creditors under the General Code of Ohio and is, therefore, protected by this section. *Matter of Fetterman* (D. C., Ohio), 39 Am. B. R. 834, 243 Fed. 975.

Massachusetts statute.—An endowment policy which has been assigned and in which the beneficiary has been changed with the consent of the company, and upon which a cash surrender value has been computed by it, held not to be exempt under the statute of Massachusetts. *Matter of Simmons and Griffin* (D. C., Mass.), 42 Am. B. R. 206, 253 Fed. 466.

²⁵⁴ *Holden v. Stratton*, 198 U. S. 202, 14 Am. B. R. 94, 40 L. Ed. 1018, revg. 7 Am. B. R. 615, 114 Fed. 650. See also *Matter of Phelps* (D. C., N. Y., Ref.), 15 Am. B. R. 170 (arising under N. Y. Domestic Relations Law, § 22); *Matter of Pfaffinger* (D. C., Ky.), 21 Am. B. R. 265,

164 Fed. 526; In *re Whelpley* (D. C., N. H.), 22 Am. B. R. 433, 169 Fed. 1019; In *re Johnson* (D. C., Minn.), 24 Am. B. R. 277, 176 Fed. 691; In *re Orear* (C. C. A., 8th Cir.), 24 Am. B. R. 343, 178 Fed. 682.

^{254a} *Matter of Brinson* (D. C., Miss.), 45 Am. B. R. 99, 262 Fed. 707.

²⁵⁵ U. S. R. S., § 4747.

²⁵⁶ Thus, § 1393, N. Y. Code of Civil Procedure.

²⁵⁷ In *re Bean* (D. C., Vt.), 4 Am. B. R. 53, 100 Fed. 262. Contra: In *re Jones* (D. C., Me.), 21 Am. B. R. 536, 166 Fed. 337.

²⁵⁸ *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 650, 23 N. E. 1108. But see In *re Stout* (D. C., Mo.), 6 Am. B. R. 505, 109 Fed. 794.

²⁵⁹ In *re Ellithorpe* (D. C., N. Y.), 5 Am. B. R. 681; *affd. s. c.*, 7 Am. B. R. 13, 111 Fed. 163.

²⁶⁰ In *re Schechter* (D. C., Col.), 9 Am. B. R. 729; *Cannon v. Dexter Broom & M. Co.* (C. C. A., 4th Cir.), 9 Am. B. R. 724, 120 Fed. 657, 57 C. C. A. 327. See also In *re Connor*, 146 Fed. 998. In the case of In *re Bailes* (D. C., So. Cal.), 23 Am. B. R. 789, 176 Fed. 460, it was held that a right of exemption of personal property cannot be defeated by a claim for a loan of money with which the property claimed as exempt was purchased.

The Constitution of Arkansas, Article IX, sections 1 and 2, providing for the allowance of exemptions, contains the proviso, "that no property shall be exempt from execution for debts contracted for the purchase money thereof, while in the hands of the vendee." Held, that bankrupt was not entitled to claim exemptions from a stock of merchandise in his possession at the time of the filing of the petition, the purchase price of which had not been paid but had been allowed as a claim against the estate. *Mullinix v. Simon* (C. C. A., 8th Cir.), 28 Am. B. R. 1, 196 Fed. 775.

²⁶¹ In *re Campbell* (D. C., Va.), 10 Am. B. R. 723, 124 Fed. 417.

the bankrupt claims exemptions and no creditors appear at the first meeting. By General Order XV, a trustee may be and usually is dispensed with. This leaves the court without the officer whose duty it is to report on and set off the exemptions. It is thought that in such cases the judge or referee may try the validity of the claim summarily. In some of the districts this practice is sanctioned by rule.²⁶² Where such a practice is followed, the claiming bankrupt should at least be required to file an affidavit giving facts in addition to those stated in his Schedule B (5), and such affidavit should show him clearly entitled under the State law to the property claimed.

b. Schedules to claim exemptions.—The bankrupt must in his schedules show that he is entitled to the exemptions which he claims. When he has done this, as directed by the bankruptcy act, the exemption must be set apart.²⁶³ And the fact that his schedules are not filed for a long time after adjudication does not deprive him of his right.²⁶⁴ The failure of the bankrupt to precisely observe the requirements of "Schedule B (5)," of the forms in bankruptcy in making the claim is not fatal; as, for instance, a failure to specifically enumerate the articles claimed as exempt.²⁶⁵

c. Amendment of schedules as to claim of exemptions.—General Order XI permits an amendment to schedules on the application of the bankrupt. This is sufficient to authorize an amendment so as to permit the bankrupt to claim his exemptions where he has through mistake failed to claim such exemptions. If he inadvertently omits from his schedules a valid claim of exemption an amendment should be permitted upon satisfactory proof of the mistake.²⁶⁶ But an amendment will not be permitted where it does not appear that an error or mistake was made,²⁶⁷ or where its purpose is to benefit creditors who hold

^{262.} In the Erie County District of the Western District of New York, Rule 15 (1) provides as follows:

"1. Where there is no trustee appointed, the exemptions claimed by the bankrupt may be set off to him at the time the order to that effect is signed, and, in that event, the following clause shall be inserted in Form 27:

"And it appearing that the said bankrupt is entitled to the exemptions claimed in the schedules accompanying the petition herein, it is further ordered that the property claimed in said schedules, being exempt pursuant to § 1390 of the Code of Civil Procedure of the State of New York, be, and the same is hereby set off to the said..... the bankrupt."

"Prior to asking for such order the bankrupt shall satisfy the referee, by affidavit or otherwise, as to the value of such exemptions, and that he is entitled to the same."

The court may set off the exemptions where no trustee has been appointed. *In re Allen & Co.* (D. C., Va.), 13 Am. B. R. 518, 134 Fed. 620; *In re Smalley v. Langenour*, 196 U. S. 93, 49 L. Ed. 400; *In re Smith* (D. C., Tex.), 2 Am. B. R. 190, 93 Fed. 791.

^{263.} *Lipman v. Stein* (C. C. A., 3d Cir.), 14 Am. B. R. 30, 134 Fed. 235; *Sheridan State Bank v. Rowell* (D. C., Ga.), 32 Am. B. R. 747, 212 Fed. 529.

^{264.} *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

^{265.} *Burke v. Guarantee Title & Trust Co.* (C. C. A., 3d Cir.), 14 Am. B. R. 31, 134 Fed. 562.

General statement.—Where the property of the bankrupt consists of a stock of merchandise it will be sufficient to state in the schedule that an exemption is claimed out of such goods, or out of the proceeds of the sale thereof. *In re Maynard & Co.* (D. C., Ga.), 25 Am. B. R. 732, 183 Fed. 823.

Curing by amendment.—Although the procedure in claiming and setting apart a bankrupt's exemption is irregular, it will be excused, where it entails no injury to anyone, and, if requisite, may be cured by amendment. *In re Kelly* (D. C., Pa.), 28 Am. B. R. 730, 199 Fed. 984.

^{266.} *In re Tollett* (C. C. A., 6th Cir.), 5 Am. B. R. 404, 106 Fed. 866; *In re Falconer* (C. C. A., 8th Cir.), 6 Am. B. R. 557, 110 Fed. 111; *In re White* (D. C., Pa.), 11 Am. B. R. 556, 128 Fed. 513; *In re Duff* (D. C., Pa.), 9 Am. B. R. 358, 118 Fed. 926; *In re Fisher* (D. C., Va.), 15 Am. B. R. 652, 142 Fed. 205; *In re Maxon* (D. C., Iowa), 22 Am. B. R. 24, 170 Fed. 356; *In re Goodman* (C. C. A., 5th Cir.), 23 Am. B. R. 504, 174 Fed. 644; *Matter of Radcliffe* (D. C., Ohio), 39 Am. B. R. 612, 243 Fed. 916. See Am. Bankr. Dig. § 869.

^{267.} *In re Neal* (Ref., Ohio), 14 Am. B. R. 550.

waivers of exemptions or to avoid a charge of concealment of property,²⁶⁸ or where it is apparent that the exemption, if included in the schedules, will be of no value to the bankrupt or his family.²⁶⁹ If the claim was omitted through inadvertence, an amendment asserting it will usually be allowed, even to reach property surrendered by one creditor to the trustee.²⁷⁰ The application for such amendment should be seasonably made.²⁷¹ An amendment should be permitted upon a proper showing if the application was made within a reasonable time while the property was still in the hands of the trustee, unaffected by adverse rights,²⁷² and the amendment when allowed must relate to conditions existing at the time the imperfect claim was formulated.²⁷³ The Federal courts are not bound to follow the State courts in the matter of the time of filing the declaration of the claim of exemptions, and may allow amendment of the claim after the original schedule has been filed.²⁷⁴

d. Claim of specific property.—The claim must be clearly stated, especially if of property in specie.²⁷⁵ Where the State law specifies the property which may be set apart as an exemption, the bankrupt may not claim and the trustee may not set apart a gross sum in lieu of such exemption; the State law must be complied with and the specific property must be claimed and set apart.²⁷⁶ In Pennsylvania, after a sale of property not exempt, a bankrupt,

^{268.} *In re Moran* (D. C., Va.), 5 Am. B. R. 472, 105 Fed. 901, *affd.* as *Moran v. King* (C. C. A., 4th Cir.), 7 Am. B. R. 176, 111 Fed. 730; *In re Royal* (D. C., N. C.), 7 Am. B. R. 106, 112 Fed. 135.

^{269.} *In re Merry* (D. C., Me.), 29 Am. B. R. 829, 202 Fed. 51.

^{270.} Amendment to include exemption.—*In re Tollett* (C. C. A., 6th Cir.), 5 Am. B. R. 404, 106 Fed. 866; *In re Falconer* (C. C. A., 8th Cir.), 6 Am. B. R. 557, 110 Fed. 111; *In re White* (D. C., Pa.), 11 Am. B. R. 556, 128 Fed. 513; *In re Kaufman* (D. C., Wis.), 16 Am. B. R. 118, 142 Fed. 898; *In re Maxson* (D. C., Ia.), 22 Am. B. R. 424, 170 Fed. 356. But in *In re Irwin* (C. C. A., 3d Cir.), 23 Am. B. R. 487, 174 Fed. 642, *revd.* 22 Am. B. R. 165, 177 Fed. 284, it has been held that after a bankrupt has been granted a discharge, he may not be allowed out of newly discovered assets, additional exemptions sufficient to make up the total exemptions to which he would have been allowed in the first instance.

In the case of *In re Baughman* (D. C., Pa.), 25 Am. B. R. 167, 183 Fed. 668, it was held that where a bankrupt amended his schedules so as to withdraw a claim of exemption which would inure to the benefit of an execution creditor, holding a waiver of exemption, the effect will be to withdraw the property from the exemption, and it will pass to the trustee to be administered with the assets of the estate.

^{271.} Application for amendment to be seasonably made.—*In re Vomkerm* (D. C., Pa.), 14 Am. B. R. 403, 135 Fed. 447, where the bankrupt asked for the privilege of amending his schedules 29 days after the sale of all his property by the trustee, and the application was denied; *In re Wunder* (D. C., Pa.), 13 Am. B. R. 701, 133 Fed. 821, where

the application was denied when made after the creditors had gone to the trouble and expense of a meeting for the purpose of passing upon the advisability of a sale and the sale had taken place; *In re Sharr* (Ref., Ohio), 15 Am. B. R. 491, 140 Fed. 761, in which the referee denied the application of the wife of an absconding bankrupt to claim an exception, where her husband had failed to do so, appearing that she had waited until after the numerous creditors of her husband had been to the expense of preserving, advertising and selling the property claimed, and the proceeds of the sale were in court; *In re Burnham* (D. C., Wash.), 30 Am. B. R. 270, 202 Fed. 762, *citing text.*

^{272.} *In re Goodman* (C. C. A., 5th Cir.), 23 Am. B. R. 504, 174 Fed. 644; *In re Irwin* (C. C. A., 3d Cir.), 23 Am. B. R. 487, 174 Fed. 642, in which it was held that an application to amend a claim for exemptions should be made within a reasonable time after discovering the facts which will justify the amendment.

^{273.} *Matter of Crum* (D. C., Ohio), 34 Am. B. R. 586, 221 Fed. 729.

^{274.} *Matter of Irving* (D. C., Ariz.), 34 Am. B. R. 399, 220 Fed. 969.

^{275.} *In re Wilson* (D. C., Va.), 6 Am. B. R. 287, 108 Fed. 197.

^{276.} State law determines amount and character.—The statutes of the State determine the amount and character of the exemptions and to whom they are allowed, both as to general and special exemptions; when a bankrupt has property which is especially exempt when selected by him, and other property subject to be selected in lieu of homestead, at the time of the filing of his petition, it is his duty to set out specifically, the articles selected, together with his estimate of the value thereof, separately. *Matter of Mc-*

even though entitled to an exemption in cash in the first instance, cannot assert his claim against the cash proceeds of such sale.²⁷⁷ Under the laws of that State it is the goods, and not the proceeds of their sale, that he is entitled to.²⁷⁸ If the property subject to exemption has been sold by authority of the court before the bankrupt's claim of the exemption had been made, or the time allowed for making it has expired, the right to its allowance is not extinguished, and the bankrupt may have his exemption out of the proceeds of the sale.²⁷⁹

Clintock (Ref., Ohio), 13 Am. B. R. 606, *affd.* by district court; see also *In re Groves*, 6 Am. B. R. 728, holding that under the Ohio statute the particular property selected as exempt must be described in the schedules; a claim of exemptions in general terms is insufficient, as simply "\$500.00 in lieu of a homestead," unless at the time of the bankruptcy there was cash in the estate.

In re Wunder (D. C., Pa.), 13 Am. B. R. 701, 133 Fed. 821, in which the court said: "In order that he may be allowed his claim he must comply with the requirements of the state law as well in regard to the manner of making the claim as to the articles claimed, and as to whether he has done this or not, the law, as construed by the highest court of the State, will be conclusive. If the bankrupt does not comply with these requirements, the property will pass to the trustee to be distributed among the creditors like other assets of the bankrupt, and he is deemed to have waived the right of exemption, unless he asserts his claim at a time long enough before the time of sale, to prevent a postponement of the same. His right of election is gone if he waits until the sale has taken place. The fact that he has given notice in his schedules filed, that he will claim \$300 worth of property to be appraised, will not entitle him to the amount of \$300 in cash out of the proceeds or to the property of that value, where he has not specified the articles as claimed by the State law." *In re Burman* (D. C., Ohio), 15 Am. B. R. 463, 140 Fed. 761; *Matter of Neal* (Ref., Ohio), 14 Am. B. R. 550, holding that the bankrupt in making his claim for a homestead, should make the claim for specified articles of property which he had on hand at the time of the filing of his petition; *In re Duffy* (D. C., Pa.), 9 Am. B. R. 358, 118 Fed. 926, holding that under the Pennsylvania law the bankrupt should set out in his schedules the exact property which he elects to take as exempt.

²⁷⁷ *In re Haskin* (D. C., Pa.), 6 Am. B. R. 485, 109 Fed. 789; *In re Manning* (D. C., Pa.), 7 Am. B. R. 571, 112 Fed. 948; *In re Stanton* (D. C., Pa.), 9 Am. B. R. 79, 117 Fed. 507.

Sufficiency of claim.—Where bankrupt whose stock was under levy and in the custody of the sheriff, made his claim for exemptions as follows: "Three hundred dollars cash from the proceeds as provided by the exemption law of Pennsylvania, or stock to the value of three hundred dollars to be

set aside by the appraisers, as provided by law," and when the stock was turned over to the trustee, pointed out to the latter the items claimed by him, the trustee was justified in setting apart the exemption claimed and reporting the items and estimated value thereof to the court, and his report should have been confirmed. *In re Kelly* (D. C., Pa.), 28 Am. B. R. 730, 102 Fed. 747.

²⁷⁸ *In re Donahey* (D. C., Pa.), 23 Am. B. R. 796, 176 Fed. 458.

²⁷⁹ *Lipman v. Stein* (C. C. A., 3d Cir.), 14 Am. B. R. 30, 134 Fed. 235; *In re Renda* (D. C., Pa.), 17 Am. B. R. 521, 151 Fed. 614, holding that where property which the bankrupt has asked to have set apart as exempt is sold by his receiver in bankruptcy with his assent, his claim for exemptions from the proceeds of sale, if made within the time fixed by the act, must be recognized; *In re LeVay* (D. C., Pa.), 11 Am. B. R. 114, 125 Fed. 990, holding that an exemption might be allowed out of the proceeds of the sale of perishable property, sold by receiver under the direction of the court.

Exemptions from proceeds of sale.—Where the bankrupt's property was sold by order of the court, by a receiver appointed the day after the petition in bankruptcy was filed, and prior to the filing of the schedule by the bankrupt and on the day of sale, or before the sale began, he notified the receiver that he claimed his exemption, and specified the property he desired set apart, he was entitled to claim his exemption from the proceeds of the sale. *In re Sloan* (D. C., Pa.), 14 Am. B. R. 435, 135 Fed. 873.

Under the provisions of the General Code of Ohio allowing exemptions in lieu of homestead to be selected out of the personal property for sale, but denying such exemption from a judgment for the purchase price of the property, a bankrupt, who fails to select property to meet his claim of a homestead exemption, but permits the property to be sold in bulk by the trustee, is not entitled to exemptions as to claims for purchase price of the property, but may be allowed exemptions as to claims for money borrowed. *Matter of Stern* (D. C., Ohio), 30 Am. B. R. 694, 208 Fed. 488. See *Matter of Nunemaker* (D. C., Ohio), 30 Am. B. R. 697, 208 Fed. 491. In the case of *Matter of Crum* (D. C., Ohio), 34 Am. B. R. 586, 221 Fed. 729, it was held that the practice of selling the bankrupt's personal property, when a selection of exempt articles is not

e. Sale by trustee, and exemptions out of proceeds.—While, as a rule, the trustee has no power to sell the exempt property, he must sell it,²⁸⁰ where it is inseparable from other property, the expense of sale to be borne by the general estate,²⁸¹ and the bankrupt is then entitled to his *pro rata* of the proceeds.²⁸² Thus, where all of a bankrupt's real estate is covered by a mortgage under which the mortgagee would have the right to sell and convey the title in fee discharged of any exemption, and the mortgagee submits his claim to the bankruptcy court, it may sell the land and allot the bankrupt his homestead from the proceeds, but it has no power to order the amount paid to the mortgagee.²⁸³ The bankrupt, having made claim for his exemption within the time fixed by the act, is not debarred because the goods were sold with his consent,²⁸⁴ and where an exemption will be defeated unless its allowance be in cash out of the proceeds of a sale, it will, if practicable, be ordered paid out of such proceeds.²⁸⁵

f. Exceptions to trustee's report.—(1) IN GENERAL.—The trustee first determines what is exempt.²⁸⁶ General Order XVII requires the trustee to report to the court in twenty days after receiving notice of his appointment, the articles set apart to the bankrupt as exempt, "and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report." This expressly authorizes a creditor to take exceptions

rendered impossible by reason of liens thereon, and then transferring to the bankrupt out of the proceeds \$500 in lieu of his homestead exemption, is neither in compliance with the Ohio statute nor a proper execution of the Bankruptcy Act.

Where the real estate of a voluntary bankrupt was sold for less than the amount of mortgages thereon, but the personal estate realized a considerable amount and the schedules filed with the petition for adjudication included a claim for exemption in cash out of the proceeds of the sale of real estate or the proceeds of the sale of personalty, the bankrupt cannot be said as a matter of law, to have waived the right of exemptions in personal property by failing to claim them by way of selection before sale. *Matter of Stitt* (C. C. A., 6th Cir.), 41 Am. B. R. 777, 252 Fed. 1.

A claim of \$500.00 exemption from personal estate in lieu of a homestead may be allowed under the Ohio law, where the bankrupt made a proper claim in his amended schedules, and where the homestead was covered by valid mortgages in excess of its scheduled and appraised value and was surrendered to the mortgagees to save them and the bankrupt estate from expense, and where he owned no other real estate. *Matter of Radcliffe* (D. C., Ohio), 39 Am. B. R. 612, 243 Fed. 716. See also *Matter of Hewitt* (D. C., Ohio), 40 Am. B. R. 6, 244 Fed. 245.

Sale of exempt property without notice to bankrupt.—Where, prior to his adjudication, a bankrupt is deprived of the possession of his property, by a receiver of his firm, appointed by a State court, and the trustee in bankruptcy sells the property, upon its being turned over to him, without notice to the bankrupt and without giving him an opportunity to make his selection of exempt property before the sale, the bankrupt is entitled to be paid his exemptions in cash from the proceeds of such sale. *In re Andrews v. Simonds* (D. C., Mich.), 27 Am. B. R. 116, 193 Fed. 776; see *In re Zack* (D. C., Pa.), 28 Am. B. R. 138, 198 Fed. 909.

^{280.} *In re Oderkirk* (D. C., Vt.), 4 Am. B. R. 617, 103 Fed. 779.

^{281.} *In re Hopkins* (D. C., Vt.), 4 Am. B. R. 619, 103 Fed. 781.

^{282.} *In re Richard* (D. C., N. Car.), 2 Am. B. R. 506, 94 Fed. 633; *In re Kane* (C. C. A., 7th

Cir.), 11 Am. B. R. 533, 127 Fed. 552; *In re Le Vay* (D. C., Pa.), 11 Am. B. R. 114, 125 Fed. 913, in which case the bankrupt was permitted to share in the proceeds of the sale of perishable property sold by a receiver under the direction of the court; *In re Stein* (D. C., Pa.), 12 Am. B. R. 384, 130 Fed. 629, *affd.* 14 Am. B. R. 30.

^{283.} *In re Paramore & Ricks* (D. C., N. Car.), 19 Am. B. R. 130, 156 Fed. 206; *McBride v. Gibbs* (Ga. Sup. Ct.), 42 Am. B. R. 328, 96 S. E. 1004.

^{284.} *In re Renda* (D. C., Pa.), 17 Am. B. R. 521, 149 Fed. 614.

^{285.} *In re Luby* (D. C., Ohio), 18 Am. B. R. 801, 155 Fed. 659; *Matter of Haas* (D. C., Pa.), 32 Am. B. R. 284, 213 Fed. 604. See also *In re Rendar* (D. C., Pa.), 17 Am. B. R. 521, 149 Fed. 614. *Lipman v. Stein* (C. C. A., 3d Cir.), 14 Am. B. R. 30, 134 Fed. 235; *In re Arnold* (D. C., Ga.), 22 Am. B. R. 392, 169 Fed. 1000, holding that where property set apart as exempt was sold with the bankrupt's consent upon the agreement that his exemption should be paid from the proceeds of sale, and they only bring 66 per cent of the inventory value, he is only entitled to his *pro rata* part of the proceeds.

Setting aside exemptions by referee upon trustee's refusal so to do; payment out of proceeds.—Where a bankrupt has complied with section 7-a (8) of the bankruptcy act by indicating in his schedule the property he selected to have set apart to cover his exemptions, it is the duty of the trustee, whose duties are merely administrative to set the same aside for his use, and upon the trustee's refusal so to do, it is proper for the referee to award the bankrupt his exemptions. Where exempt property, for which a bankrupt has duly made claim has been converted and sold, the bankrupt is entitled to be allowed his exemptions out of the proceeds of the sale, since property that is exempt, forms no part of the bankrupt's estate, so as to permit the bankruptcy court to acquire any right to administer upon or distribute it. *In re Finklestein* (D. C., Pa.), 27 Am. B. R. 229, 192 Fed. 738.

^{286.} *In re Friedrich* (C. C. A., 7th Cir.), 3 Am. B. R. 801, 100 Fed. 284; his report should be itemized, *In re Manning* (D. C., Pa.), 7 Am. B. R. 571, 112 Fed. 948.

to the determination of the trustee.²⁸⁷ The determination of the trustee is not final; if exceptions are filed within twenty days the referee decides the issue. Until exceptions are filed there is no issue.²⁸⁸ A creditor must file his exceptions within twenty days after the filing of the report; he will not be permitted to come in after the expiration of that time and file objections or add new and additional grounds to those already filed.²⁸⁹ Where objections are made before the referee to a bankrupt's claim for exemptions it is proper practice for the referee to decide the question, and for the unsuccessful party to take the matter to the District Court.²⁹⁰

(2) WHO MAY TAKE EXCEPTIONS; RIGHT OF BANKRUPT.—The language of the General Order would seem to indicate that only creditors may except to the report of the trustee setting apart the bankrupt's exemptions and the referee's action thereon. It may be doubted whether the order should be construed as restricting the right of a bankrupt to take exceptions to the determination of the trustee as to his exemptions.²⁹¹ If it be established that the duty of the trustee in setting apart the bankrupt's exemptions is ministerial,²⁹² it would follow that he would be bound by the claim of the bankrupt, and his report would be conclusive upon the bankrupt. The General Order indicates that the trustee is to make a determination. The bankrupt

287. In re Friedrich (C. C. A., 7th Cir.), 3 Am. B. R. 801, 100 Fed. 284; In re Smith (D. C., Tex.), 2 Am. B. R. 190, 93 Fed. 791; In re White (D. C., Vt.), 4 Am. B. R. 613, 103 Fed. 774; McGahan v. Anderson (C. C. A., 4th Cir.), 7 Am. B. R. 641, 113 Fed. 115.

288. In re Campbell (D. C., Va.), 10 Am. B. R. 723, 124 Fed. 417, holding that a trustee in setting apart property claimed as exempt acts ministerially, and there is no issue on the question, whether the exemption is properly allowable, until exceptions are filed to the trustee's report. In re White (D. C., Vt.), 4 Am. B. R. 613, 103 Fed. 774; In re Smith (D. C., Tex.), 2 Am. B. R. 190, 93 Fed. 791; but the issue may be certified to the judge without decision. McGahan v. Anderson (C. C. A., 4th Cir.), 7 Am. B. R. 641, 113 Fed. 115.

Exceptions to be filed.—Until exceptions are filed to the trustee's report there is no issue on the question whether the exemption is properly allowable. In re Campbell (D. C., Va.), 10 Am. B. R. 723, 124 Fed. 417. Exceptions filed more than twenty days after the filing of the trustee's report must be dismissed. Matter of Amos (Ref., Ga.), 19 Am. B. R. 804. And a failure to file exceptions or contest the bankrupt's claim will deprive the creditor of his right to reopen the matter. In re Reese (D. C., Ala.), 8 Am. B. R. 411, 115 Fed. 993.

Necessity for notice to creditors.—An objection to a trustee's report refusing to set aside an exemption is only a continuation of the proceeding initiated by making the claim for exemption in the schedules, and no notice to creditors of a hearing before the referee is necessary. Sheridan State Bank v. Rowell (D. C., Ore.), 32 Am. B. R. 747, 212 Fed. 529.

289. In re Cotton & Preston (D. C., Ga.), 25 Am. B. R. 532, 183 Fed. 190; In re Amos (D. C., Ga.), 19 Am. B. R. 804; Matter of Krecun (C. C. A., 7th Cir.), 36 Am. B. R. 172, 229 Fed. 711, holding that the provision as to the time within which exceptions to the trustee's report may be taken is mandatory and may not be extended.

290. Matter of Gorman (D. C., Md.), 35 Am. B. R. 638, 226 Fed. 361.

291. In re Ellis (Ref., Ohio), 10 Am. B. R. 754, in which Referee Remington very ably insists that General Order 17 should not be so strictly construed as to preclude the right of the bankrupt to take exceptions to the trustee's determination.

292. Trustee acts ministerially.—In the case of In re Campbell (D. C., Va.), 10 Am. B. R. 723, 124 Fed. 417, the court said: "But the trustee acts as a mere ministerial agent. Ordinarily the creditors do not appear before the trustee; they are allowed to, and I think usually do, wait until the report of the trustee is filed, and then they make their objections by excepting to the report. The Bankrupt Act requires the trustee to put his own valuation on the property claimed as exempt. And unless the bankrupt should claim a greater value than the State law allows him, the act does not seem to authorize the trustee to exercise any discretion. Having valued the property, his duty is to set it apart and make a report. His action is in no sense even a quasi-judicial finding that the exemption is properly allowable. There is no issue on this question until exceptions are filed to his report. And on that issue as above stated, the bankrupt clearly has the affirmative."

may assert a claim of exemptions which does not conform to the State law. He may assert a claim to articles which are not allowable and may claim a greater value than he is entitled to. Section 47-a (11) makes it the duty of the trustee to set apart the bankrupt's exemptions. It is difficult to understand how this may be done without determining the validity of the claim to exemptions under the State law. In performing this duty the trustee acts in a quasi-judicial capacity. If he denies the bankrupt's right to a specified exemption, and refuses to set it apart, the bankrupt should be permitted as a matter of right to come before the referee and object to the trustee's determination.

(3) REPORT AND EXCEPTIONS AS PLEADINGS.—The exception to a trustee's report is in some sense a pleading, and the better practice is to verify it, although a failure to verify would probably not be fatal.²⁹³ The report of the trustee and the exceptions of creditors constitute the pleadings.²⁹⁴ It is not necessary to plead the exemption laws of the State, as the Federal courts will take judicial notice of the laws of all the States.²⁹⁵

g. Allowance of exemptions; proof required.—The bankrupt should show by a preponderance of proof, that he is entitled to the exemption where there is an issue on the question as to whether the exemption is allowable.²⁹⁶ Although a law allowing exemptions is always to be construed liberally and in favor of the debtor,²⁹⁷ yet, the burden of proving that property comes within the list of exemptions rests upon the claimant. He must bring himself and his property clearly within the statute.²⁹⁸ The bankrupt is not entitled to trial by jury of the issues raised by the exceptions.²⁹⁹ A referee's findings of fact on a claim to exemptions will not be disturbed unless palpably erroneous,³⁰⁰ but where a trustee has been dispensed with, the judge cannot review the decision of the referee.³⁰¹ The bankrupt having sold goods after the filing of the petition for adjudication and used the proceeds, the amount thereof should be deducted in the allowance of his exemptions.³⁰² Where, to entitle any one to the benefits of a homestead exemption statute, he is required to cause "homestead" to be entered in the margin of his record title to the same, such entry may not be made after the qualification of his trustee in bankruptcy.³⁰³ Where a homestead exemption is allowed by a State statute up to a certain amount, and such exemption is claimed in land valued at more than such amount, the bankruptcy court has jurisdiction to determine the time and manner of setting

293. *In re Campbell* (D. C., Va.), 10 Am. B. R. 723, 124 Fed. 417.

294. *McGahan v. Anderson* (C. C. A., 4th Cir.), 7 Am. B. R. 641, 113 Fed. 115.

295. *Matter of Reed* (D. C., Okla.), 26 Am. B. R. 286, 191 Fed. 920.

296. *Matter of Rainwater* (D. C., Miss.), 25 Am. B. R. 419; *McGahan v. Anderson* (C. C. A., 4th Cir.), 7 Am. B. R. 641, 113 Fed. 115; *In re Burnbull* (D. C., Mass.), 5 Am. B. R. 549, 106 Fed. 667; *Lun v. Henry* (Hawaii Sup. Ct.), 22 Haw. 160, 35 Am. B. R. 795.

297. *In re Tilden* (D. C., Iowa), 1 Am. B. R. 300, 91 Fed. 500; *Matter of Ellsworth Conley* (D. C., Neb.), 19 Am. B. R. 200, 162 Fed. 806; *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

298. *In re Turnbull* (D. C., Mass.), 5 Am. B. R. 549, 106 Fed. 666; *McGahan v. Anderson* (C. C. A., 4th Cir.), 7 Am. B. R. 641, 113 Fed. 115; *In re Campbell* (D. C., Va.), 10 Am. B. R. 723, 124 Fed. 417; *In re Monroe & Co.* (D. C., N. C.),

19 Am. B. R. 255, 156 Fed. 216; *Guise v. State*, 41 Ark. 249; *Briggs v. McCullough*, 36 Cal. 542; *Swan v. Stephens*, 97 Mass. 7; *Giffin v. Sutherland*, 14 Barb. (N. Y.) 456.

Burden of proof.—Where the claimant has brought himself within the terms of the statute and claims the proceeds of personal property, and the statute provides that no personal property shall be exempt from execution on a judgment rendered for the purchase price or any part thereof, the burden is on the trustee in bankruptcy to show that there was not on hand the requisite amount of personalty not subject to prior claims for purchase price. *Matter of Stitt* (C. C. A., 6th Cir.), 41 Am. B. R. 777, 252 Fed. 1.

299. *In re Thedford* (D. C., Tex.), 27 Am. B. R. 354.

300. *In re Waxelbaum* (D. C., Ga.), 4 Am. B. R. 120, 101 Fed. 223.

301. *In re Smith* (D. C., Tex.), 2 Am. B. R. 190, 93 Fed. 791; *In re Dobbs* (D. C., Ga.), 23 Am. B. R. 569, 175 Fed. 319.

302. *In re Ansley Bros.* (D. C., No. Car.), 18 Am. B. R. 467, 153 Fed. 963.

303. *In re Youngstrom* (C. C. A., 8th Cir.), 18 Am. B. R. 572, 153 Fed. 98.

apart the exemption, and may, if necessary, direct a sale of the entire property, setting apart the value of the bankrupt's exemption.³⁰⁴

h. Costs and expenses.—Costs may be paid out of exempt property where there are no other assets.³⁰⁵ And if the bankrupt consents the costs and expenses of administering his estate may be paid out of the exemption allowed to him, and the creditors may not object thereto.³⁰⁶ But where all the property of the bankrupt estate is sold for the purpose of converting into cash the bankrupt's homestead exemption the amount of the exemption should be paid to the bankrupt without deduction of the costs of administration.³⁰⁷ Property set apart to a bankrupt as an exemption forms no part of the bankrupt estate, and the referee may not diminish it by allowing commissions, costs and counsel fees.³⁰⁸ A bankrupt will be required to deposit the amount of the costs and expenses of litigation where, being entitled to a homestead, she has been granted an exemption in kind, and the petition of the trustee to sell the assets of the estate has been denied.³⁰⁹

304. *Bank of Nez Perce v. Pindel* (C. C. A., 9th Cir.), 28 Am. B. R. 69, 193 Fed. 917.

305. *In re Collier* (D. C., Tenn.), 1 Am. B. R. 182, 93 Fed. 191; *In re Bean* (D. C., Vt.), 4 Am. B. R. 53, 100 Fed. 262; *In re Hines* (D. C., W. Va.), 9 Am. B. R. 27, 117 Fed. 790.

306. *In re Castleberry* (D. C., Ga.), 16

Am. B. R. 430, 133 Fed. 821.

307. *Dunlap Hardware Co. v. Huddleston* (C. C. A., 5th Cir.), 21 Am. B. R. 731, 167 Fed. 433.

308. *In re Yager* (D. C., Pa.), 25 Am. B. R. 51, 182 Fed. 951.

309. *Matter of Jackson* (Ref. Ga.), 16 Am. B. R. 216.

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Friedrich, In re, 95 Fed. 282, modified on appeal in 3 Am. B. R. 801, 100 Fed. 284.

Hoag, In re, 3 Am. B. R. 290, 97 Fed. 543.

Jones, In re, 3 Am. B. R. 259, 97 Fed. 773.

Kaufman, In re, 16 Am. B. R. 118, 142 Fed. 898.

Mayer, In re, 6 Am. B. R. 117, 108 Fed. 599.

Neimann, In re, 10 Am. B. R. 739, 124 Fed. 738.

Nelson, In re, 2 Am. B. R. 556, 98 Fed. 76.

Peterson, In re, 1 Am. B. R. 254.

Safady Brothers, Matter of, 36 Am. B. R. 6.

Schuller, In re, 6 Am. B. R. 278, 108 Fed. 591.

Wood, In re, 17 Am. B. R. 93, 147 Fed. 877.

Zimmerman, In re, 30 Am. B. R. 361, 202 Fed. 812.

SECTION SEVEN.

DUTIES OF BANKRUPTS.

§ 7. **Duties of bankrupts.**—*a.* The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustees of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town or village of his residence.

Analogous provisions: In U. S.: As to (5), Act of 1867, § 14, R. S., § 5051; as to (8), Act of 1867, §§ 11, 26, 42 (as amended by Act of July 27, 1868), R. S., §§ 5014, 5015, 5016, 5017, 5020, 5030, 5044; Act of 1841, § 1; As to (9), Act of 1867, § 26, R. S., § 5086; Act of 1800, §§ 18, 52.

In Eng.: As to (8) Act of 1883, § 16; As to (9), Act of 1883, § 17. See also General Rules 184 to 189-A, and 217, 218.

In Can.: Act of 1919, §§ 54, 56.

Cross-references: To the law: As to meetings of creditors, § 55-a.

Hearings upon applications for discharges, § 14-b.

Lawful orders of court, § 1(4), 2(13), (14), (15), (16).

Examination of claims, § 57.

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Schedules of assets, debts, exemptions, §§ 18-a, 39-a(6), 59-a, 70-a.

Submission to examination, §§ 14-b(6), 21, 29, 39-a, 41.

To General Orders: See V, IX, X, XI, XII, XXII.

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I. MISCELLANEOUS DUTIES

a. **Attendance on meetings.**—(1) *IN GENERAL.*—The first statutory duty of the bankrupt prescribed by this section is to “attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed.” Four things should be noted: (a) The bankrupt is not obliged to attend the first or any other meeting of creditors, unless ordered to do so; (b) if his home or usual place of business is more than one hundred and fifty miles from the place of meeting, he cannot be required to attend save for cause shown; (c) if ordered to attend a meeting other than in the place of his residence, he is entitled to actual expenses out of the estate; and (d) that, none of these limitations seeming to apply to a hearing on discharge; he must attend such a hearing, wherever it is and at his own expense, even though not ordered to do so.¹

(2) *PROVISIONS OF ACT OF 1867.*—There was no like clause in the act of 1867. Under the former law, it was held that, in the absence of an order to attend, the bankrupt might stay away;² and that, for sickness or other good cause, he might be excused;³ but that he must, when ordered, attend a meeting called to consider a proposed composition.⁴

(3) *PRESENCE OF BANKRUPT REQUIRED.*—Under the present law, it has been said that the bankrupt is required and should be present at the first meeting of the creditors to aid the referee in assisting the creditors.⁵ The

1. **Attendance at hearing on discharge.**—In *Matter of Carle* (D. C., Cal.), 33 Am. B. R. 502, 217 Fed. 688, it was held that a bankrupt might not avoid attendance at the hearing upon his application for a discharge by removing from the district pending bankruptcy proceedings, and that this would be so even if the provision that a bankrupt may not be required to attend at a place more than 150 miles from his home or place of business did apply to applications for a discharge. In *re Shanker* (D. C., Pa.), 15 Am. B. R. 109, 138 Fed. 862, quoting this paragraph with approval, and holding that a

referee, if requested, must require the attendance of the bankrupt on a hearing upon objections to his discharge.

2. In *re Dumahaut*, Fed. Cas. 4,124.

3. In *re Carpenter*, Fed. Cas. 2,427.

4. In *re Scott et al.*, Fed. Cas. 12,519.

5. In *re Eagles & Crisp* (D. C., No. Car.), 3 Am. B. R. 733, 99 Fed. 695. This case is a brief monograph on practice at meetings of creditors, and the statement therein that a bankrupt is required to be present at the first meeting, apparently whether ordered to do so or not, may be questioned.

bankrupt's presence is not indispensable.⁶ In the case of a bankrupt corporation the attendance of its officers may be required.⁷

(4) ATTENDANCE AT DISTANCE; EXPENSES.—The proviso at the end of this section does not require the attendance of the bankrupt at a place more than 150 miles from his home or principal place of business, and provides for the payment of his expenses from the estate when he is required to attend at any place other than the city, town or village of his residence. But where the bankrupt voluntarily removes from the district pending bankruptcy proceedings this proviso does not require the payment of his expenses,⁸ or excuse him from attendance at hearings on his application for a discharge.⁹

(5) PRACTICE.—By Form No. 14, the bankrupt is at the time of the adjudication ordered to appear before referee on a day certain. This in actual practice should be forthwith, since, under the words of the form and of General Order XII (1), there is doubt whether the referee acquires jurisdiction until he does so. In some districts, this day is fixed as that for the first meeting of creditors and, if so, the bankrupt must attend. The more common practice, however, is to notify the attorney in charge to produce the bankrupt at the time of the first meeting, a practice somewhat loose, as not probably amounting to such an order as to require the bankrupt's presence under this subsection, or sufficient to predicate thereon a report for contempt under § 41-a (1) and b. If once ordered to attend a meeting, he must attend every continuance of the meeting; but a referee will not permit the bankrupt to be harrassed by repeated applications for adjournments. When the presence of the bankrupt seems not likely to be required at a continuance or at subsequent continuances, he should be excused and a minute made of such order.¹⁰

b. Obedience to lawful orders.—The section requires the bankrupt to "comply with all lawful orders of the court." "Bankrupt" includes any person against whom a petition has been filed.¹¹ "Bankrupt" includes any person files a petition in bankruptcy he submits himself personally to the jurisdiction of the court and becomes bound to obey its orders and directions, even before adjudication.¹² It is not for the bankrupt or his counsel to determine whether the order is lawful.¹³ What are lawful orders depends on many facts, such as jurisdiction, and the like, and such orders may be concerning any of the numerous acts which, under the law, a bankrupt and his creditors or other persons may be required to do or to refrain from doing.¹⁴ Thus, the court may order a bankrupt to turn over to his trustee goods found to be in

6. In re Parker (Ref., Kan.), 1 Am. B. R. 615, wherein the court said: "I am of the opinion that a fair and reasonable construction of that clause [clause (1) of section 7, paragraph a] does not make it mandatory or an absolute requirement of the bankrupt to be present at either the first meeting of the creditors, or at the hearing upon application for discharge, unless directed by the court or a judge thereof to do so."

7. See Bankr. Act, § 1 (19); In re Alpin & Lake Cotton Co. (D. C., Ark.), 12 Am. B. R. 653, 131 Fed. 823.

8. In re Groves (Ref., Ohio), 6 Am. B. R. 732.

9. Matter of Curle (D. C., Cal.), 33 Am. B. R. 502, 217 Fed. 688.

10. The above suggestions are based on the

practice of the Erie County District of the Western District of New York.

11. Bankr. Act, § 1 (4). In re Bromley, 3 N. B. R. 686.

12. In re Kyler, Fed. Cas. 7,956, 2 Ben. 414; In re Harris, 3 N. Y. Leg. Obs. 152.

Any voluntary appearance has been held sufficient to bring a person within the jurisdiction of the court. In re Ulrich, Fed. Cas. 14,327, 3 Ben. 355; In re Kirtland, Fed. Cas. 7,851, 10 Blatch. 515.

13. U. S. v. Memphis, etc., R. R. Co., 6 Fed. 238; Atlantic Co. v. Dittmar Powder Mfg. Co., 9 Fed. 317; Goodyear v. Mulles, Fed. Cas. 5,577; Burr v. Kimback, 29 Fed. 432; Societe v. Western Distilling Co., 42 Fed. 96; Ullman v. Ritter, 72 Fed. 1,000.

14. Bankr. Act, § 2 (16), and discussion thereunder, *ante*.

the possession or under the control of the bankrupt.¹⁵ But the failure to turn over property which is not in the bankrupt's possession and over which he has no control, does not constitute contempt;¹⁶ and he has a right to a hearing before he can be committed for contempt.¹⁷ An order will not be granted directing bankrupts to turn over assets where neither the report of the commissioner nor the proofs show accurately just what and how much property was concealed.¹⁸ If a bankrupt explains a discrepancy as to goods purchased by him prior to his bankruptcy, a summary order to turn over such goods should not be granted.¹⁹ An order stands until it is modified or withdrawn by the court²⁰ even though the court be without jurisdiction.²¹ This may be accomplished by a personal appearance and motion to that end, or the court may act *proprio motu*. It has been held that the order need not necessarily be in writing;²² indeed, referees often give oral directions to the bankrupt which, if properly noted on their record books, are as effective for all purposes (including a proceeding to punish for contempt) as if reduced to writing and actually served. It is under this subsection that referees frequently report contempts growing out of a bankrupt's refusal to obey an order requiring the surrender of money or property in his possession.²³ In a turnover proceeding the issue is whether the bankrupt had property within his possession or control at the date of the bankruptcy which he had concealed from his trustee, while in a contempt proceeding the only question is whether the bankrupt is presently able to comply with the turnover order previously made.^{23a} Punishment for a refusal to obey a lawful order may be by fine or imprisonment, or by both.²⁴ Since the amendatory act of 1903, there is a further penalty,—the refusal of a discharge.²⁵

c. Examination of claims and notification of trustee of proof of false claims.—Subdivisions 3 and 7 of this section should be considered together. The former makes it the duty of the bankrupt to "examine the correctness of all proofs of claims filed against his estate;" and the latter requires him to notify the trustee "in case of any person having to his knowledge proved a false claim against his estate."²⁶ The section further limits this duty by providing in the proviso at the end thereof that he shall not be required "to examine claims except when presented to him unless ordered by the court or a judge thereof for cause shown."²⁷ In actual practice, these subsections are rarely construed.

15. In re Purvine (C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192; In re Greenberg (D. C., N. Y.), 5 Am. B. R. 840, 106 Fed. 496; In re Rosser (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562; Ripson Knitting Works v. Schreiber (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810; In re Schlesinger (C. C. A., 2d Cir.), 4 Am. B. R. 361, 102 Fed. 117; In re Willson (D. C., Ark.), 8 Am. B. R. 612, 116 Fed. 419; In re Schachter (D. C., Ga.), 9 Am. B. R. 499, 119 Fed. 1,010; In re Felson (D. C., N. Y.), 10 Am. B. R. 716, 124 Fed. 288; Schweer v. Brown (C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 329; In re Averick (D. C., Pa.), 22 Am. B. R. 518, 170 Fed. 521; Matter of Heyman (D. C., Pa.), 32 Am. B. R. 693, 214 Fed. 491; Matter of Marquette, Jr. Inc. (C. C. A., 2d Cir.), 42 Am. B. R. 555, 254 Fed. 419.

Election of remedies.—The action of a trustee in petitioning the court to compel the bankrupt to pay the surrender value of a policy of life insurance as a condition of keeping the same, amounts to an election of remedies, and where an order is entered in the District Court refusing to compel the bankrupt to pay the surrender value of the policy, the trustee cannot thereafter proceed by petition to compel him to pay the loan value of the same policy as a condition of keeping it. Matter of Samuels (C. C. A., 2d Cir.), 45 Am. B. R. 13, 263 Fed. 561.

Property not part of estate.—No lawful order can be made for the delivery to the

trustee of property not a part of the bankrupt's estate. In re Rosser C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562.

16. See *ante*, under § 2 (16) "possibility of performance."

17. See *ante*, under § 2 (16), "Notice of hearing."

18. Matter of Kolmanowitz (D. C., N. Y.), 32 Am. B. R. 210, 211 Fed. 167.

Financial statement as evidence.—In a proceeding to require bankrupts to pay over property, or the value thereof, a financial statement, signed by them about a month before bankruptcy, is admissible in evidence. Matter of Chavikin (C. C. A., 2d Cir.), 41 Am. B. R. 36, 249 Fed. 342.

19. In re Reese (D. C., Pa.), 22 Am. B. R. 521, 170 Fed. 986.

20. Worden v. Searls, 121 U. S. 14, 30 L. Ed. 853; Wagner v. U. S. (C. C. A., 6th Cir.), 4 Am. B. R. 596, 104 Fed. 133.

21. In re Eaton, 51 Fed. 804.

22. Bridges v. Sheldon, 7 Fed. 45.

23. In re Willson (D. C., Ark.), 8 Am. B. R. 612, 116 Fed. 419. Compare text and cases referred to under §§ 2 (15), 23-b, 41-a (1).

23a. Frederick v. Silverman (C. C. A., 3d Cir.), 42 Am. B. R. 24, 250 Fed. 75.

24. Bankr. Act, § 2 (13) (15). See discussion under such subsections, *ante*.

25. See Bankr. Act, § 14-b(6), *post*.

The importance of a personal examination of all proofs of claims by the bankrupt is apparent, especially if he kept no books or his business records are unreliable. As a rule, the bankrupt sits by at the call of claims on the first meeting and informs the referee whether they are correct. He may, of course, be put on oath, if desired. He should also be frequently consulted by the trustee concerning the correctness of claims subsequently presented. At all times until his discharge, or until the final closing of administration if the discharge is granted sooner, it is his duty to inform the trustee immediately in case he knows that a false claim has been proven. There seems to be no penalty, either by contempt or as for the commission of a crime, in case the bankrupt fails to perform these duties.²⁸ He also has sufficient standing to move to expunge a false claim, though where there is a trustee, the latter, as the representative of all the creditors, should do this.²⁹

d. **Execution and delivery of papers.**—(1) **IN GENERAL.**—Subdivisions 4 and 5 require the bankrupt "to execute and deliver such papers as shall be ordered by the court," and "to execute to his trustee transfers of all his property in foreign countries." Under the former law, a formal assignment was given the assignee (trustee) by the judge or register (referee).³⁰ This seems to have been for record purposes, a difficulty now met by the requirement permitting the recording of the order approving the trustee's bond in the proper record office,³¹ and the new subsection requiring the recording of a copy of the adjudication.³² No formal assignment is now necessary; the assets of the bankrupt at the time the petition was filed, by operation of law, passing, as of the date of the adjudication, to the trustee subsequently appointed.³³ When, however, the property is subject to the laws of another nation, a formal instrument, evidencing the transfer, often becomes necessary, and must then be executed by the bankrupt.³⁴

(2) **EXECUTION OF NECESSARY PAPERS TO PASS TITLE TO TRUSTEE.**—Under the broad terms of these subdivisions, the court may order the bankrupt to execute any other papers; as, for instance, such consents as will permit the substitution of the trustee in a suit pending in a State court.³⁵ Under the present law, a bankrupt may be compelled to execute an assignment of a liquor license,³⁶ or to join in a petition by the receiver for a transfer of the license to the purchaser thereof at the receiver's sale.³⁷ He may be required to transfer his interest in an insurance policy,³⁸ or to execute a power of attorney to exercise options under a tontine insurance policy at and after the expiration

28. For proof and allowance of claims generally, see discussion under Section Fifty-seven of this work.

27. *Jacobs v. United States* (C. C. A., 1st Cir.), 20 Am. B. R. 550, 161 Fed. 604, holding that in the absence of evidence that the defendant bankrupt had neither examined or approved claims filed against his estate, they are not competent as admissions on his part as to ownership or possession of property, and the admission of such evidence was erroneous and prejudicial.

Statute of limitations.—Where it does not appear that a bankrupt examined a claim, the allowance thereof, although sufficient and controlling as a judgment for the purpose of the bankruptcy proceeding, does not affect the running of the statute of limitations. *American Woolen Co. v. Samuelsohn* (N. Y. Ct. of App.), 43 Am. B. R. 530, 123 N. E. 154.

29. Surely not under § 2(13) (15), unless there is an order by the court; nor under § 41-a(1), for the same reason; nor under § 29-b(3), which refers only to creditors.

30. *In re Ankeny* (D. C., Iowa), 4 Am. B. R. 72, 100 Fed. 614.

31. Act of 1867, § 14; R. S., § 5,044.

32. Bankr. Act, § 21-e.

33. Bankr. Act, § 47-c, added by amendatory act of 1903.

34. See Bankr. Act, § 70-a.

35. *In re Granite City Bank* (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818, affg. 12 Am. B. R. 727, 131 Fed. 1004. Compare *Oakley v. Bennett*, 11 How. 33, 13 L. Ed. 593.

36. *Samson v. Burton*, Fed. Cas. 12,285; *In re Clark*, Fed. Cas. 2,798; *Clark v. Binninger*, 39 How. Pr. 363.

37. *In re Fisher* (D. C., Mass.), 3 Am. B. R. 406, 98 Fed. 891; *Fisher v. Cushman* (C. C. A., 1st Cir.), 4 Am. B. R. 646, 103 Fed. 860.

Necessity that license be of benefit to estate.—Where licensing boards upon the unconditional surrender of a liquor license customarily grant a new one in its place and refund part of the fee paid for the surrendered license, the licensee may be ordered to surrender his license and assign his rights in the refund to his trustee in bankruptcy. *Matter of Beahn* (D. C., Mass.), 32 Am. B. R. 375, 212 Fed. 762.

38. *Matter of Wiesel & Knaup* (D. C., Pa.), 23 Am. B. R. 50, 173 Fed. 719.

39. *In re Diack* (D. C., N. Y.), 3 Am. B. R. 723, 100 Fed. 770; *In re Madden* (C. C. A., 2d Cir.), 6 Am. B. R. 614, 190 Fed. 348.

of the tontine period.³⁹ The court may compel the bankrupt to execute such papers as may be necessary to transfer a seat in a stock exchange.⁴⁰ The power has been exercised to compel the transfer of personal rights and privileges, such as patents and trademarks,⁴¹ a license of a stall in a market,⁴² and commissions on renewal premiums of life insurance policies.⁴³

e. **Notification of trustee of attempt to evade act.**—Subdivision 6 requires the bankrupt to "immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge." "To evade the provisions of the act" refers only to an attempted evasion within the bankrupt's knowledge. If the evasion be an accomplished fact, that there was an attempt to evade would probably follow. It would seem, too, that the attempt can be predicated on acts antedating the filing of the petition, as the acceptance of a preference voidable under § 60-b, or the completion of a fraudulent transfer, with knowledge on the part of the transferee, under § 67-e, and as well of those that are in the law deemed continuing as of those actually after the bankrupt.⁴⁴ There is, however, no penalty for failure to perform this duty. This is unfortunate. Were punishment prescribed and enforcement against the bankrupt's person possible, frauds on creditors, due to evasions of the provisions of the act, would rarely occur.

II. PREPARATION AND FILING OF SCHEDULES.

a. **In general.**—Subdivision 8 of this section provides for the preparation and filing by the bankrupt of a schedule showing the kind and value of his property, a list of his creditors and a claim for such exemptions as he may be entitled to.⁴⁵ This provision as to the filing of schedules is imperative⁴⁶ and one of the most important duties performed by a bankrupt's attorney consists in the preparation of his schedules. The form prescribed⁴⁷ is carefully subdivided and elaborate in its invitation to details. The schedules often become of vital importance when application is made for a discharge, or when the discharge is pleaded in bar against a creditor at the time of the bankruptcy. The necessity for careful investigation increases proportionately to the remoteness in point of time of the failure whence came the debts. No voluntary petition should be filed until the attorney in charge—by questioning and investigating the books of the debtor, and tracing the ownership of, not merely ordinary debts like accounts and notes, but also, from an examination of the

39. *Matter of Phelps* (D. C., N. Y. Ref.), 15 Am. B. R. 170.

40. *Matter of Harburt, Hatch & Co.* (C. C. A., 2d Cir.), 13 Am. B. R. 50, 135 Fed. 504; *In re Ketcham*, 1 Fed. 840.

41. *Ager v. Murray*, 105 U. S. 126, 131, 26 L. Ed. 942, 943.

42. *In re Emrich* (D. C., Pa.), 4 Am. B. R. 89, 101 Fed. 231.

43. **Commissions on renewal premiums.**—In the case of *In re Wright* (D. C., N. Y.), 18 Am. B. R. 198, 151 Fed. 361, the court said: "Under the terms of the agreement in controversy, the commissions did not accrue until the renewal premiums were actually paid; but, as the services in procuring the insurance have actually been performed by the agent, the liability of the insurance company to pay such commissions become fixed

and absolute, and the insurance company is released from its obligation to pay the commissions only when the policy lapses, or the insured dies, or, as stated in the contract, when the renewal premiums or notes are unpaid. It is clearly apparent from the record, that there exists a reasonable expectation that a substantial portion of the commissions specified in the contract will become due and payable. Such being the fact, the right to receive commissions for insurance procured by an agent is unquestionably assignable."

44. Compare *Bankr. Act*, § 29-b.

45. *In re Granite City Bank* (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818.

46. *Matter of Back Bay Automobile Co.* (Ref. Mass.), 19 Am. B. R. 33, 37.

47. See Form No. 1.

records, of judgments and unliquidated liabilities like bonds or notes accompanying mortgages — is reasonably certain that he knows every financial obligation of his client, its actual then owner, and the post-office address of that owner. The property interests of the debtor, whether present, future, or contingent, should also be carefully ascertained, as should the exemptions allowed by the State law. Not until all these facts are in hand and summarized should the lawyer begin drawing the papers.⁴⁸

b. *When to be prepared and filed.*—It is the bankrupt's duty to file the schedules with a voluntary petition, or, if the proceeding be involuntary, within ten days after the adjudication, unless further time is granted.⁴⁹ For the place where such petition must be filed, and by and against whom it can be filed, reference should be had to the appropriate sections.⁵⁰

c. *By whom to be prepared and filed.*—The schedules may be prepared and filed either by the bankrupt, by the creditors, or by the referee. Thus, if the bankrupt, in an involuntary case, fails to prepare and file them within ten days, or where the bankrupt otherwise fails, refuses, or neglects so to do, the referee must do or cause it to be done;⁵¹ to this end the bankrupt may be ordered to appear and testify. This provision, however, seems to be modified by General Order IX. By its terms, in involuntary cases, the initiative is put on the petitioning creditors. If the bankrupt can be served with notice, his failure to file schedules entitles them to an attachment against his person;⁵² if he cannot be found, they must file a schedule giving the names and places of residence of all the creditors, according to their best information. They, as a rule, know little or nothing about the other creditors. Hence where the bankrupt has disappeared, in some districts a practice has grown up of bringing into court on subpoenas all persons who would be likely to know the facts, and, in a preliminary proceeding, on the evidence of such persons, making up the list required. Such a procedure is certainly within the broad powers conferred on courts of bankruptcy, and may be instituted either by the petitioning or other creditors, or by the referee himself. Such schedules, when prepared, should, of course, be in triplicate, and conform as nearly as possible to those which make a part of Form No. 1, though they need give only names and addresses. Proceedings to compel filing may be instituted by creditors, although the trustee is the proper person to do so; in case of a corporation the order may be directed to the treasurer, as the officer who should know the facts essential for the preparation of the schedules.⁵³

d. *Punishment for failure to file.*—A bankrupt may be adjudged guilty of contempt of court for refusing and neglecting to file a schedule as required by

48. The importance of these suggestions cannot be too strongly emphasized. Starting right will save many delays and much annoyances later, and, to the bankrupt, may amount to a discharge that can be relied on as a stout bar to all possible suits, or a mere reed that will bend and break when most needed.

49. *Armstrong v. Fisher* (C. C. A., 8th Cir.), 34 Am. B. R. 701, 224 Fed. 97. In the case of *In re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, the court said: "The bankrupt must file his schedules in court according to § 7-a (8) within ten days after adjudication. It may be true, as the referee says, that there

can be no objection to the bankrupt voluntarily filing them at any time. But the filing contemplated in § 12-a must, I think, if the most natural and reasonable construction is sought, be the filing required by § 7-a (8)."

50. See Bankr. Act, §§ 2, 3, 4, 5, 18, 50 and 63.

51. Bankr. Act, § 39-a (6).

52. An order to show cause why a bankrupt should not be compelled to file his schedules may be granted without notice. *In re Brady* (D. C., Ky.), 21 Am. B. R. 364, 169 Fed. 152.

53. *In re Brocton Ideal Shoe Co.* (C. C. A., 2d Cir.), 29 Am. B. R. 76, 200 Fed. 745.

this section.⁵⁴ In the Southern District of New York, a bankrupt who refuses or neglects to file his schedules is fined, in the first instance, a sufficient sum to compensate the attorneys for making the motion to punish the contempt; if the imposition of such fine is ineffectual, punishment by imprisonment is inflicted.⁵⁵

c. Use of schedules as evidence.—The use of the bankrupt's schedules in criminal proceedings against the bankrupt for concealment, conspiracy and the like, is permissible, and is not now held to be an invasion of the bankrupt's constitutional rights.⁵⁶ Some courts have held that schedules may be used as evidence in an action to recover an unlawful preference,⁵⁷ while others have reached the opposite conclusion.⁵⁸ Diverse decisions have been made as to the admissibility of the schedules in a criminal prosecution for receiving deposits in an insolvent bank.⁵⁹

f. Framing schedules.—(1) **IN GENERAL.**—As under the act of 1867, the forms accompanying the general orders include a form for schedules. It has been held that a failure to use this form warrants a dismissal of the petition.⁶⁰ Manifestly the use of the form is in the interest of uniformity and for the convenience of the courts and parties; but a failure to precisely observe the form is not necessarily fatal.⁶¹ Schedules conforming substantially to the requirements of the statute but not necessarily to the rules and forms are sufficient.⁶² The form prescribed covers property in reversion, remainder or expectancy, includes property held in trust for the debtor, or subject to any power or right to dispose of or to charge, including a particular statement

54. *Matter of Fellerman* (D. C., N. Y.), 17 Am. B. R. 785, 149 Fed. 244; text cited in *In re Currier* (D. C., N. Y.), 27 Am. B. R. 597, 192 Fed. 695. As to jurisdiction of referee to require filing of schedules, see Bankr. Act, § 38 (1) and discussion thereunder.

55. *In re Schulman & Goldstein* (D. C., N. Y.), 20 Am. B. R. 707, 164 Fed. 440.

56. *Ensign v. Pennsylvania*, 227 U. S. 592, 30 Am. B. R. 408, 57 L. Ed. 658; *United States v. Green* (D. C., Pa.), 34 Am. B. R. 405, 220 Fed. 973. But see *United States v. Chambers* (C. C., N. Y.), 13 Am. B. R. 708, 135 Fed. 1023, holding that an indictment found on use of such schedules would be dismissed. See also *Johnson v. United States* (C. C. A., 1st Cir.), 20 Am. B. R. 724, 163 Fed. 30; *In re Podolin* (D. C., Pa.), 30 Am. B. R. 576, 205 Fed. 563; s. c., 29 Am. B. R. 406, 202 Fed. 1014.

Under section 860 of the United States Revised Statutes a bankrupt's schedules are incompetent as evidence against him upon the trial of an indictment charging him with knowingly and fraudulently concealing assets from his trustee. *Cohen v. United States* (C. C. A., 4th Cir.), 22 Am. B. R. 333, 170 Fed. 715; *Johnson v. United States* (C. C. A., 1st Cir.), 20 Am. B. R. 724, 163 Fed. 30. But this section was repealed by Congress in 1910.

57. *Utah Association v. Boyle Furniture Co.* (Utah Sup. Ct.), 39 Utah 518, 26 Am. B. R. 867, 117 Pac. 800.

58. *Balchelder v. Home Nat. Bank of Mil-*

ford (Mass. Sup. Jud. Ct.), 218 Mass. 420, 32 Am. B. R. 555, 105 N. E. 1052; *Taylor v. Nichols* (N. Y. Supp. Ct.), 134 App. Div. 787, 23 Am. B. R. 310, 119 N. Y. Supp. 1042.

59. **Receiving deposits in insolvent bank.**—In Pennsylvania the schedules have been held admissible. *Com. v. Ensign* (Super. Ct., Pa.), 40 Pa. Super. Ct. 157, 22 Am. B. R. 797; *affd. sub nom Ensign v. Pennsylvania*, 227 U. S. 592, 30 Am. B. R. 408, 57 L. Ed. 658. In Minnesota, it has been held that the schedules are privileged and not admissible. *State v. Drew*, 110 Minn. 248, 124 N. W. 1091.

60. *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278; *Matter of McClintock* (Ref., Ohio), 13 Am. B. R. 606. As to framing schedules generally see Am. Bankr. Dig. §§ 245-254.

61. *Burke v. Guarantee Title & Trust Co.* (C. C. A., 3d Cir.), 14 Am. B. R. 31, 134 Fed. 562, holding that the failure of a bankrupt to precisely observe Schedule B (5) relating to exemptions is not necessarily fatal to a claim therefor. But in the case of *In re City Contracting & Bldg. Co.* (D. C., Hawaii), 30 Am. B. R. 133, it was said by way of dictum that a statement of assets and liabilities which did not furnish a direct and full answer to each item of the official form of schedules adopted by the Supreme Court is insufficient.

62. *In re Soper* (Ref., N. Y.), 1 Am. B. R. 193; *Burke v. Guarantee Title & Trust Co.* (C. C. A., 3d Cir.), 14 Am. B. R. 31, 134 Fed. 562. See also under § 18.

of property which had been conveyed for the benefit of creditors.⁶³ General Order V provides that the schedules shall be written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference. As the schedules must be filed in triplicate, the use of those blanks that are so printed as to permit their being typewritten and, therefore, manifolded, is advised. It should be noted also that the statute requires that the schedules only be in triplicate. The petition may be a separate paper, though this is unusual. The schedules divide themselves naturally into three parts, (a) of creditors, (b) of assets, and (c) of exemptions. The official form, however, includes the exemption in the property schedule. The official form prescribes in extensive detail the items to be included. Care should be used in observing this form. It would serve no useful purpose to describe this form in this place. The form must be examined and applied to the fullest possible extent to the circumstances of each particular case.

(2) SCHEDULE OF CREDITORS AND LIABILITIES.—By far the most important schedule is that of creditors.⁶⁴ Its purpose is threefold: (a) to give the court information as to the persons entitled to notice, (b) to inform the trustee as to the claims against the estate and the considerations on which they rest, and (c) to an extent at least, to limit the effect of the bankrupt's discharge to parties to the proceeding. It follows that the requirements of the statute—"a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due to each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to," should be strictly observed. It has been held that ditto marks should not be used.⁶⁵ The practice of writing the word "none" where the facts come within the terms of the forms is now quite universal and should be followed. The names of creditors should be written with care.⁶⁶ Yet the listing of a creditor by an initial, instead of the full Christian name, is not necessarily a fatal defect.⁶⁷ It has been held that a debt is not "duly scheduled" if the name of the creditor has been improperly spelled.⁶⁸ When the creditor is a copartnership whose claim has been reduced to judgment in favor of the individuals, the names both of the firm and of the individuals should be set out. Even greater care should be observed in addresses. Schedules are defective if they do not contain the residences of the creditors or show that they are unknown.⁶⁹ It seems that a

63. In re Wood (D. C., N. Y.), 3 Am. B. R. 572, 95 Fed. 946; In re Gailey (C. C. A., 7th Cir.), 11 Am. B. R. 539, 127 Fed. 538.

64. Schedule A (1) (2) (3) (4) (5) of Form No. 1.

65. In re Mackey (Ref., N. Y.), 1 Am. B. R. 593; Haack v. Theise (N. Y. Sup. Ct.), 51 N. Y. Misc. 3, 16 Am. B. R. 699.

66. See Liesum v. Kraus, 71 N. Y. Supp. 1,022. See also In re Archenbrow, Fed. Cas. 504.

67. Kreitlein v. Ferger (U. S. Sup. Ct.), 238 U. S. 21, 34 Am. B. R. 862, 59 L. Ed. 1184; Gatliff v. Mackey, 31 Ky. L. Rep. 947, 104 S. W. 379.

68. Custard v. Wigderson (Sup. Ct., Wis.), 130 Wis. 412, 17 Am. B. R. 337, 110 N. W.

263; Liesum v. Kraus, 35 Misc. 376, 71 N. Y. Supp. 1022.

69. Abbreviated addresses, such as "135 Bway." are not allowed under General Order V. Sutherland v. Lasher, 11 Am. B. R. 780, 41 Misc. (N. Y.) 249, 84 N. Y. Supp. 56.

Sufficiency of residence statement.—A schedule which gives a street number as the residence of a creditor but omits the name of the city is insufficient. Troy v. Rudnick (Mass. Sup. Jud. Ct.), 198 Mass. 563, 85 N. E. 177; Sutherland v. Lasher (N. Y. Sup. Ct.), 41 Misc. (N. Y.), 249, 11 Am. B. R. 780, 84 N. Y. Supp. 56. Neither is a debt duly scheduled if the creditor is listed as residing in one city when he actually resides in another. Marshall v. English-American Loan & T. Co., 127 Ga. 376, 56 S. E. 449.

Name of corporation containing name of residence.—Merchants' Bank of Brooklyn v. Miller (N. Y. Sup. Ct.), 39 Am. B. R. 416, 178 App. Div. 412.

debt is not "duly scheduled" when the office address instead of the residence is given in the schedule under the designation of residence.⁷⁰ If the residence cannot be ascertained, that fact must be stated, and the proper practice requires that the bankrupt shall state what efforts he has made to ascertain the residence.⁷¹ Where the residence of the creditor is scheduled as "unknown," when, in fact, the bankrupt has knowledge thereof, a judgment in favor of the creditor will not be affected by the discharge of the bankrupt.⁷² A schedule listing a creditor's residence as in a certain city, without giving his street and number, is *prima facie* sufficient.⁷³ But if a wrong address of a creditor is inserted in the schedule, so that it is fair to assume that he did not receive notice of the proceedings, he will not be affected thereby and a discharge of the bankrupt will not be a defense in an action by the creditor on his claim.⁷⁴ All creditors should be scheduled, even those barred by the statute of limitations; but scheduling the latter is not a revival of the debt,⁷⁵ although it may be different in case of a voluntary bankruptcy, where it afterwards happens that the bankrupt was not insolvent.⁷⁶ Accuracy is not so important in stating the amount of the debt, its consideration, or when and where contracted; but these facts should be fully set out when possible. The description of securities should be sufficient to inform the court of their value, should a motion be made at the first meeting to adjust the same for voting purposes.⁷⁷ Where a claim has been reduced to judgment, it may be scheduled in the name of the record holder although the bankrupt knows that the claim has been assigned to another person.⁷⁸ The effect on the discharge of the omission of creditors from the schedule is discussed under section seventeen, *post*.

(3) SCHEDULE OF ASSETS.—The words of the statute require this schedule to show "the amount and kind of property, the location thereof," and "its money value in detail." What has been said in the previous paragraph as to accuracy and details applies with equal force here. The oath to this schedule calls for an affidavit that it is a statement of "all his estate, both real and personal;" words which mean what they say.⁷⁹ While, where the omission of

70. *Weidenfeld v. Tillinghast* (City Ct., N. Y.), 54 Misc. 90, 18 Am. B. R. 531, 104 N. Y. Supp. 712, *affd.* 104 N. Y. Supp. 902.

71. *In re Pulver*, 1 N. B. R. 46, Fed. Cas. 11,466.

Proof of search for address.—In the case of *In re Dvorak* (D. C., Ia.), 6 Am. B. R. 66, 107 Fed. 76, the court said: "The act requires the bankrupt to furnish a list of creditors and their addresses, and in cases like the present, when the bankrupt gives a list of creditors, but states that their addresses are unknown, the referee should require the addresses to be furnished or satisfactory proof to be made that the same cannot be ascertained after due search has been made."

72. *Guasti v. Miller* (N. Y. Ct. of App.), 26 Am. B. R. 797, 203 N. Y. 259, *affd.* 226 U. S. 170, 29 Am. B. R. 201, 57 L. Ed. 173.

73. *Kreitlein v. Ferger* (U. S. Sup. Ct.), 238 U. S. 21, 34 Am. B. R. 862, 59 L. Ed. 1184, *reversing* 28 Am. B. R. 908; *overruling* *In re Brumelkamp* (D. C., N. Y.), 2 Am. B. R. 318, 95 Fed. 814.

74. *Westheimer v. Howard*, 47 N. Y. Misc. 145, 14 Am. B. R. 547, 93 N. Y. Supp. 518;

Matter of Quackenbush, 122 N. Y. App. Div. 456, 19 Am. B. R. 647, 106 N. Y. Supp. 773; *Murphy v. Blumenrich*, 123 N. Y. App. Div. 645, 19 Am. B. R. 910, 108 N. Y. Supp. 175. See also discussion under section 17, *post*.

75. *In re Lipman* (D. C., N. Y.), 2 Am. B. R. 46, 94 Fed. 353; *In re Resler* (D. C., Minn.), 2 Am. B. R. 602, 95 Fed. 304; *In re Kingsley*, Fed. Cas. 7,819, 1 N. B. R. 329.

76. *In re Currier* (D. C., N. Y.), 27 Am. B. R. 597, 192 Fed. 695, 601, *approving* the case of *In re Gibson*, 4 Ind. Ter. 498, 69 S. W. 974 (see note to *In re Wooten* [D. C., N.], 9 Am. B. R. 247, 118 Fed. 670) holding that including the debt in a voluntary bankrupt's schedules is a sufficient acknowledgment to revive the debt.

77. Bankr. Act, § 57-a.

78. *Sellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 94 Fed. 811. Compare *Lansing Liquidation Corp. v. Heinze* (N. Y. Sup. Ct.), 42 Am. B. R. 512, 184 App. Div. (N. Y.), 129.

Under the statute of 1841 it was held that a judgment previously confessed though without consideration was proper to be inserted in the schedule, though not binding on the assignee. *In re Robertson*, 1 N. Y. Leg. Obs. 20.

79. See Bankr. Act, §§ 14 and 29, *post*.

assets is charged, it is not usually difficult to show either mistake in law or want of intent, the only safe way is to schedule all interests in property,⁸⁰ including of course, property claimed to be exempt, whether such property seems to pass to the trustee or not.⁸¹ Property transferred by the bankrupt by general assignment or otherwise, if his act will be voidable by his trustee, as well as all property fraudulently conveyed, should be included.⁸² A grantee of lands subject to a trust for the benefit of the grantor takes an interest in the lands and must schedule the same upon becoming a bankrupt.⁸³ A bank account should be scheduled as an asset.⁸⁴ Where a tenant has a three-fourths interest in growing crops, such interest should be scheduled.⁸⁵ Where the individual property of the bankrupt is mingled with property of an estate of which he is the administrator, it is his duty to prepare the schedules so as to distinguish the individual property from that held in the representative capacity.⁸⁶ Property acquired by the bankrupt between the filing of the petition and the adjudication should not be scheduled,⁸⁷ nor a mere expectancy dependent upon contingencies.^{87a}

(4) CLAIM OF EXEMPTIONS.—The law does not compel a detailed specification of the articles claimed as exempt,⁸⁸ but on the other hand, a claim of the exemptions in general terms is not sufficient; it should appear what property is claimed as exempt.⁸⁹ If, when the schedules are filed, the property is still in specie, the articles themselves should be described,⁹⁰ and he will not be permitted to claim subsequently his exemptions out of the proceeds of the

80. *In re Beal*, Fed. Cas. 1,156.

81. *In re Todd* (D. C., Vt.), 7 Am. B. R. 770, 112 Fed. 315. See Bankr. Act, § 70, as to certain insurance policies.

82. *In re Pierce*, Fed. Cas. 11,141; *In re O'Bannon*, Fed. Cas. 10,394. *Contra*: *In re Robertson*, Fed. Cas. 11,921; *In re Hussman*, Fed. Cas. 6,951, 2 N. B. R. 437.

83. *In re Gailey* (C. C. A., 7th Cir.), 11 Am. B. R. 539, 127 Fed. 538.

84. *Steinhardt v. National Park Bank*, 120 N. Y. App. Div. 255, 19 Am. B. R. 72, 105 N. Y. Supp. 23.

85. *In re Barrow* (D. C., Va.), 3 Am. B. R. 414, 98 Fed. 562, holding that where the bankrupt did not omit such crops with a fraudulent intent, he should be allowed a reasonable compensation for labor and care bestowed upon them from the date of the adjudication.

86. *In re Walther* (D. C., N. Y.), 2 Am. B. R. 702, 95 Fed. 941, holding that the discharge of the bankrupt would be withheld until the schedules were so prepared.

87. *In re Harris* (Ref., Ill.), 2 Am. B. R. 359, 99 Fed. 71.

87a. *Hooker v. Peterson* (Tenn. Sup. Ct.), 42 Am. B. R. 120, 204 S. W. 858; *Matter of Seal* (D. C., N. Y.), 44 Am. B. R. 556, 261 Fed. 112.

88. *Burke v. Guarantee Title & Trust Co.* (C. C. A., 3d Cir.), 14 Am. B. R. 31, 134 Fed. 562; *Lipman v. Stein* (C. C. A., 3d Cir.), 14 Am. B. R. 30, 134 Fed. 235. Compare *In re Wunder* (D. C., Pa.), 13 Am. B. R. 701, 133 Fed. 821; *In re Duffy* (D. C., Pa.), 9 Am. B. R. 358, 118 Fed. 926; *Matter of Lenters* (D. C., Pa.), 35 Am. B. R. 3, 225 Fed. 878.

Claim of exemptions held sufficient.—The following claim, while perhaps not commendable, was held sufficient in *Burke v. Guarantee Title & Trust Co.* (C. C. A., 3d Cir.), 14 Am. B. R. 31, 134 Fed. 562: "I

claim the exemption of \$300.00, under the Act of the General Assembly of Pennsylvania, 1849, section one, of the following property: Stock in trade in my shoe business, at No. 111 Frankstown avenue, in city of Pittsburgh, county of Alleghany, Pa.; stock in trade consisting of shoes and slippers, and men's, women's and children's shoes and slippers, as set out in schedule B, No. 2, under head of C, \$300.00."

Amount of exemption greater than property.—Where a bankrupt owns personal property of a value less than the amount to which he is entitled he need not file with his schedules an itemized list of the property claimed by him to be exempt, because he is entitled to all of the property. *Matter of Ziff* (D. C., Ala.), 35 Am. B. R. 83, 225 Fed. 323.

89. *In re Neal* (Ref., Ohio), 14 Am. B. R. 550; *In re Von Kern* (D. C., Pa.), 14 Am. B. R. 403, 135 Fed. 447; *In re McClintock* (Ref., Ohio), 13 Am. B. R. 606.

Insufficient claim.—The following claim has been held insufficient: "Fixtures and wearing apparel under and by virtue of the Act of April 9th, 1849, \$300." *In re Von Kern* (D. C., Pa.), 14 Am. B. R. 403, 135 Fed. 447.

90. *In re Haskin* (D. C., Pa.), 6 Am. B. R. 485, 109 Fed. 789; *In re Woodard* (D. C., Pa.), 2 Am. B. R. 692, 95 Fed. 954.

An agreement between the bankrupt and his trustee that the bankrupt should retain goods to a certain amount and the balance of the amount of exemption should be paid in cash upon a sale of the bankrupt's effects is unlawful as to the balance. *In re Haskin* (D. C., Pa.), 6 Am. B. R. 485, 109 Fed. 789.

property sold.⁹¹ Where a schedule, duly filed by an involuntary bankrupt, contains a claim for exemptions, the bankrupt is entitled thereto out of the proceeds of a receiver's sale of all the assets made prior to the filing of the schedules.⁹² The bankrupt is not permitted to omit from his schedules cash on hand or any other property on his claim that he is entitled thereto as an exemption; such a course, if permitted, would defeat one of the plain provisions of the law and deprive the creditors of their rights.⁹³ His claim of exemptions must be filed with his schedules as a part thereof; this is the practice indicated by the statute and the official forms. While the State statute controls as to the amount and kind of exemptions, the time and manner of claiming them are regulated by the bankrupt act,⁹⁴ and a claim therefor in the schedules of an involuntary bankrupt will be regarded as effective.⁹⁵ The future action of the trustees in setting apart the bankrupt's exemptions is based upon the schedules containing the claim, and it is the assertion of the claim in this manner which gives the court jurisdiction.⁹⁶ The form of the schedule, B (5), recognizes the propriety of estimating the value of the articles claimed and of mentioning the State statute under which the exemption is claimed.

(5) VERIFICATION.—The previous statute required the schedules to be verified before a Federal officer. Now, they can be verified before a State officer.⁹⁷ The oaths, like each separate sheet of the schedules, should be signed by the bankrupt. As the official forms are now printed, space is not provided for the signature. It is not thought, however, that a separate verification is so essential as to affect jurisdiction provided the schedules accompany the petition; the oath to the latter, when coupled with its reference to the schedules and what they contain, complies with the statute.⁹⁸

g. Amendment of schedules.⁹⁹—It is the referee's duty to cause incomplete or defective schedules to be amended.¹⁰⁰ This he can do on his own motion, or in response to an application under General Order XI. Amendments to the schedule of creditors often become necessary. If the first meeting has been

91. In re Wunder (D. C., Pa.), 13 Am. B. R. 701, 133 Fed. 821; In re Manning (D. C., Pa.), 7 Am. B. R. 571, 112 Fed. 948; In re Stein (D. C., Pa.), 12 Am. B. R. 384, 130 Fed. 629; In re Prince & Walter (D. C., Pa.), 12 Am. B. R. 680, 131 Fed. 546.

Claim "for the proceeds."—The bankrupt should claim specific property; a claim "for the proceeds of personal property, \$300" is not authorized. In re Donahey (D. C., Pa.), 23 Am. B. R. 796, 176 Fed. 458. See discussion under Section Six, ante.

92. Lipman v. Stein (C. C. A., 3d Cir.), 14 Am. B. R. 30, 134 Fed. 235.

93. In re Royal (D. C., No. Car.), 7 Am. B. R. 106, 112 Fed. 135.

Pension money in the hands of a bankrupt is exempt but should be put into the schedule as money on hand with a statement of the exemption. In re Bean (D. C., Vt.), 4 Am. B. R. 53, 100 Fed. 262.

94. In re Stein (D. C., Pa.), 12 Am. B. R. 384, 130 Fed. 377; In re LeVay (D. C., Pa.), 11 Am. B. R. 114, 125 Fed. 990; In re Grove (Ref., Ohio), 6 Am. B. R. 728; In re Prince & Walter (D. C., Pa.), 12 Am. B. R. 680, 131 Fed. 646; Brandt v. Mayhew (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422;

Matter of Crum (D. C., Ohio), 34 Am. B. R. 586, 221 Fed. 729. In re Andrews & Simonds (D. C., Mich.), 27 Am. B. R. 116, 193 Fed. 776, holding that the provisions of the Bankr. Act should receive a liberal and not a narrow or technical construction.

95. In re Stein (D. C., Pa.), 12 Am. B. R. 384, 130 Fed. 377; Matter of McClintock (Ref., Ohio), 13 Am. B. R. 606; In re LeVay (D. C., Pa.), 11 Am. B. R. 114, 125 Fed. 990.

96. McGahan v. Anderson (C. C. A., 4th Cir.), 7 Am. B. R. 641, 113 Fed. 115. See also In re Nunn (Ref., Ga.), 2 Am. B. R. 664; In re Harrington, 1 N. B. N. 513; In re Harber, 2 N. B. N. Rep. 449.

97. See Bankr. Act, § 20-a.

98. Matter of McConnell (Ref., N. Y.), 11 Am. B. R. 418.

99. Consult also for amendments of claims to exemptions, § 6; and for amendments to petition, § 18; and for amendments to proof of debts, § 57; and see Am. Bankr. Dig. § 254.

100. Bankr. Act, § 39(2); In re Orne, Fed. Cas. 10,582; In re Brumelkamp (D. C., N. Y.), 2 Am. B. R. 318, 95 Fed. 814.

held, an amendment may deprive a creditor brought in of his right to participate in the choice of trustee, and, therefore, the reason for the omission should appear to be sufficient.¹⁰¹ While omitted creditors may be added by amendment, yet such amendment relates to the date of the filing of the petition.^{101a} Under the former law, it was held that amendments might be made, even after objections had been filed to a discharge.¹⁰² This is undoubtedly so under the present law, but the utmost good faith should appear.¹⁰³ An application to amend a schedule by inserting a creditor's name and claim will be denied when made within a few days of the end of the year from his adjudication,¹⁰⁴ and ordinarily a discharge will not be opened to permit a bankrupt to amend his schedules;¹⁰⁵ but it has been held in an exceptional case that a discharge might be opened to permit an amendment of the schedules by the insertion of a claim omitted through a mistake of law,¹⁰⁶ where the creditor was still in position to file his claim. If, on an examination of a bankrupt, it is shown that he has failed to schedule property which should be surrendered to his trustee, he may be permitted to correct his schedule.¹⁰⁷ Both petition and order should be in triplicate, and the copies intended for the clerk and the trustee should be immediately sent them by the referee. As already suggested the schedules may be amended to include a claim of exemption.¹⁰⁸ A suggested practice on amendments of this character is set out in the foot-note.¹⁰⁹

III. PUBLIC EXAMINATION OF BANKRUPT.¹¹⁰

a. In general.—Subdivision 9 of this section requires a bankrupt to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, etc. The right to examine the bankrupt is essential to a due

101. In re Myers (D. C., Ind.), 3 Am. B. R. 780, 99 Fed. 691; In re Bean (D. C., Vt.), 4 Am. B. R. 53, 100 Fed. 262; In re Wilder, 3 Am. B. R. 761, 101 Fed. 104.

For form of petition to amend schedules see Hagar & Alexander's Forms in Bankruptcy (2d Ed.), No. 108.

Under General Order 11, an applicant for leave to amend his schedules must state the cause of the error in the paper originally filed. Matter of Brincat (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

101a. An amendment of the petition may be made in order to correct the schedules for the purpose of establishing a set-off against the demand of a creditor who filed a petition in the bankruptcy proceeding, and equally to defeat a claim of set-off put forward by a creditor in a suit by the bankrupt on a claim arising subsequent to the filing of a petition in bankruptcy. Bramham v. Lanier Bros. (Tenn. Sup. Ct.), 41 Am. B. R. 215, 200 S. W. 830.

102. In re Heller, Fed. Cas. 6,339; In re Connell, Fed. Cas. 3,110; In re Preston, Fed. Cas. 11,392.

103. In re Eaton (D. C., N. Y.), 6 Am. B. R. 531, 110 Fed. 731; In re Royal (D. C., N. Car.), 7 Am. B. R. 106, 112 Fed. 135; In re Mudd. 2 N. B. N. Rep. 710.

104. In re Kittler (D. C., Pa.), 23 Am. B. R. 585, 176 Fed. 655.

105. In re Hawk (C. C. A., 8th Cir.), 8 Am. B. R. 71, 114 Fed. 916. In re Spicer (D. C., N. Y.), 16 Am. B. R. 802, 145 Fed. 431.

106. In re McKee (D. C., N. Y.), 21 Am. B. R. 306, 165 Fed. 269.

107. Matter of Harrell (D. C., N. Car.), 34 Am. B. R. 809, 222 Fed. 160.

108. See ante, p. 262.

109. Amendment of schedules; practice.—1. Prior to the time set for, or before the transaction of any other business at, the first

meeting of creditors, a petition and schedules or other papers may be amended and new parties may be brought in, as of course and without notice, unless otherwise ordered. Except as hereinbefore in this rule provided, at or after the first meeting of creditors, a petition and schedules or other papers shall not be amended in any material matter, except on an application, made either at a stated meeting or hearing, or upon motion and cause shown, after due notice to the adverse party or the creditor or other party in interest to be affected thereby. In case the amendment will add a party to the proceeding, such party shall be entitled to notice of the motion, and any meeting already noticed may be adjourned for that purpose. If publication is begun or is completed when the motion for the amendment adding other parties is made, further publication as to such parties may be dispensed with.

2. All applications for amendments shall be made by a verified petition addressed to the referee, and the amendments desired shall be set out in separate schedules or paragraphs and in such a way as to bring them clearly to the attention of the referee. Similar schedules or paragraphs shall also be incorporated in any order granting amendments. Copies of orders which amend a petition and schedules, duly certified by the referee, shall be forthwith filed with the clerk and, if then appointed, with the trustee. (Rule 5, Erie County District, Western District of New York.)

110. As to the examination of third persons, see discussion under § 21, post.

administration of the law. It has existed since the very earliest of the English bankruptcy laws. The present English law provides for a public examination even before the first meeting of creditors.¹¹¹ If present at a regular meeting of creditors, the bankrupt may be sworn, if with his consent, and, while there is authority the other way,¹¹² without his consent if so ordered by the court—this under the general powers conferred by § 2 (15) and the broad phrasing of the subdivision under discussion. The clause is to be so construed as to require the bankrupt's attendance upon a hearing of objections to a discharge, if requested by the creditors.¹¹³ The purpose of an examination under this provision is to assist in the administration of a bankrupt's property, which the court undertakes only after adjudication.¹¹⁴ And the obligation of a bankrupt to submit to an examination involves the duty of answering material questions truthfully and as intelligently, connectedly and fully as mental equipment will permit.¹¹⁵ The fact that a creditor had not, at or prior to the time of the examination, formally presented his claim does not deprive him of the right to participate in the examination.^{115a}

b. Time of examination.—Under our law, the examination may be had "at the first meeting of creditors or at such other times as the court shall order." This permits an examination before adjudication.¹¹⁶ The intent of this subdivision seems to be that creditors may have an examination of the bankrupt at any time during the pendency of his proceedings.¹¹⁷ This permits of an examination for the purpose of making up the schedules,¹¹⁸ or to lay a foundation for objections to a discharge.¹¹⁹ An examination of the bankrupt may be had, even after his discharge, to ascertain whether he has, after his discharge, concealed property from his trustee.¹²⁰ It has been held that where a bankrupt is present he may be examined without notice,¹²¹ and that he is not entitled to witness fees.¹²² An examination may also be granted though the

111. Eng. Act of 1883, § 16. This resembles our requirement for an examination in open court before a composition may be offered, § 12-a.

112. *In re Price* (D. C., N. Y.), 1 Am. B. R. 419, 91 Fed. 635, and Bankr. Act, § 58-a (1).

113. *In re Shanker* (D. C., Pa.), 15 Am. B. R. 109, 138 Fed. 862.

114. *In re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679.

115. *Matter of Feller* (D. C., N. Y.), 17 Am. B. R. 785, 149 Fed. 244, holding that the bankrupt is guilty of contempt of court if he persists in giving vague, contradictory and evasive answers to material inquiries.

115a. *Beavan v. Stuart* (C. C. A., 5th Cir.), 41 Am. B. R. 81, 250 Fed. 972.

116. *Cameron v. United States* (U. S. Sup. Ct.), 231 U. S. 710, 31 Am. B. R. 604, 58 L. Ed. 448; *Matter of Fleischer* (D. C., N. Y.), 18 Am. B. R. 194, 151 Fed. 89; *United States v. Lieberman* (C. C., N. Y.), 23 Am. B. R. 734, 176 Fed. 161.

Contra cases, decided before the question was settled by the *Cameron* case, are *Skubinsky v. Bodek* (C. C. A., 3d Cir.), 22 Am. B. R. 689, 172 Fed. 332; *In re Thompson* (D. C., Pa.), 24 Am. B. R. 655, 179 Fed. 874; *In re Davidson* (D. C., Mass.), 19 Am. B. R. 833, 158 Fed. 678; *In re Crenshaw* (D. C., Ala.), 19 Am. B. R. 266, 155 Fed. 271.

117. *In re Mellen* (D. C., N. Y.), 3 Am. B. R. 226, 97 Fed. 326; *Matter of Bryant* (D. C., Pa.), 26 Am. B. R. 504, 188 Fed. 530.

118. *In re Franklin Syndicate* (D. C., N. Y.), 4 Am. B. R. 244, 101 Fed. 402. Purpose of making up schedules.

119. *In re Price* (D. C., N. Y.), 1 Am. B. R. 419, 91 Fed. 605, holding that but one such examination should be had. See also *In re Mellen* (D. C., N. Y.), 3 Am. B. R. 226, 97 Fed. 326.

120. *In re Peters* (Ref., Mass.), 1 Am. B. R. 248.

A bankrupt after his discharge and while the bankruptcy proceedings are pending undetermined must submit to an examination, at the instance of his trustee, as to the affairs and transactions connected with the bankrupt estate, especially where he has been duly subpoenaed and paid the attendance fees of an ordinary witness. *In re Westfall Bros. & Co.* (D. C., Cal., Ref.), 8 Am. B. R. 431.

121. *In re Brandt*, Fed. Cas. 1,812, 2 N. B. R. 215; *In re Bromley & Co.*, 3 N. B. R. 386.

122. *In re Okell*, Fed. Cas. 10,475, 2 Ben. 144; *In re McNair*, Fed. Cas. 8,907, 2 N. B. R. 219.

creditor asking for the same has not filed or formally proved his claim,¹²³ unless the bankrupt can prove that the claim is invalid.¹²⁴

c. *How brought on.*—At the first meeting of creditors, the referee should ask if an examination of the bankrupt is desired, and, if the bankrupt is present, order it to proceed. If the bankrupt is absent, a direction through his attorney will usually secure his presence. If he is obdurate, the referee may, on his own motion or at the instance of the trustee or any creditor whose claim is proven, make an order requiring his attendance for examination,¹²⁵ and a failure or refusal to attend may be reported as a contempt. If the bankrupt is confined in prison or a State hospital for insane criminals, the court may, in its discretion, grant a writ of *habeas corpus ad testificandum* compelling the custodian of the bankrupt to produce him for examination.¹²⁶ An application for an order for the examination of a bankrupt is *ex parte*,¹²⁷ and may be granted at any time before the final disposition of the proceedings,¹²⁸ but where an examination already had is apparently full, an application for a further examination will be refused.¹²⁹ The fact that one creditor has examined the bankrupt is no reason for withholding the privilege from another.¹³⁰ A court of bankruptcy has no power to make an order of arrest, as the basis of extradition proceedings, for the purpose of an examination.¹³¹ The proviso clause of this subdivision and the restrictions as to time, previously noted, are the only limitations, other than a sound discretion, on the granting of this order. The examination, when once begun, should, however, not be unnecessarily prolonged. Nor, after the completion of the main examination and the excuse of the bankrupt, should he be recalled, save for good cause shown.

d. *Method of conducting.*—The usual method of question and answer is followed, but the rules of evidence are not the same as on ordinary trials. The examination is in the nature of an inquisition, and great latitude is allowed the examiner.¹³² It may be taken down in narrative form, or in the form of question and answer,¹³³ and the referee may, upon the application of the trustee, authorize the employment of a stenographer for that purpose and order his fees paid out of the estate.¹³⁴ The fiction that, in every such case, the trustee has been directed to employ a stenographer, seems quite general throughout the country. It is even the practice to employ such an assistant where there is no estate and to order the bankrupt to deposit with the referee

123. In re Jehu (D. C., Iowa), 2 Am. B. R. 498, 94 Fed. 638; In re Samuelsohn (D. C., N. Y.), 23 Am. B. R. 528, 174 Fed. 911.

The listing by the bankrupt in his verified schedules of a debt as being one owed by him to a certain person is *prima facie* evidence that the claim exists and is provable against the estate, and is sufficient, unless contradicted, to entitle that person to appear in the examination of the bankrupt. In re Walker (D. C., N. Dak.), 3 Am. B. R. 35, 90 Fed. 550.

124. In re Kingsley, Fed. Cas. 7,818, 6 Ben. 300; In re Winship, Fed. Cas. 17,878, 7 Ben. 194; In re Belden, Fed. Cas. 1,241, 4 N. B. R. 194.

125. See Form No. 28; see also Hagar & Alexander's Bankruptcy Forms (2d Ed.), No. 212.

Service of process on non-resident while attending proceedings.—An alleged bankrupt while attending an involuntary proceeding against him is not privileged from examination under section 21a, and may be served with an order requiring him to submit to such an examination, although he claims to be a non-resident. Matter of Havens (C. C. A., 2d Cir.), 42 Am. B. R. 734, 255 Fed. 478.

126. In re Thaw (C. C. A., 3d Cir.), 21 Am. B. R. 561, 166 Fed. 71, holding also

that where such writ is issued, it may be quashed by a judge of another court, in his discretion.

127. In re Macintire, Fed. Cas. 8,821, 1 Ben. 277.

128. In re Solis, Fed. Cas. 13,165, 4 Ben. 143; In re Vetterlein, Fed. Cas. 16,926, 5 Ben. 7; In re Furelle, Fed. Cas. 5,132, 5 N. B. R. 119.

129. In re Frisbie, Fed. Cas. 5,131, 13 N. B. R. 349; In re Isidor, Fed. Cas. 7,106, 3 Ben. 123.

130. In re Adams, Fed. Cas. 40, 3 Ben. 7; In re Gilbert, Fed. Cas. 5,410, 1 Low. 340; In re Vogel, Fed. Cas. 16,984, 5 N. B. R. 393.

131. In re Hassenbusch, 47 C. C. A. 177, 108 Fed. 35.

132. Matter of Horgan & Slattery (C. C. A., 2d Cir.), 3 Am. B. R. 253, 98 Fed. 414.

133. General Order XXII; Bankr. Act, § 39-a (9).

134. See Bankr. Act, § 38-a (5).

a sum sufficient for that purpose. This practice, which is claimed to be sanctioned by General Order X, and is usually prescribed in local rules, is clearly within the broad powers conferred on courts of bankruptcy by § 2 (15), and has now been ratified by usage.¹³⁵ The examination, when reduced to writing, should be read over by the bankrupt and subscribed by him,^{135a} but it has been held that where the testimony was not signed by the bankrupt it could be received in evidence on the testimony of the person who took the minutes.¹³⁶ A bankrupt has the right, on his general examination at the first meeting of creditors, or at any other examination, to the attendance and services of counsel,¹³⁷ but it is clearly improper for a former counsel of the bankrupt to conduct his examination on behalf of the trustee.¹³⁸ Whether a bankrupt may consult counsel, before answering a question, is within the discretion of the examining magistrate.¹³⁹ The examination may not be conducted by an attorney in fact who is not also an attorney at law.^{139a} The bankrupt may be cross-examined,¹⁴⁰ but such cross-examination should be conducted as directed by General Order No. 22, in conformity with the mode, existing in courts of law.¹⁴¹ The referee has ample power to administer oaths and compel the production of documents,¹⁴² and need not issue a subpoena *duces tecum* for that purpose, nor specify in the order the importance of their production.¹⁴³ He should enter on the record any objections to testimony and his rulings thereon, and any offers to prove which he rules out, as well as any statements of counsel or the bankrupt when asserting the latter's constitutional privilege.¹⁴⁴ Excluded testimony should

135. Testimony taken by stenographer.—Rule II of Rules for Western District of New York, Erie District, provides that:

1. The examination of the bankrupt and other witnesses at meetings of creditors of otherwise, and all testimony offered on contested claims, or for any other purpose, will be taken down by the official stenographer in the form of question and answer, and transcribed. One copy thereof will be inserted in the record book of the referee and the other copy will be delivered to the trustee. The expense of thus perpetuating testimony will be at the rate of ten cents (10c.) a folio for both copies, and shall be paid as follows: Where there are no assets, for one reasonable examination, on one day, by the bankrupt and thereafter by the creditor or party in interest for whose benefit or at whose request such examination is had; where there are assets, as may be ordered by the referee in each particular case.

2. After the testimony has been transcribed the attorney in charge of the case will produce each witness before the referee, that such testimony may be signed as provided in General Order XXII.

3. If indemnity is not demanded, all moneys advanced by the referee in publishing or mailing notices, or for traveling expenses, or for procuring the attendance of witnesses, or for perpetuating testimony, or otherwise, shall be paid to the referee prior to, or at the time application is made to him for the report or certificate called for by District Rule X.

135a. Matter of Post (D. C., Ohio), 43 Am. B. R. 126, 256 Fed. 236, quoting Collier on Bankruptcy (11th ed.), 267.

136. Matter of Kaplan Brothers (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 Fed. 753; In re Bard (D. C., N. Y.), 5 Am. B. R. 810, 108 Fed. 208.

137. Good v. Kane (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 956.

138. In re Teuthorn (Ref., Mass.), 5 Am. B. R. 767.

139. In re Tanner, Fed. Cas. 13,745, 1 Low, 215; In re Jackson, Fed. Cas. 7,562, 2 Ben. 210; In re Lord, Fed. Cas. 8,502, 3 N. B. R. 243.

139a. Matter of Looney (D. C., Tex.), 44 Am. B. R. 542, 262 Fed. 209.

140. In re Levy, Fed. Cas. 8,296, 1 Ben. 496; In re Leachman, Fed. Cas. 8,157, 1 N. B. R. 391; In re Bragg, Fed. Cas. 1,799, 5 Law Rep. 232.

141. Matter of Kinnane Co. (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488.

142. Bankr. Act, § 38-a (2); In re Soloway v. Katz (D. C., Conn.), 28 Am. B. R. 228, 195 Fed. 103.

143. In re Soloway v. Katz (D. C., Conn.), 28 Am. B. R. 228, 195 Fed. 103.

144. The practice is clearly indicated in the following:

"Referees may pass upon the competency, materiality and relevancy of evidence in matters properly before them for investigation, and shall have all the powers of the judge concerning the admission or rejection thereof, and shall note on the record all objections, the rulings thereon and the exceptions which may be taken; and in cases where testimony is excluded they shall note a brief statement by the party offering the same of the facts he expects to prove thereby. Referees shall limit the inquiry before them to relevant and material matters, and in case an examination or a cross-examination is unnecessarily prolix, or improperly prolonged, the referee may, in his discretion, limit the time of such examination; or he may impose costs, including the fees of the stenographer

be taken down and made a part of the record together with the ruling of the referee on the objections and the exceptions noted.¹⁴⁵ The reason for this procedure is to enable the judge on a review not to reverse a decision made because of the error of the referee in excluding evidence, but to enable such judge at once, without reference back to take such testimony, to determine the issue upon the proper testimony, disregarding that which was improper.¹⁴⁶

e. **Subject-matter of the examination.**— This is pointed out by the words of the statute, *i. e.*, “concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate.” Broader phrases could not well have been employed.¹⁴⁷ A bankrupt may be required to disclose to the trustee the combination of a safe,¹⁴⁸ and may properly be asked whether he did not, shortly before his bankruptcy, sign a statement upon the strength of which he had obtained credit and merchandise from one of his present creditors.¹⁴⁹ But the examination cannot as a rule be extended to property acquired after the filing of the petition;¹⁵⁰ or the adjudication;¹⁵¹ or to property which does not belong to the bankrupt.¹⁵² On the other hand, it is not limited to transactions during the four months’ period.¹⁵³ The difference between an examination under this subsection and one under § 21-a should always be borne in mind. Suggestive precedents under both statutes will be found in the foot-note.¹⁵⁴

and other expenses, upon the party responsible for the improper prolongation.” (Rule XXIV, Western District of New York.)

145. *In re Lipset* (D. C., N. Y.), 9 Am. B. R. 32, 119 Fed. 379; *In re Goltardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328; *Dressel v. North State Lumber Co.* (D. C., N. Car.), 9 Am. B. R. 541, 119 Fed. 531; *In re Romaine* (D. C., W. Va.), 14 Am. B. R. 785, 138 Fed. 837; *In re Sturgeon* (C. C. A., 2d Cir.), 14 Am. B. R. 681, 139 Fed. 608; *Bank of Ravenswood v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463. A contrary conclusion, disapproved in some of the above cases, was reached in *In re Wilde* (D. C., N. Y.), 11 Am. B. R. 714, 131 Fed. 142.

Stay of proceedings to determine admissibility of evidence.—A reference must receive all the evidence offered upon a hearing before him, noting the objections made thereto and may refuse to stop the proceedings and certify questions raised on the objections to the testimony. *Bank of Ravenswood v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463.

146. *In re Lipset* (D. C., N. Y.), 9 Am. B. R. 32, 119 Fed. 379; *In re Romaine* (D. C., W. Va.), 14 Am. B. R. 785, 138 Fed. 837.

147. *In re Foerst* (D. C., N. Y.), 1 Am. B. R. 259, 93 Fed. 190.

148. *In re Hooks Smelting Co.* (D. C. Pa.), 15 Am. B. R. 83, 138 Fed. 954.

149. *Matter of Jacobs & Roth* (D. C., Pa.), 18 Am. B. R. 728, 154 Fed. 988, wherein the

court said: “It is not to be intended by this to state that a general voyage of discovery is to be authorized covering any and every period of the bankrupt’s business dealings and transactions, but only such as within a reasonable time of the bankrupt proceeding can fairly be taken to shed some light upon his affairs at that time.”

150. *In re Hayden* (D. C., N. Y.), 1 Am. B. R. 670, 90 Fed. 199; *In re White*, 2 N. B. N. Rep. 536. But see *In re Walton*, 1 N. B. N. 533; *In re Clark*, Fed. Cas. 2,805, and *In re McBrien*, Fed. Cas. 8,666.

151. *In re Patterson*, Fed. Cas. 10,815, 1 Ben. 508; *In re Levy*, Fed. Cas. 8,296, 1 Ben. 496.

152. *In re Van Tuyl*, Fed. Cas. 16,890, 1 N. B. R. 636.

153. *In re Brundage* (D. C., Iowa), 4 Am. B. R. 47, 100 Fed. 613.

154. *In re Lange* (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 197; *In re Cliffe* (D. C., Pa.), 3 Am. B. R. 257, 97 Fed. 540; *In re Tudor* (D. C., Col.), 4 Am. B. R. 78, 100 Fed. 796; *In re Kamsler*, 2 N. B. N. & R. 97, 97 Fed. 194; *In re Carley* (D. C., Ky), 5 Am. B. R. 554, 106 Fed. 862; *People’s Bank v. Brown* (C. C. A., 3d Cir.), 7 Am. B. R. 475, 112 Fed. 652; *U. S. v. Wechsler* (D. C., N. Y.), 16 Am. B. R. 1; *In re Bonesteel*, Fed. Cas. 1,628; *In re Hoult*, Fed. Cas. 6,646; *In re Cooke*, Fed. Cas. 3,168; *In re Salkey*, Fed. Cas. 12,252; *In re Campbell*, Fed. Cas. 2,348; *In re Hatje*, Fed. Cas. 6,215.

f. Unsatisfactory answers.— Persistent evasion or refusal on the part of a bankrupt to answer material questions within his knowledge will be considered as contempt and be punishable as such.¹⁵⁵ Thus, under the former law, where the bankrupts had concealed a large sum, and, when questioned, "had told all they knew on the subject," and refused to answer further questions because "they knew no more about the matter," they were punished for contempt.¹⁵⁶ And under the present law it is held that, where he persistently answers "I don't know" to questions about his property, which he must and evidently does know, and could answer fully, he is guilty of contempt.¹⁵⁷ From unsatisfactory answers and other evidence the conclusion is sometimes drawn that the bankrupt is withholding property from his trustee.¹⁵⁸ A bankrupt may be guilty of contempt when he refuses to answer questions and withdraws from the office of the referee;¹⁵⁹ and his testimony may be rejected where it is unworthy of credit.¹⁶⁰

g. Criminating questions.— (1) **IN GENERAL.**— The once-mooted question as to whether the words "but no testimony given by him shall be offered in evidence against him in any criminal proceeding" amount to the privilege against testifying against himself guaranteed by the Fifth Amendment to the Constitution seems no longer open. It is now well settled that the bankrupt need not answer criminating questions.¹⁶¹ The authorities to the contrary seem not to

155. *In re Singer* (D. C., Pa.), 23 Am. B. R. 28, 174 Fed. 208; *In re Fellerman* (D. C., N. Y.), 17 Am. B. R. 785, 149 Fed. 244; *Matter of Levin* (D. C., N. Y.), 11 Am. B. R. 382, 131 Fed. 388; *Matter of Shear* (D. C., N. Y.), 32 Am. B. R. 833, 188 Fed. 677.

The English authorities are to the same effect. *Ex parte Legge*, 17 Jurist, 415; *In re Martin*, 11 Jurist, 461; *Ex parte Lord*, 10 Mees. & W. 463; *In re Bradbury*, 11 Jur. 189, 14 C. B. 15; *In re Taylor*, 8 Ves. 328; *Ex parte Nowlan*, 6 Dumf. & East 118, 6 T. R. 58.

Committed for contempt.— Where a bankrupt, under examination before a referee, persistently evaded making direct answers to questions concerning the recent sale of a house, about which he could not have been ignorant, and it becomes necessary, because of such conduct, to suspend the examination, he will be committed to jail for contempt. *In re Singer* (D. C., Pa.), 23 Am. B. R. 28, 174 Fed. 208.

Where a bankrupt's whole examination is a perfectly transparent case of duplicity, intentional evasion and refusal to make any explanation of the facts connected with his bankruptcy, under the pretense of ignorance and stupidity, and he manifests a deliberate determination to conceal all the material facts within his knowledge, he will be adjudged guilty of contempt of court and committed to jail. *In re Schulman* (D. C., N. Y.), 21 Am. B. R. 288, 167 Fed. 237, *affd.* 23 Am. B. R. 809, 177 Fed. 191; *U. S. v. Appel* (D. C., N. Y.), 31 Am. B. R. 154, 211 Fed. 495; *Matter of Kaplan Brothers* (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 Fed. 753.

Evidence insufficient to show contempt.— Where, upon the examination of a bankrupt

before a special commissioner as to the keeping of a cash book and its whereabouts, he testified that he last saw the book in the office of the firm shortly before the appointment of the custodian, and did not take it himself but left it where he saw it, and there was no certificate of the special commissioners indicating that in his opinion the witness testified falsely or withheld information, it was held that proceedings to punish the bankrupt for contempt should be dismissed. *Matter of Cantor* (C. C. A., 2d Cir.), 32 Am. B. R. 768, 215 Fed. 61.

156. *In re Salkey*, Fed. Cas. 12,253.

157. *In re Gitkin* (D. C., Pa.), 21 Am. B. R. 113, 164 Fed. 71; *Matter of Kaplan Brothers* (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 Fed. 753.

158. *In re McCormick* (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566; *In re Schlesinger* (D. C., N. Y.), 3 Am. B. R. 342, 97 Fed. 935; *In re Deuell* (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 633.

159. *In re Vogel*, Fed. Cas. 16,984, 5 N. B. R. 393.

160. *In re Tudor* (D. C., Col.), 4 Am. B. R. 78, 100 Fed. 796; *In re Leslie* (D. C., N. Y.), 9 Am. B. R. 561, 119 Fed. 406.

161. *In re Scott* (D. C., Pa.), 1 Am. B. R. 49, 95 Fed. 815; *In re Hathorn* (Ref., La.), 2 Am. B. R. 298; *In re Rosser* (D. C., Mo.), 2 Am. B. R. 755, 96 Fed. 305; *In re Feldstein* (D. C., N. Y.), 4 Am. B. R. 321, 108 Fed. 794; *In re Henschel* (Ref., N. Y.), 7 Am. B. R. 207; *In re Shera* (D. C., N. Y.), 7 Am. B. R. 552, 114 Fed. 207; *In re Nachman* (D. C., S. Car.), 8 Am. B. R. 180, 114 Fed. 995; *In re Kantor* (D. C., N. Y.), 9 Am. B. R. 104, 117 Fed. 356; *U. S. v. Goldstein* (D. C., Va.), 12 Am. B. R. 755, 132 Fed. 789;

have recognized the full force of *Counselman v. Hitchcock*.¹⁶² The bankrupt may even assert his privilege in response to a petition that he be ordered to surrender property.¹⁶³ Although a bankrupt has a right to claim his privilege against self-incrimination, there must be some basis for the supposed fear.¹⁶⁴ If the court is convinced that an answer to a question cannot by any possibility criminate the bankrupt, and especially if he does not swear that he believes it would, it is the duty of the court to compel him to answer.¹⁶⁵ The inhibition not only protects the bankrupt from the disclosure of facts which would tend to prove his guilt, but also from disclosure of facts which might furnish a clue or a link in a chain of evidence by which a criminal offense might be made known.¹⁶⁶ It seems that the protection extends only to a prosecution in the Federal courts.¹⁶⁷ Section 860 of the Revised Statutes, (now repealed) in force when the incriminating testimony was given, does not prevent the use of such testimony in the prosecution of the witness for perjury.¹⁶⁸

(2) **USE OF TESTIMONY ON EXAMINATION.**—It is provided in subdivision 9 of clause *a* of this section that no testimony given by the bankrupt on examination "shall be offered in evidence against him." It has held that full effect may be given to the immunity provision of this subdivision by confining it to the testimony given thereunder,¹⁶⁹ and that the bankrupt is not protected by this clause against the use of his testimony given upon an examination where he has been indicted for perjury in relation to the bankruptcy proceedings.¹⁷⁰

Carey v. Donohue (C. C. A., 6th Cir.), 31 Am. B. R. 210, 209 Fed. 328. *Contra*: *Mackel v. Rochester* (C. C. A., 9th Cir.), 4 Am. B. R. 1, 135 Fed. 904.

Concealing property.—A bankrupt may refuse to answer questions the answers to which would tend to show him guilty of the offense of concealing property after his adjudication under § 29-b of the bankruptcy act. *U. S. v. Goldstein* (D. C., Va.), 12 Am. B. R. 755, 132 Fed. 789.

Larceny.—The bankrupt cannot be compelled to give testimony which might expose him to a prosecution for larceny. *In re Henschel* (Ref., N. Y.), 7 Am. B. R. 207.

Waiver.—The filing of a voluntary petition in bankruptcy is not a waiver of the constitutional provision. *In re Hathorn* (Ref., La.), 2 Am. B. R. 298.

¹⁶² 142 U. S. 547, 35 L. Ed. 1110. See also *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819.

¹⁶³ *In re Glassner* (Ref., Md.), 8 Am. B. R. 184.

¹⁶⁴ *Matter of Tobias, Greenthal & Mendelson* (D. C., N. Y.), 31 Am. B. R. 889, 215 Fed. 815.

¹⁶⁵ *Matter of Levin* (D. C., N. Y.), 11 Am. B. R. 382, 131 Fed. 388; *In re Heas* (D. C., Pa.), 14 Am. B. R. 559, 136 Fed. 988; *In re Walsh* (D. C., S. Dak.), 4 Am. B. R. 693, 104 Fed. 518.

¹⁶⁶ *Edelstein v. United States* (C. C. A., 8th Cir.), 17 Am. B. R. 649, 149 Fed. 633.

¹⁶⁷ *In re Nachman* (D. C., S. Car.), 8 Am. B. R. 180, 114 Fed. 995; *In Commonwealth v. Ensign*, 227 U. S. 592, 30 Am. B. R. 408, 57 L. Ed. 658, in which it was held that the provisions of the fifth amendment applies only to proceedings in the federal courts.

¹⁶⁸ Section 860 of the U. S. Revised Statutes saved the right to use incriminating testimony in the prosecution of a witness for perjury for any legitimate purpose in establishing the charge made. The use of such testimony was not limited to merely proving that it was in fact given. On the prosecution of a bankrupt for perjury in two bankruptcy proceedings, testimony given in one bankruptcy proceeding, not tending to establish perjury in the other, was held to be inadmissible to establish the crime charged in the other proceeding. *Cameron v. United States* (U. S. Sup. Ct.), 231 U. S. 710, 31 Am. B. R. 604, 58 L. Ed. 448, revg. 27 Am. B. R. 657, 113 C. C. A. 20, 192 Fed. 548.

¹⁶⁹ *Ensign v. Pennsylvania*, 227 U. S. 592, 30 Am. B. R. 408, 57 L. Ed. 658; *Glickstein v. United States*, 222 U. S. 139, 27 Am. B. R. 786, 56 L. Ed. 128.

Among the cases *contra* are: *Mackel v. Rochester* (C. C. A., 9th Cir.), 4 Am. B. R. 1, 102 Fed. 314; *In re Franklin Syndicate Co.* (D. C., N. Y.), 4 Am. B. R. 511, 114 Fed. 205; *In re Sapiro* (D. C., Wis.), 1 Am. B. R. 296, 92 Fed. 340.

Cross-examination.—A bankrupt may be cross-examined as to any matter he has voluntarily sworn to in his petition or schedules or testimony, and must answer pertinent questions relative thereto. *In re Walsh* (D. C., S. Dak.), 4 Am. B. R. 693, 104 Fed. 518.

¹⁷⁰ *Cameron v. United States*, 231 U. S. 710, 31 Am. B. R. 604; revg. s. c. (C. C. A., 2d Cir.), 27 Am. B. R. 657, 192 Fed. 548, 113 C. C. A. 20; *Wechler v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579, revg. 16 Am. B. R. 1; *Daniels v. United States* (C. C. A., 6th Cir.), 27 Am. B. R. 790,

Neither does the clause protect him against the use of his testimony where he is charged with contempt in refusing to give testimony.¹⁷¹ This provision does not exempt a bankrupt from prosecution for an unlawful act concerning which he voluntarily testifies, but only provides that his testimony so given cannot be used against him on such prosecution.¹⁷² In order to take advantage of this provision of the statute an objection must be made when the evidence is offered.^{173a}

(3) **USE OF BANKRUPT'S BOOKS.**—The books of a bankrupt in the possession of the trustee or a receiver are not "testimony" within the meaning of subdivision 9, and they may be used against him.¹⁷³ He may not be compelled to produce books rightfully in his possession, for use in criminal proceedings against him, but the declaration of the rule in the Johnson case would seem to permit their use where they have been transferred to the possession of his trustee in one course of the proceeding.¹⁷⁴ Where a bankrupt asserts his constitutional privilege against an order compelling him to produce books of account alleged to contain incriminating evidence the books should be produced so as to enable the court or referee to determine whether they do in fact contain such evidence; the court or referee may then make an order protecting the bankrupt from the use of such evidence, and at the same time enable the trustee to obtain other necessary information from such books.¹⁷⁵ If the bankrupt surrenders his books without protest or claim of constitutional privilege, he waives such privilege so far as such books are concerned.¹⁷⁶

h. Effect of § 14-b (6).—The amendatory act of 1903 makes the bankrupt's refusal "to obey any lawful order or to answer any material question approved by the court" an objection to a discharge. The new clause is clearly aimed at

196 Fed. 450; *Matter of Kaplan Brothers* (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 Fed. 753; *United States v. Brod* (C. C., Ga.), 23 Am. B. R. 740, 178 Fed. 165; *Edelstein v. United States* (C. C. A., 8th Cir.), 17 Am. B. R. 640, 149 Fed. 636. *State v. Frasier* (Ore. Sup. Ct.), 44 Am. B. R. 425, 184 Pac. 848. See contra, *U. S. v. Simon* (D. C., Wash.), 17 Am. B. R. 41, 146 Fed. 89.

171. *Matter of Kaplan Brothers* (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 Fed. 753.

172. *Burrell v. State*, 194 U. S. 572, 12 Am. B. R. 132, 48 L. Ed. 1122, affg. 27 Mont. 282, 70 Pac. 982; *United States v. Simon* (D. C., Wash.), 17 Am. B. R. 41, 146 Fed. 89; *Edelstein v. United States* (C. C. A., 8th Cir.), 17 Am. B. R. 649, 149 Fed. 636. It was held in the case of *Commonwealth v. Ensign* (Super. Ct., Pa.), 40 Pa. Super. Ct. 157, 22 Am. B. R. 797, that the schedules of the bankrupt and books offered by him are to be considered as voluntarily offered.

173a. *Bain v. United States* (C. C. A., 3th Cir.), 45 Am. B. R. 79, 262 Fed. 664.

173. *Ensign v. Commonwealth*, 227 U. S. 592, 30 Am. B. R. 408, 57 L. Ed. 658.

Use of books of bankrupt in possession of receiver.—In the case of *United States v. Halstead* (Ct. of App. Dist. Col.), 38 App. D. C. 69, 27 Am. B. R. 302, it was held that the use before a grand jury of books, papers and records of a bankrupt which had been taken possession of by a receiver in bankruptcy, pursuant to an order of the bankruptcy court, and which contained the record and accounts with respect to the matters charged in an indictment against the bankrupt, is no violation of the Fifth Amendment of the Constitution, providing that no person

shall be compelled to be a witness against himself. See also *Matter of Harris*, 221 U. S. 274, 26 Am. B. R. 302, 55 L. Ed. 732.

Use of bankrupt's books in prosecution for concealment of assets.—Books of a bankrupt which have been transferred to his trustee, although against his will, may properly be produced before a grand jury and before the petit jury at a trial under an indictment for concealing money from his trustee, since the use of such books does not compel the bankrupt to be a witness against himself. *Johnson v. United States*, 228 U. S. 457, 30 Am. B. R. 14, 57 L. Ed. 919; Compare *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 528, 212 Fed. 518; *People v. Swarts*, etc. (Ill.), 8 Am. B. R. 487, 24 Nat. Corp. Rep. 263; *Matter of Kanter & Cohen* (D. C., N. Y.), 9 Am. B. R. 104, 117 Fed. 356.

As to the use of the bankrupt's schedules in evidence see *ante*, p. 259.

174. *Johnson v. United States*, 228 U. S. 457, 30 Am. B. R. 14, 57 L. Ed. 919, where Justice Holmes remarks that: "A party is privileged from producing the evidence, but not from its production. The transfer by bankruptcy is no different from a transfer by execution of a volume, with a confession written on the fly leaf."

175. *In re Hess* (D. C., Pa.), 14 Am. B. R. 559, 134 Fed. 109; *Matter of Hark* (D. C., Pa.), 14 Am. B. R. 624, 136 Fed. 986; *Matter of Rosenblatt* (D. C., Pa.), 13 Am. B. R. 306, 143 Fed. 663.

176. *Matter of Tracy & Co.* (D. C., N. Y.), 23 Am. B. R. 438, 177 Fed. 532.

the difficulty mentioned in the preceding paragraph. Its constitutionality was questioned even in advance of its becoming the law.¹⁷⁷ But the proceeding for a discharge is not a criminal proceeding, and the protection of the witness extends to criminal proceedings only. The privilege of a discharge is not a natural right, or a right of property, but is a matter of favor to be accepted upon such terms as Congress sees fit to impose. Hence this provision does not violate the constitutional immunity.¹⁷⁸

i. **Effect of false swearing.**— This subject and the right to use the bankrupt's examination as a means to prevent his discharge is discussed in detail later.¹⁷⁹

j. **Examination of third persons.**— § 7-a (9), previously discussed, has to do only with the examination of the bankrupt. The procedure on and the subject-matter and effect of the examination of other witnesses, and the bankrupt, too, for that matter, under § 21-a, will be found in another place.¹⁸⁰

177. See editor's note *In re Feldstein* (D. C., N. Y.), 4 Am. B. R. 321, 103 Fed. 269. But see contra, *In re Nachman* (D. C., S. Car.), 8 Am. B. R. 180, 114 Fed. 995.

178. *In re Dresser* (C. C. A., 2d Cir.), 16 Am. B. B. 561, 145 Fed. 1021.

179. See discussion under Sections Fourteen and Twenty-nine of this work.

180. See discussion under Section Twenty-one.

SECTION EIGHT.

§ 8. **Death or Insanity of Bankrupts.**—*a.* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowances fixed by the laws of the state of the bankrupt's residence.

Analogous provisions: In U. S.: Act of 1867, § 12, R. S., § 5090; Act of 1800, § 45.
In Eng.: Act of 1883, § 108.
In Can.: Act of 1919, § 68.
Cross-references: To the law: §§ 4, 5-a
To the General Orders: None.
To the Forms: None.

SYNOPSIS OF SECTION.

DEATH OR INSANITY OF BANKRUPTS.

- I. Comparative Legislation, 273.
 - II. Effect of Bankrupt's Death or Insanity on the Proceeding, 274.
 - a.* In general, 274.
 - b.* On right to discharge, 274.
 - III. Effect on Statutory Rights of Widow and Children, 275.
 - a.* In general, 275.
 - b.* Dower and statutory allowances, 275.
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I. COMPARATIVE LEGISLATION.

There is at present no substantial difference between the English, Canadian and American statutes, save that the English and Canadian sections provide for the contingency of death only.¹ But in England the court may, in its discretion, refuse to proceed.² The English practice also permits the service of process on the personal representatives of the debtor, if he dies before such service.³ Our law, in providing that there shall be no abatement after a petition filed, seems to warrant this practice. The analogous section in our statute of 1800 provided

1. Eng. Bankr. Act of 1883, § 108; Can. 145, under the act of 1869, with In re Walker, 54 L. T. N. S. 682, under that of 1883.

2. Compare In re Obbard, 24 L. T. N. S. 3. Ex parte Hill, 4 Morrell, 281.

only for the due distribution of assets in case of death "after any commission in bankruptcy sued forth." The statute of 1867 was permissive, not mandatory, and was applicable only "after the issue of the warrant" (in this being identical with that of 1800), but had no provision relative to insanity or concerning dower or allowances.⁴

II. EFFECT OF BANKRUPT'S DEATH OR INSANITY ON THE PROCEEDINGS.⁵

a. In general.—The language of this section is mandatory. The proceeding "shall not abate" and "shall be conducted and concluded in the same manner, as far as possible," as though the debtor had not died or become insane. It was held under the former law that involuntary proceedings abated on the death of the alleged bankrupt before the trial, but not if the adjudication had been made, even though the warrant had not been issued.⁶ But the rule was different where one of two or more partners died after the filing of a petition against the copartnership.⁷ Under the present statute the filing of a petition begins "the proceedings," and there can be no abatement thereafter,⁸ and therefore the death of a bankrupt after the filing of an involuntary petition, but before the adjudication, does not abate the proceedings,⁹ nor does his death before the service of process upon him effect such result.¹⁰ Likewise, if a party committed an act of bankruptcy while sane, and by reason of such act the court obtained jurisdiction, it can continue the proceedings, notwithstanding the subsequent insanity of the bankrupt.¹¹ The rule as to non-abatement is the same whether the cause be death or insanity, but, if the latter, a committee *ad litem* should be appointed.¹² This section applies to a corporation seeking to defeat bankruptcy proceedings by a voluntary dissolution begun after the filing of the petition.¹³

b. On right to discharge.—The decisions under the previous law to the effect that a discharge could not be granted where the bankrupt had died after the

4. Act of 1867, § 12; R. S., § 5,090.

5. As to the adjudication on bankruptcy of estates of decedent's see discussion under § 4, *ante*. As to the effect of the death or insanity of a partner on the right to adjudicate the estate of the partnership in bankruptcy, see discussion under § 5, *ante*.

6. *Frazier v. McDonald*, Fed. Cas. 5,073; *In re Litchfield*, Fed. Cas. 8,385.

7. *Hunt v. Pooke*, Fed. Cas. 6,896. Compare *Ex parte Hall*, 1 De Gex, 332.

8. *In re Hicks* (D. C., Vt.), 6 Am. B. R. 182, 107 Fed. 910; *Matter of Spalding* (C. C. A., 2d Cir.), 14 Am. B. R. 129, 137 Fed. 1,020, revg. 13 Am. B. R. 223 on other grounds; *Shute v. Patterson* (C. C. A., 8th Cir.), 17 Am. B. R. 99, 147 Fed. 509; *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

The word "bankrupt" in this section refers to a person against whom a petition has been filed, as well as one who has already been adjudicated a bankrupt. *In re Larkin* (D. C., N. Y.), 21 Am. B. R. 711, 168 Fed. 100.

9. *Partridge v. Andrews* (C. C. A., 3d Cir.), 27 Am. B. R. 388, 191 Fed. 325; *In re Hicks* (D. C., Vt.), 6 Am. B. R. 182, 107 Fed. 910.

10. *Shute v. Patterson* (C. C. A., 8th Cir.), 17 Am. B. R. 99, 147 Fed. 509.

11. *In re Kehler* (C. C. A., 2d Cir.), 19 Am. B. R. 513, 162 Fed. 674, revg. 18 Am. B. R. 596, 153 Fed. 235.

Where the defense is insanity at the time of the commission of the alleged act of bankruptcy, the issue of insanity must be tried in the bankruptcy court, and while an adjudication of his insanity by a State court after the filing of the petition in bankruptcy may be *prima facie* evidence of the fact, it does not conclude the bankruptcy court. *In re Ward* (D. C., N. J.), 20 Am. B. R. 482, 161 Fed. 755. As to effect of findings of a State court upon inquisition issued to determine sanity of an alleged bankrupt, see *In re Ward* (D. C., N. J.), 28 Am. B. R. 29, 194 Fed. 174.

12. Compare *In re O'Brien*, 2 N. B. N. Rep. 312; *In re Burka* (D. C., Tenn.), 5 Am. B. R. 843, 107 Fed. 674.

13. *Scheuer v. Smith, etc., Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 384, 112 Fed. 407; *White Mountain Paper Co. v. Morse* (C. C. A., 1st Cir.), 11 Am. B. R. 633, 127 Fed. 643.

Prior dissolution proceedings.—For a discussion of the effect of dissolution proceedings begun prior to bankruptcy proceedings, see § 4, *ante*.

adjudication, are no longer applicable,¹⁴ for the reason that such cases rested on the requirement of that law that the bankrupt should, when applying for his discharge, take a certain oath. No such oath is now necessary, and a discharge will be granted, though the requirement calling for the personal presence of the bankrupt cannot be complied with.¹⁵ It is only possible to successfully oppose the discharge by proving one of the acts described in section fourteen of the bankruptcy act, and such proof may be made whether the bankrupt is sane or insane, living or dead.¹⁶

III. EFFECT OF STATUTORY RIGHTS OF WIDOW AND CHILDREN.

a. *In general.*—The proviso protects the rights of dower and allowance, granted to the widow and children under State statutes. The clause is a new enactment, but it does not change existing law.¹⁷ The doctrine rests on the principle that the trustee's title is charged with the same liens and burdens, whether actual or inchoate, as was the bankrupt's. It is not material that previous to the bankruptcy proceedings but within the four months' period, the husband had assigned his property for the benefit of creditors,¹⁸ or that he died after the vesting of title in the trustee.¹⁹ But the family has nothing in the nature of a lien and may not enforce their rights, where the bankrupt dies after the trustee has wholly or partially administered the estate, and the property has passed into the hands of purchasers.²⁰ It has been held that, notwithstanding the reference in this section to the laws of the State of the bankrupt's residence, a wife's right of dower in lands situated in another State is protected, although the laws of the State where the bankrupt lives have abrogated the right of dower. This conclusion is reached by reasoning that the wife was entitled to such dower rights independent of the bankruptcy act and that this section is not restrictive but simply saves such rights.²¹

b. *Dower and statutory allowances.*—What would be the effect of this clause provided the rights or allowances were not actually inchoate at the time the proceedings began, has not yet been decided; the words used would, however, seem sufficient to cover such a case.²² The rule as to dower applies to allowances

14. *In re O'Farrell*, Fed. Cas. 10,446; *In re Gunike*, Fed. Cas. 5,868.

15. *In re Parker* (Ref., Kan.), 1 Am. B. R. 615. See also under Bankr. Act, § 14.

16. *In re Miller* (D. C., Pa.), 13 Am. B. R. 345, 133 Fed. 1,017.

17. *Porter v. Lazear*, 109 U. S. 84, 27 L. Ed. 865; *In re Shaeffer* (D. C. Pa.), 5 Am. B. R. 248, 105 Fed. 352.

18. *Assignment for benefit of creditors preceding bankruptcy.*—Where a bankrupt, who has made a general assignment for the benefit of creditors within four months of bankruptcy, dies before the proceeds of his estate are distributed to creditors, his widow is entitled under section 8 of the bankruptcy act to the share allowed her under the State statute; *Matter of Scott* (C. C. A., 7th Cir.), 35 Am. B. R. 746, 226 Fed. 201.

19. *Hull v. Dicks* (U. S. Sup. Ct.), 235 U. S. 584, 34 Am. B. R. 1, 59 L. Ed. 372; *Partridge v. Andrews* (C. C. A., 3d Cir.), 27 Am. B. R. 388, 191 Fed. 325; *In re Newton* (D. C., Conn.), 10 Am. B. R. 345, 122 Fed. 103; *In re Dicks* (D. C., Ga.), 28 Am. B. R. 845, 198 Fed. 293; *In re Slack* (D. C.,

Vt.), 7 Am. B. R. 121, 111 Fed. 523; Compare *In re McKenzie* (C. C. A., 8th Cir.), 15 Am. B. R. 679, 142 Fed. 383, affg. 13 Am. B. R. 227, 132 Fed. 114; *Matter of Scott* (C. C. A., 7th Cir.), 33 Am. B. R. 53.

20. *Hull v. Dicks*, 235 U. S. 584, 34 Am. B. R. 1, 59 L. Ed. 372.

21. *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585.

22. But see *Hawk v. Hawk* (D. C., Ark.), 4 Am. B. R. 463, 102 Fed. 679, holding that under a statute providing that a wife when granted a divorce against her husband shall be entitled to one-third of the husband's personal property absolutely, the wife had no claim on the assets of her husband's estate in bankruptcy while the divorce proceeding was still pending.

Inchoate right of dower.—The proviso of section 8-a, that in case of the death of a bankrupt pending the proceedings, the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence, was intended simply to preserve such rights as already existing, and where a bankrupt is

to a widow or children granted by the State statutes. The beneficiaries take them, as if there had been no bankruptcy. Where such allowances are authorized by State statutes the bankruptcy court may make them.²³ If the wife of a bankrupt consents to the sale of real estate free from her dower, she is entitled to the value of such dower as fixed by the laws of the State of the bankrupt's residence.²⁴

living his wife may assert her right of dower in his real property in accordance with the State law. *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585.

^{23.} *In re Newton* (D. C., Ct.), 10 Am. B. R. 345, 122 Fed. 103; *In re Parschen* (D. C.,

Ohio), 9 Am. B. R. 389, 119 Fed. 976.
Contra: *In re Seabolt* (D. C., N. Car.), 8 Am. B. R. 57, 61, 113 Fed. 766.

^{24.} *In re Forbes* (Ref., Ohio), 7 Am. B. R. 42.

SECTION NINE.

PROTECTION AND DETENTION OF BANKRUPTS.

§ 9. Protection and Detention of Bankrupts.—*a* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Analogous provisions: In U. S.: As to (a), Act of 1867, § 26, R. S., § 5107; Act of 1800, §§ 22, 38, 60; As to (b), Act of 1867, § 40, R. S., § 5024.

In Eng.: As to (a), Act of 1883, § 9 (1).

In Can.: Act of 1919, § 53.

Cross-references. To the law: §§ 1 (4), 2 (13), (15), 10, 11-a, 17, 63. Compare, also, R. S., §§ 752, 753.

To the General Orders: XII, XXX.

To the Forms: None.

SYNOPSIS OF SECTION.

PROTECTION AND DETENTION OF BANKRUPTS.

I. Comparative Legislation; Scope of Section, 278.

- a. *Analogous provisions*, 278.
- b. *Scope of section*, 278.

II. Protection of Bankrupts, 279.

- a. *When right to protection begins and ends*, 279.
- b. *On what depends*, 279.
- c. *Kind of liability*, 280.
- d. *Practice*, 280.
- e. *General Order XXX*, 280.

III. Detention of Bankrupts, 281.

- a. *Purpose of subsection*, 281.
- b. *Practice*, 281.

I. COMPARATIVE LEGISLATION; SCOPE OF SECTION.

a. *Analogous provisions*.—The corresponding clause in the English act of 1888 applies both to protection from arrest and to the stay of suits. Under that act a bankrupt from the moment of the receiving order is immune from arrest on civil process.¹ Our first statute exempted the bankrupt from arrest for forty-two days—this, to give ample time for his examination—no matter what the character of the indebtedness, and from an arrest based on a debt owing before the bankruptcy during the pendency of the proceeding. The law of 1867 differed little from the present law, save in omitting entirely the two excepted classes stated in subheads (1) and (2). Minor differences will be discussed later.

b. *Scope of section*.—This section has undoubtedly a threefold purpose: (a) to preserve unimpaired the authority of the court of bankruptcy over the persons of the parties to the proceeding, (b) to protect the debtor from imprisonment on all civil suits in which the remedy will be barred by the subsequent discharge, and (c), as incidental to the first purpose and analogous to that expressed in § 10, to detain a bankrupt in the district when there seems a likelihood of his departing from it. There are two kinds of protection from arrest, (a) the absolute right, which existed at common law, *i. e.*, while in attendance on court or engaged in performing a duty imposed by the bankruptcy act, and (b) the qualified right, which may not exist as against a liability to which a discharge is not a release, or a warrant or order of commitment based upon a bankrupt's contempt or disobedience of the lawful orders of a court of bankruptcy. The section itself is somewhat narrower than its supplement, General Order XXX.² This same discrepancy existed under the former laws.³ Section 9-a which restricts the immunity of a bankrupt to debts which would be released by a discharge, and General Orders No. 12 and 30, which relate to practice only, and announce no rule as to the effect of a discharge, are in *pari*

1. Eng. Bankr. Act of 1883, § 9(1, 2).

2. In *re Baker* (D. C., Kan.), 3 Am. B. R. Order XXVII, under that law.

101, 96 Fed. 954.

3. See § 26, Law of 1867, with General

materia and should be construed as a whole.⁴ But § 9-b should not be confounded with § 11-a; nor should the right to detain the person be confused with the right to seize that person's property.⁵ And jurisdiction to protect from arrest, which is similar to the jurisdiction to restrain proceedings which may result in arrest, should always be clearly distinguished from it.⁶ It should be noted also that the General Order XXX refers only to cases where the bankrupt has been actually imprisoned, while General Order XII relates to protection from an arrest not yet accomplished.

II. PROTECTION OF BANKRUPTS.

a. When right to protection begins and ends.—The right of protection conferred by subsection *a* is personal to the bankrupt. By § 1 (4), a person who files a petition or one against whom a petition is filed is from the moment of filing a bankrupt. The section provides for protection of the bankrupt only during the period covered by the pendency of the bankruptcy proceedings during which jurisdiction is conferred on the bankruptcy court to protect the bankrupt from arrest on a provable debt until a discharge has been granted or refused.⁷ The right is not available after he ceases to be a bankrupt, *i. e.*, when he is discharged.⁸ The exemption from arrest when in attendance upon a court of bankruptcy, as construed by General Order XII, continues until final adjudication upon his application for a discharge. The bankrupt is entitled to the exemption, not merely on the particular occasions when he is actually in attendance in court but during the whole period during which he may attend or has duties to perform in reference to the estate.⁹ The period of protection, therefore, is not, as a rule, longer than eighteen months; but may be, as where a contest develops on the application for the discharge. It is conceivable, also, that a petitioner may prolong the time by delaying the adjudication. But the court can impose terms on granting orders of protection, and an effort to extend the time would be quickly checked.

b. On what it depends.—Protection, as a rule, is granted only to bankrupts. It has been held, however, that, under the common law, the right of protection extends to witnesses,¹⁰ and to parties, including creditors, while attending bankruptcy proceedings.¹¹ The protection given to such persons is, however, only that which is always allowed to those in attendance on a court, or in going and coming to the court, in response to its summons or mandate. The court may grant the protection on the terms that the bankrupt give security that he will obey all orders of the court and not depart from its jurisdiction.¹² Pending a petition to review an order denying a petition to revoke a discharge, the court may restrain the arrest of the bankrupt based upon a claim coming within clause *a* of this section.¹³ The term "arrest" as used in this section is not

4. United States ex rel. Kelley v. Peters (D. C., Ill.), 22 Am. B. R. 177, 166 Fed. 613.

5. Consult also under §§ 2, 3 and 69.

6. See under § 11, and compare *In re Walker*, Fed. Cas. 17,060; *In re Hazelton*, Fed. Cas. 6,287.

7. *Herschman v. Bolster* (Sup. Ct. Mass.), 220 Mass. 137, 33 Am. B. R. 747, 107 N. E. 543.

Exemption from arrest upon civil process in certain cases, should not be extended, after adjudication and the examinations or attendance of the bankrupt have been completed, beyond a reasonable time for the bankrupt to make application for discharge, and, if that is granted, to apply to such court as may have jurisdiction for relief or protection from the effect of the order of arrest if process thereunder be still outstanding against him. *Mat-*

ter of Lockwood (D. C., N. Y.), 39 Am. B. R. 482, 240 Fed. 158.

8. *In re Dole*, Fed. Cas. 3,964, 11 Blatchf. 498; *In re Kimball*, Fed. Cas. 7,768, 6 Blatchf. 292; *In re Wiggers*, Fed. Cas. 17,623.

9. *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 594, 98 Fed. 576; *In re Dresser* (D. C., N. Y.), 10 Am. B. R. 270, 124 Fed. 915.

10. *Lamkin v. Starkey*, 7 Hun (N. Y.), 479.

11. *Ex parte List*, 2 Ves. & B. 373; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Matthews v. Tufts*, 87 N. Y. 568.

12. *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 594, 98 Fed. 576; *In re Dresser* (D. C., N. Y.), 10 Am. B. R. 270, 124 Fed. 915.

13. *In re Chandler* (D. C., Ill.), 13 Am. B. R. 614, 135 Fed. 893.

confined to the original taking into custody but applies to a continued detention. Thus he may be released after the adjudication where he was under arrest at the time thereof.¹⁴ The phrasing of General Order XXX seems to limit to voluntary bankrupts the right to protection from an arrest already made. Under the policy of the law, as indicated by § 1 (1), this right, however, is equally available to involuntary bankrupts.¹⁵

c. **Kind of liability.**—The bankrupt is entitled to protection from process from a State court where the debt or claim, for the enforcement of which the process is issued, would be released by the discharge in bankruptcy. Where the claim, though provable, is not dischargeable, the bankrupt is not protected from arrest.¹⁶ The dischargeability of debts is discussed in detail under section 17, *post*. How far the determination of a court of bankruptcy on the question whether the debt is dischargeable, should be followed by a State court, is for the latter court to decide. It may thus happen that, during the bankruptcy proceedings, a debtor will be protected, only to find the discharge of no avail when pleaded in habeas corpus in a State court on a subsequent arrest.¹⁷ Where the application is for the protection against arrest while in attendance or while performing some duty prescribed by the act, the dischargeability of the debt is not material.¹⁸

d. **Practice.**—When the application for protection is made before arrest, it often takes the form of a petition for a stay, on the theory that the order of arrest is a step in a suit; and, if so, it will be in accordance with the practice indicated under section 11.^{19a} Where, however, the bankrupt desires protection against arrest generally, the proper method is to apply for an order of protection. This order can be granted by the referee.¹⁹ It is a matter of right, but extends only to process resting on debts which are dischargeable, and should be in terms so limited. If the bankrupt has already been arrested and he applies for release on the ground that the debt is dischargeable, comity suggests an application in the first instance to a State court.²⁰ But such an application may be made to a Federal court.²¹ Where a bankrupt wilfully disobeys an order made in proceedings supplementary to execution, a subsequent order of the bankruptcy court, restraining his arrest upon civil process, does not prevent his commitment by a State court as punishment for disregard of its authority.²²

e. **General Order XXX.**—The practice is well outlined in General Order XXX.²³ Where the reason for the application is that the bankrupt may attend an examination or perform any other duty under the act, either method of affording protection is available, and the application should be made to the

14. *Turgeon v. Emery* (D. C., Me.), 25 Am. B. R. 694, 182 Fed. 1016; *People ex rel. Taranto v. Erlanger* (D. C., N. Y.), 13 Am. B. R. 197, 182 Fed. 883.

A contrary conclusion was reached in *In re Claiborne* (D. C., N. Y.), 5 Am. B. R. 812, 109 Fed. 74.

15. See under the law of 1897, *In re Wiggers*, Fed. Cas. 17,623; *In re Williams*, Fed. Cas. 17,700.

16. *In re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 954; *In re Marcus* (C. C. A., 1st Cir.), 5 Am. B. R. 365, 105 Fed. 907.

17. Compare *In re Tinker* (D. C., N. Y.), 3 Am. B. R. 580, 99 Fed. 79, with *Colwell v. Tinker*, 6 Am. B. R. 434, 35 N. Y. Misc. 330, 72 N. Y. Supp. 505.

18. *United States ex rel. Mansfield v. Flynn* (D. C., N. Y.), 23 Am. B. R. 294, 179 Fed. 316.

19a. **Restraining arrest.**—Where, on an application to restrain a sheriff from levying a body execution upon a judgment debtor, pending the time within which an application for a discharge can be made, and the proceedings

in bankruptcy so advanced that the bankrupt will not be harassed by the process in the hands of the sheriff, a temporary stay is granted, and the discharge allowed and the hearings in bankruptcy nearly concluded, the stay should be allowed for a definite period in order to permit the bankrupt to apply to the State court for the appropriate remedy to bring up the question of the effect of his discharge. *Matter of Lockwood* (D. C., N. Y.), 39 Am. B. R. 482, 240 Fed. 158.

19. See *In re Marcus* (C. C. A., 1st Cir.), 5 Am. B. R. 365, 105 Fed. 907, which contains a form for an order of prohibition. Compare also forms under "Supplementary Forms," *post*, and see *Hagar & Alexander's Bankruptcy Forms* (2d Ed.), Nos. 143, 144.

20. *Scott v. McAleese* (C. C. A., 3d Cir.), 1 Am. B. R. 650, 93 Fed. 656.

21. *In re Seymour*, Fed. Cas. 12,694.

22. *In re Frits* (D. C., N. Y.), 18 Am. B. R. 244, 152 Fed. 562.

23. See General Order XXX and cases thereunder, *post*.

referee. But, if any of the bankrupt's debts are not dischargeable, the order of protection should be limited in time and the body of the bankrupt returned to the jailer as soon as the examination is completed or the duty performed; unless the arrest post-dated the petition, when, it seems, he should be discharged from imprisonment.²⁴ No protection can be afforded by any other court to a debtor under arrest for contempt or disobedience of the lawful orders of a court of bankruptcy. Whether, on a contested application, the court will go behind the face of the papers, was a disputed question under the former act.²⁵ The better opinion seems to be that it will, *i. e.*, that it is the character of the debt which is the subject of investigation and the court, being a paramount court, should hear all disputed facts. This view seems in accordance with the provisions of General Order XXX.

III. DETENTION OF BANKRUPTS.

a. Purpose of subsection.—It is apparent that the purpose of subsection *b* of this section is to provide a means to keep the bankrupt within the district, if the court is satisfied that he is about to leave it to avoid examination.²⁶ The law of 1867 contained no analogous clause²⁷ and his detention was not authorized save before adjudication in an involuntary case,²⁸ and then only as incident to a seizure of the bankrupt's property similar to that now authorized by §§ 3-e and 69-a. The warrant and its purpose were more like the writ of *ne exeat*, referred to in the next paragraph.²⁹ The present section is, however, for a very different purpose. That the bankrupt is about to depart, that he intends thereby to avoid examination, and that his departure will tend to defeat the proceedings in bankruptcy, must satisfactorily appear. Otherwise, a warrant under this subsection cannot be issued.

b. Practice.—The limitations here are important. Such an application can be made only between the time of filing the petition and the expiration of one month after the qualifications of the trustee; and the bankrupt, if taken into custody, can be detained only ten days. The affidavits of two persons are necessary; they must show facts, not opinions, and must be reasonably conclusive. The bankrupt cannot be actually imprisoned. Within these limitations and on a showing of the facts indicated in the last paragraph, the judge may, on petition or motion, issue a warrant. The bankrupt can, it seems, move for his release, or give bail. As soon as the ten days have elapsed, he must be released. There seems to be no prohibition on second or other like applications, but the court will not permit the use of this process to become persecution. The similarity between the detention here authorized and that made effective through the writ of *ne exeat* will be recognized.³⁰ The latter is, however, not limited to a detention for the purpose of examination. It has been held that a court of bankruptcy may, under the broad powers

24. See first sentence of General Order XXX. *Matter of Bass* (D. C., Pa.), 43 Am. B. R. 280, 257 Fed. 137.

25. Compare *In re Robinson*, Fed. Cas. 11,939; *In re J. H. Kimball*, Fed. Cas. 7,769, and other like cases, with *In re Williams*, Fed. Cas. 17,700, and *In re Aleberg*, Fed. Cas. 261.

26. See § 46 of the Torrey Bankruptcy Bill, S. 1035, Fifty-fifth Congress, introduced by Senator Lindsay on March 22, 1897, under which a bankrupt might have been detained if "his departure will delay or hinder the

proceeding;" and the reason for the change in the statement of the conferees on the part of the House. Cong. Record, 55th Congress, Vol. 1, p. 7,205.

27. See Act of 1867, § 40; U. S. Rev. Stat. § 5024, *post*.

28. *Usher v. Pease*, 116 Mass. 440.

29. *Griswold v. Hazard*, 141 U. S. 260, 35 L. Ed. 678.

30. See R. S., §§ 717, 5024. And consult *In re Hale*, Fed. Cas. 5,911; *In re Hadley*, Fed. Cas. 5,894; *In re McKibben*, Fed. Cas. 8,859.

conferred by § 2 (15)³¹ grant such a writ, and this procedure will usually be resorted to. But a warrant cannot be issued under this subsection solely as a basis for extradition proceedings in another district to bring the bankrupt to the district in which the detention warrant has been issued.³² Where a bankrupt arrested under a writ of *ne exact regno* is released upon giving a bond conditioned upon his remaining constantly within the jurisdiction of the court, his absence from the district from time to time without leave of the court, is a breach of the bond.³³

31. In re Lipke (D. C., N. Y.), 3 Am. B. R. 569, 98 Fed. 970; In re Cohen (D. C., Ill.), 14 Am. B. R. 355, 136 Fed. 999; Matter of Berkowitz (D. C., N. J.), 22 Am. B. R. 231, 173 Fed. 1012. As to sufficiency of affidavit to obtain a writ of *ne exact*, see Hoffschlaeger Co. v. Young Nap (D. C., Hawaii), 2 U. S., D. C., Hawaii 103, 12 Am. B. R. 510.

Expiration of ten-day limit.—Where the bankrupt is arrested and examined under the provisions of this subsection and the ten-day limit is about to expire, the court may issue a writ in the nature of a writ *ne exact* to restrain him from departing from the juris-

diction. In re Cohen (D. C., Ill.), 14 Am. B. R. 355, 136 Fed. 999.

Order authorizing issuance of writ.—The irregularity, if any, in failing to enter a formal order authorizing the issuance of a writ *ne exact*, may be cured by the entry of an order *nunc pro tunc*. Matter of Berkowitz (D. C., N. J.), 22 Am. B. R. 231, 173 Fed. 1012.

32. In re Ketchum (C. C. A., 6th Cir.), 5 Am. B. R. 532, 108 Fed. 35.

33. In re Appel (C. C. A., 1st Cir.), 20 Am. B. R. 890, 163 Fed. 1002.

SECTION TEN.

EXTRADITION OF BANKRUPTS.

§ 10. **Extradition of Bankrupts.**—*a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Analogous provisions: None.

Cross-references: To the law: §§ 2(13) (14) (15), 9, 29-b, 41-a.

To the General Orders: None.

To the Forms: None.

SYNOPSIS OF SECTION.

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I. EXTRADITION OF BANKRUPTS.

a. When a bankrupt may be extradited.—This section is new to the present bankruptcy act. Extradition proceedings can be instituted under this section only when a warrant for the apprehension of a bankrupt has been issued, as when he has committed one of the offenses mentioned in § 29-b, or has been adjudged in contempt under § 2 (13) (15), or § 41-a. The court has no jurisdiction to issue a warrant of arrest as a basis for extradition proceedings to bring the bankrupt before the court for examination after he has departed from the district and settled in another jurisdiction.¹ He must also be found in the district whence extradition is sought. This implies positive identification. Further than this, however, the court need not go. The mere production of the warrant, authenticated either in writing or orally, appears to be sufficient. In this, extradition in bankruptcy seems to differ from extradition for crime.²

1. In re Ketchum (C. C. A., 6th Cir.), 5 lan v. Wilson, 127 U. S. 540, 32 L. Ed. 223;
Am. B. R. 532, 108 Fed. 35. In re Wolf, 27 Fed. 606; In re Hasenbusch,

2. Compare In re Dana, 68 Fed. 886; Cal- 47 C. C. A. 177, 108 Fed. 35.

b. **Practice.**—By the terms of this section, the practice on extradition in bankruptcy is assimilated to that provided by § 1014 of the Revised Statutes.³ The bankrupt is brought in on a warrant issued by a commissioner on complaint under oath; he may deny identity, or that the warrant was issued, or, if issued, that it was for his apprehension. The commissioner must either discharge him or commit him to custody. If the latter, he may be admitted to bail. If no bail is offered, he must be taken before the judge, who, after inquiry into the facts, may either release him or grant an order or warrant for removal. And the marshal will then deliver him into the custody of the court which issued the original warrant of arrest.⁴

3. This section is as follows:

"§ 1014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance

of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

4. For practice and forms, see works on Federal Procedure.

SECTION ELEVEN.

SUITS BY AND AGAINST BANKRUPTS.

§ 11. **Suits By and Against Bankrupts.**—*a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Analogous provisions: In U. S.: As to right to maintain an action against a bankrupt, Act of 1867, § 21, R. S., § 5105; Act of 1841, § 5; As to stay of suits against a bankrupt, Act of 1867, § 21, R. S., § 5106; As to continuance of pending suits by trustee, Act of 1867, §§ 14, 16, R. S., § 5047; Act of 1841, §§ 3, 5; Act of 1800, § 13; As to limitations of actions against the trustee, Act of 1867, §§ 2, 14, R. S., §§ 5056, 5057.

In Eng.: As to stays, Act of 1883, § 10 (2).

In Can.: Act of 1919, § 7.

Cross-references: To the law: As to jurisdiction of bankruptcy court to issue such orders as may be necessary to enforce provisions of Act, § 2 (7), (15).

Exemption from arrest except order issued from a court of bankruptcy, § 9-a (1).

Jurisdiction of district courts as to plenary suits by and against trustees, § 23; as to summary orders in respect to bankrupt's property, § 23.

Discharge as affecting suits against bankrupts, § 14.

Prosecution of suits by trustee, § 47-a (2).

To the General Orders: Application for injunctions to stay proceedings in other courts, to be decided by judge. XII (3).

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I. COMPARATIVE LEGISLATION.

a. **Stay under previous acts.**—The power to stay suits concerning the person or property of the bankrupt is essential to the orderly administration of a bankruptcy law. This principle has always been recognized in England; and, while it is not yet authoritatively settled, it seems that there even an inferior county court, sitting in bankruptcy, may stay a suit on a debt in a

superior, *i. e.*, the high court.¹ The English statute also deprives a creditor whose debt is provable in bankruptcy of all remedies against the bankrupt, including the right to sue, during the pendency of the proceedings, save with the consent of the court.² In Canada the bankruptcy court has power, after presentation of a bankruptcy petition, to stay actions or other proceedings against the debtor. After the adjudication such actions or proceedings are automatically stayed.^{3a} In this country, for obvious reasons, stays of proceedings in State courts have been regarded with some alarm, and, as a rule, only those authorized by "any law relating to proceedings in bankruptcy" are permitted.³ The act of 1841 contained no clause like that now under discussion, but, under it, the assignee was empowered to prosecute or defend all pending suits, and the filing of a claim was deemed a waiver of all other remedies. Not so the law of 1867, which, by a specific grant of power to order stays, supplemented § 720 of the Revised Statutes and rendered the jurisdiction to enjoin both affirmative the *virile*. There is, however, a marked difference between the provisions of that and the present law.

b. Differences between previous acts and the present law.—These differences may be summarized thus: Stays under the former law were mandatory, if against a suit on a provable debt brought either before or during the pendency of the proceeding, and lasted until the time of discharge, unless there was unreasonable delay in obtaining it; provided, however, that the court might permit the suit to go as far as judgment, thus to measure up the amount of the debt. Stays of suits under the present law are, strictly speaking, confined to actions pending at the time of the bankruptcy. They are mandatory if before the adjudication, and discretionary after it.^{3a} They cannot be granted against suits founded on provable debts that are not dischargeable, and if granted, they put an end to all further proceedings, and if granted after the adjudication, continue in force to the determination of the bankrupt's right to a discharge. The stay of suits against the bankrupt pending the bankruptcy proceedings, is absolutely necessary to give effect to the present bankruptcy act.⁴

II. STAYS OF SUITS BEGUN AFTER FILING OF PETITION.

a. Purpose of stays of suits.—If, as has been said, a chief purpose of such stays is to prevent the harassment of the bankrupt by suits, pending a discharge which will be a bar, it would seem that a court of bankruptcy could, in its discretion, restrain a suit begun after the filing of the petition.⁵ There was no doubt about this under the law of 1867, as the creditor who proved elected his remedy, and the creditor who did not could not prosecute his suit to judgment.⁶ The omission is perhaps significant. Yet, while a suit began on a provable debt after the bankruptcy would seem but a shot into the air and likely to amount to naught save a liquidation of the debt,⁷ the rule that a court of bankruptcy will stay an after-brought suit only when and because

1. Baldwin on Bankruptcy, 9th Ed., p. 22.

2. Eng. Bankr. Act of 1883, § 9.

3a. Canadian Bankruptcy Act of 1919, § 7.

3. Judicial Code, § 206 (formerly R. S., § 720). The prohibition of this section against enjoining the proceedings of a State court does not apply when any law relating to bankruptcy authorizes an injunction, nor does it where the proceedings sought to be enjoined have been commenced after the jurisdiction of the Federal court has attached. In *re Russell et al* (C. A., 2d Cir.), 8 Am. B. R. 658, 101 Fed. 248.

3a. *Matter of Vadner* (D. C., Nev.), 42 Am.

B. R. 465, 250 Fed. 614.

4. In *re Basch* (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761.

5. *Baltimore Bargain House v. Busby* (Ga. Sup. Ct.), 143 Ga. 734, 35 Am. B. R. 119, 85 S. E. 875.

6. See R. S., §§ 5105, 5106, and compare, however, to the effect that a suit might be prosecuted, provided it did not reach a judgment, In *re Ghiradelli*, Fed. Cas. 5376. And see *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403.

7. *McDonald v. Davis*, 105 N. Y. 508, 12 N. E. 40.

directed against possession of the bankrupt's property,⁸ by no means affects the broad doctrine here urged. Nor does the converse rule, that the court will not generally stay such a suit brought for the purpose of asserting a valid lien which attached before the beginning of the proceeding.⁹

b. **When stay of after-brought suits will be granted.**—It is not necessary to rely wholly on the terms of § 2 (15) for power to enjoin. The stay can be directed to the plaintiff, who, being doubtless a scheduled creditor, is a party to the proceeding; or, under § 2 (6), such a plaintiff can be brought in, and then stayed.¹⁰ Either procedure is well within the principle that, to protect its jurisdiction, a court will enjoin all parties from proceedings looking to the same remedy in another court of concurrent jurisdiction.¹¹ It seems to be the clear intent of the bankruptcy act that the administration of a bankrupt estate by the bankruptcy court shall not be unduly interfered with.¹² Therefore where the result of a suit in a State court, brought after the commencement of bankruptcy proceedings, will be to deprive the bankruptcy court of jurisdiction over claims of the plaintiff against the bankrupt estate, an injunction order staying further proceedings in such suit is proper.¹³ An action in replevin,¹⁴ or to recover for the technical conversion of goods consigned to the bankrupt for sale,¹⁵ or to foreclose a mortgage given by the bankrupt over four months before bankruptcy,¹⁶ or an action to remove an alleged bankrupt from leased premises commenced after institution of the bankruptcy proceedings, may be restrained.¹⁷ So, an action by a chattel mort-

8. *In re Chambers* (D. C., R. I.), 3 Am. B. R. 537, 98 Fed. 865; *In re Russell et al.* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248.

9. *In re San Gabriel Sanitorium Co.* (C. C. A., 9th Cir.), 7 Am. B. R. 206, 111 Fed. 892, holding that leave may be granted to a mortgagee to make the trustee in bankruptcy a party defendant to foreclosure proceedings in the State court, and that a petition of the trustee for an injunction to restrain the foreclosure proceedings in the State court was properly denied.

10. *Byran v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 145 L. Ed. 814.

11. *Moran v. Sturgis*, 154 U. S. 256, 273, 38 L. Ed. 981; *Texas & Pac. R. R. Co. v. Johnson*, 151 U. S. 81, 38 L. Ed. 81. See *Hull v. Burr* (C. C. A., 1st Cir.), 30 Am. B. R. 588, 206 Fed. 1.

12. *In re Gutman* (D. C., N. Y.), 8 Am. B. R. 252, 114 Fed. 1009; *In re Nutall* (D. C., N. Y.), 29 Am. B. R. 800, 201 Fed. 557, citing text.

Interference with administration. Although this section does not in terms cover actions begun after the filing of the petition, such actions, in so far as they interfere with the bankruptcy administration, are inconsistent with its exclusive jurisdiction, and when they do interfere they will be enjoined. *Matter of Lavery & Son* (D. C., Mass.), 37 Am. B. R. 606, 235 Fed. 910.

13. *Bothwell v. Fitzgerald* (C. C. A., 9th Cir.), 34 Am. B. R. 261, 219 Fed. 408.

14. An action in replevin after an adjudication in bankruptcy cannot be commenced and maintained against the bankrupt to re-

cover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun. *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178, 44 L. Ed. 1183; *In re Russell et al.* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248.

Where a purchaser of goods, prior to the finding of an involuntary petition in bankruptcy against it, makes an assignment for the benefit of creditors, and after the filing of the petition but before adjudication the vendor instituted an action of replevin against the assignee, claiming that the goods had been obtained by fraud, the trustee is entitled to an order restraining the vendor from prosecuting his suit. *Matter of Well-made Gas Mantle Co.* (C. C. A., 1st Cir.), 37 Am. B. R. 7, 233 Fed. 250.

15. *In re Basch* (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761.

16. *Pugh v. Loesel* (C. C. A., 5th Cir.), 33 Am. B. R. 580, 219 Fed. 417.

17. Ejectment may be enjoined where it would interfere with the possession of the bankruptcy court. *In re Chambers* (D. C., R. I.), 3 Am. B. R. 537, 98 Fed. 865; *In re Kleinhaus* (D. C., N. Y.), 7 Am. B. R. 604, 113 Fed. 107.

Restraining interference with tenant.—In the case of *In re Metz*, Fed. Cas. 9,509, an injunction was granted restraining interference with the property of the bankrupt before adjudication in an involuntary proceeding and restraining the landlord from dispossessing him. The injunction order was made after the proceedings to dispossess the

gagee to recover damages for the alleged wrongful taking of the mortgaged property from his possession, may be stayed.¹⁸ But a proceeding under a writ of forcible detainer may not be restrained.¹⁹

II. STAYS OF SUITS AGAINST BANKRUPT.

a. Depending on dischargeability of debt.—The section under consideration provides for the stay of a suit which is founded upon a claim from which a discharge would be a release. This dischargeability of the debt is made the basis of jurisdiction. There can be no stay under this section unless the suit is founded upon a claim from which a discharge would be a release.²⁰ The difference between the present § 11 and § 21 of the old law in this regard has already been noted.²¹ The words, "from which a discharge would be a release," are construed broadly, and suits not strictly within them are sometimes stayed.²² The word "suits" is also given a wide meaning. It includes actions at law, suits in equity, and, in fact, any legal proceedings where the personal liability of the debtor is sought to be fixed.²³ It includes a proceeding under a city ordinance to collect a debt which is made a charge upon the compensation due the bankrupt from the city.²⁴ It embraces legal steps

debtors were instituted. Judge Batchford said: "The occupation of the premises by the marshal was the occupation of them by the court. A landlord who lets premises to a tenant to be occupied for the purposes of trade must be held to do so with the full understanding that the tenant may be proceeded against in bankruptcy, and that the bankrupt court may be called in to take possession of the goods of the tenant on the premises. In many cases it would be impossible to remove the goods, before a sale of them, without great loss and injury."

18. Stay of action by mortgagee.—Where the day after a chattel mortgagor was adjudged a bankrupt, the mortgagee took possession of the mortgaged property and brought an action against the receiver in bankruptcy to recover damages for the alleged wrongful taking of the property from his possession, his action was stayed by the bankruptcy court and the judge in the course of his opinion said: "Ordinarily, where a receiver of the court has merely general directions to take into his possession the property of the bankrupt, and there is a claim that he has taken the property of a third person, the court, in conformity with general principles, would leave him to answer in any proper forum for his individual acts, . . . but where it appears without dispute, as it does here, that the third party cannot possibly have any legal rights to be established by the litigation in the State court, and the result of permitting it to be continued would not only suffer an injustice to the receiver but indirectly tend to embarrass this court in administering the estate, the equitable powers of the court should be exercised both for the

prevention of the injustice and to protect the court's full jurisdiction." *In re Gutman & Wenk* (D. C., N. Y.), 8 Am. B. R. 252, 114 Fed. 1009.

19. *In re Van Da Grift Motor Car Co.* (D. C., Ky.), 27 Am. B. R. 474, 192 Fed. 1015.

20. *In re Cole* (D. C., N. Y.), 5 Am. B. R. 780, 106 Fed. 837; *In re Basch* (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761; *In re Butts* (D. C., N. Y.), 10 Am. B. R. 16, 120 Fed. 966; *White v. Thompson* (C. C. A., 5th Cir.), 9 Am. B. R. 653, 119 Fed. 868; *In re Sullivan* (Ref., N. Y.), 2 Am. B. R. 30; *Gleason v. Thaw*, (C. C. A., 3d Cir.), 25 Am. B. R. 782, 185 Fed. 345; *Matter of Clipper Mfg. Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 683, 179 Fed. 843; *In re Nuttall* (D. C., N. Y.), 29 Am. B. R. 800, 201 Fed. 557; *In re Wollock* (D. C., Ill.), 9 Am. B. R. 685, 120 Fed. 516; *In re Dowie* (D. C., N. Y.), 29 Am. B. R. 338, 202 Fed. 816; *Continental National Bank v. Katz* (Ill. Sup. Ct.), 1 Am. B. R. 19; *Matter of Pyatt* (D. C., Nev.), 42 Am. B. R. 462, 257 Fed. 362; *Matter of Vadner* (D. C., Nev.), 42 Am. B. R. 465, 259 Fed. 614.

See also Am. B. R. Dig. § 921.

For debts that are dischargeable and those that are not, see discussion under Section Seventeen, *post*. See also Am. B. R. Dig. §§ 1090-1151.

21. See *supra*.

22. *In re Hilton* (D. C., N. Y.), 4 Am. B. R. 774, 104 Fed. 981; *In re Basch* (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761. See also *Ex parte Christy*, 3 How. 292.

23. *In re Rosenberg*, Fed. Caa. 12,054; *McKay v. Funk*, 13 Am. B. R. 334; *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636.

24. *In re Hicks* (D. C., N. Y.), 13 Am. B. R. 654, 133 Fed. 739.

after judgment, such as supplementary proceedings,²⁵ levy of execution,²⁶ judicial and sheriff's sales,²⁷ even the distribution of the proceeds of such sales,²⁸ though, were it not for other sections of the law, it may be doubted whether the word could be extended so far.²⁹ The fact that the creditor who is bringing the action has been omitted from the list of creditors on the bankrupt's schedule, does not necessarily prevent his action from being stayed, for his claim is still released by discharge, if he has notice of the bankrupt proceedings.³⁰ It is immaterial upon the question of jurisdiction of the court to grant a stay, whether the determination as to the dischargeability of the debt is sound or unsound; until reversed it is binding and conclusive upon the parties.³¹ In determining whether the claim upon which the suit is based is a dischargeable debt, the court may be guided by the pleadings.³² The court, on motion to stay proceedings on a claim against a bankrupt pending his application for a discharge, passes upon the character of the claim to be stayed, but if the claim is evidenced by a judgment, it will not, in passing upon that question, go behind the judgment as shown by the record of the action in which the judgment resulted.^{32a} The privilege of a stay conferred by this section is to be accorded in both voluntary and involuntary bankruptcy.³³

25. In re De Lany & Co. (D. C., N. Y.), 10 Am. B. R. 634, 124 Fed. 280; In re De Long (Ref., N. Y.), 1 Am. B. R. 66; in re Adams (Ref., N. Y.), 1 Am. B. R. 94; In re Kletchka (D. C., N. Y.), 1 Am. B. R. 479, 92 Fed. 901; Matter of Francisco (D. C., N. Y.), 41 Am. B. R. 87, 245 Fed. 216.

See also Am. B. R. Dig. § 934.

A continuation of a stay of proceedings supplementary to execution may be granted and a motion by a judgment creditor to vacate such stay denied, for the judgment debtor, is entitled to have the matter disposed of in the bankruptcy proceedings. In re Burke (D. C., N. Y.), 19 Am. B. R. 51, 165 Fed. 703.

The effect of an injunction issued by a court of bankruptcy, enjoining a judgment creditor of a bankrupt and his attorneys, and his and their servants and agents from taking any further proceedings in an action in a State court is to restrain the creditor and his attorneys from taking proceedings in a State court to punish the bankrupt for an alleged contempt committed before the adjudication in bankruptcy. In re Fortunato (D. C., N. Y.), 9 Am. B. R. 630, 123 Fed. 622. But the protection of a stay of supplementary proceedings is personal to the bankrupt and does not extend to those jointly liable as judgment debtors with him. As to the latter no stay should be allowed. In re De Long (Ref., N. Y.), 1 Am. B. R. 66.

After an estate in bankruptcy has been administered and the bankrupt discharged, the bankruptcy court will not grant an order restraining further action in supplementary proceedings in the State court or determine whether the State court judgment sought to be enforced has been released by the bankrupt's discharge. Matter of Madden (D. C., N. J.), 43 Am. B. R. 452, 257 Fed. 581.

26. Execution on a judgment recovered after the filing of the bankrupt's petition in an action pending at the time of the adjudication may be stayed. In re Beerman (D. C., Ga.), 7 Am. B. R. 434, 112 Fed. 663. Where the personal property of the bankrupt at the date of the adjudication is subject to the levy of a pending execution, the right of the court to enjoin the execution creditor, if the execution is an unlawful preference and contrary to the provisions of the bankruptcy act, is clear. In re Kimball (D. C., Pa.), 3 Am. B. R. 161, 97 Fed. 29; Blake, Moffit & Towne v. Francis-Valentine Co. (D. C., Cal.), 1 Am. B. R. 372, 89 Fed. 665.

27. In re Northrop (Ref., N. Y.), 1 Am. B. R. 427.

If, after an attachment, and before judgment, an insolvent is adjudicated a bankrupt within four months, etc., and properly pleads the discharge, but the State court refuses to regard it, and nevertheless renders judgment of condemnation, and directs a sale of the property, the receiver or trustee is entitled to an injunction and mandatory order to its officer to surrender possession. In re Tune (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906.

28. A sheriff may be restrained from paying over to a judgment creditor the proceeds of a sale of personal property of a bankrupt upon an execution issued upon a judgment obtained within four months prior to the adjudication of the insolvent debtor as a bankrupt. In re Kenney (D. C., N. Y.), 2 Am. B. R. 494, 95 Fed. 427.

29. In re Basch (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761.

30. In re Beerman (D. C., Ga.), 7 Am. B. R. 434, 112 Fed. 663, citing Collier on Bankruptcy, 3d ed., page 128.

31. Wagner v. U. S. (C. C. A., 6th Cir.), 4 Am. B. R. 596, 104 Fed. 133; In re Mustin (D. C., Ala.), 21 Am. B. R. 147, 166 Fed. 506.

32. In re Adler (C. C. A., 2d Cir.), 18 Am. B. R. 240, 144 Fed. 659; Matter of Lusch (D. C., N. Y.), 42 Am. B. R. 246, 251 Fed. 316.

32a. Matter of Lusch (D. C., N. Y.), 42 Am. B. R. 246, 251 Fed. 316.

33. In re Geister (D. C., Iowa), 3 Am. B. R. 228, 97 Fed. 322.

Stay where previous voluntary petition was within six years.—A bankrupt, who has been discharged upon his voluntary petition within six years, is not entitled to have a suit by a creditor in the State court stayed until application for discharge is presented and acted upon by the court in his present voluntary proceeding. This because none of the debts existing against the bankrupt at the time of his second adjudication can be discharged, and, further because the assets in the custody of the bankruptcy court will in no wise be affected by the suit in the State court. Matter of Johnson (D. C., Ala.), 37 Am. B. R. 597, 233 Fed. 841.

b. **Power to grant stays discretionary.**—Bankruptcy courts have the right and power to enjoin not only the officers of the State courts but to stay the proceedings of the courts themselves when necessary to the administration of the bankruptcy act.³⁴ The power given by this section to stay a suit upon a dischargeable debt is discretionary with the court, and the discretion should not be interfered with unless it has been abused.³⁵ The discretion conferred should not be exercised unless the claim is clearly dischargeable,³⁶ and only after the court has examined into the equities of any application made therefor.³⁷ The power should be exercised by the court as the interests of the bankrupt's estate shall require; there may be cases when it will appear to the court that it is to the advantage of the estate that the suit should be defended rather than stayed.³⁸ Where the suit involves but a question of fraud, to which a discharge cannot be pleaded, its prosecution should not be stayed.³⁹ An action brought in good faith against the bankrupt for damages for an alleged deceit in obtaining a loan of money should not be stayed, for a judgment in such an action is not dischargeable.⁴⁰ If the trustee has no interest in the claim sued upon, the court should not intervene.⁴¹ Where creditors seek judgments against a bankrupt corporation to enable them to proceed against stockholders upon their unpaid subscriptions, it has been held proper to

34. *McLoughlin v. Knop* (D. C., La.), 32 Am. B. R. 582, 214 Fed. 200.

35. *In re Lesser* (C. C. A., 2d Cir.), 3 Am. B. R. 758, 100 Fed. 433; *New River Coal Land Co. v. Ruffner Bros.* (C. C. A., 4th Cir.), 21 Am. B. R. 474, 165 Fed. 881; *Simpson v. Tootle, etc., Co.*, (Sup. Ct., Okla.), 42 Okl. 275, 32 Am. B. R. 551, 141 Pac. 448, citing *Collier on Bankruptcy* (8th Ed.), 236; *Moore v. Green* (C. C. A., 4th Cir.), 16 Am. B. R. 648, 145 Fed. 472; *Smith v. Miller* (Mass. Sup. Jud. Ct.), 39 Am. B. R. 52, 115 N. E. 243.

Review of discretion.—Where the only effect of the staying order upon the proceedings in the State court will be to prevent examination of the bankrupt in supplementary proceedings for the purpose of obtaining information which might be useful in the prosecution of a creditor's bill in equity, and where such information can be easily obtained in the District Court, there is no occasion to review the exercise of its discretion. *In re Lesser* (C. C. A., 2d Cir.), 3 Am. B. R. 758, 100 Fed. 433.

See also Am. B. R. Dig. § 920.

36. *In re Sullivan* (N. Y., Ref.), 2 Am. B. R. 30.

37. *In re Mercedes Import Co.* (D. C., N. Y.), 20 Am. B. R. 648, revd. on other grounds, 21 Am. B. R. 590, 166 Fed. 427.

Suits to recover; income from trust funds.—An order of the District Court, entered upon the commencement of bankruptcy proceedings, staying the prosecution of suits by creditors under section 98 of the New York Real Property Law to reach the surplus of income due the bankrupt from trust funds, may be vacated and similar suits prosecuted to judgment with the assent of the trustee. The District Court might, however, have allowed the original suits to be prosecuted to judgment so as to liquidate the claims of the creditors. *Matter of Buchanan* (C. C. A., 2d Cir.), 33 Am. B. R. 636, 219 Fed. 492.

38. *Matter of Penn Development Co.* (D. C., Cal.), 33 Am. B. R. 759, 220 Fed. 222; *In re St. Albans Foundry Co.* (Ref., Vt.), 4 Am. B. R. 594, holding, that where a bankrupt had been summoned as trustee, or garnishee, before his bankruptcy, in a suit against one of his creditors, returnable after the bankruptcy proceedings were commenced, no interests of the bankrupt's creditors or estate being affected, there is no reason why the receiver or trustee of the bankrupt estate should not be held to respond in said suit, under the direction of the bankruptcy court, with such disclosure as is practicable.

Action on bond.—Where a bond given after the enactment of the bankruptcy act of 1898, by a corporation to secure a claim against a bankrupt required the entry of judgment against the obligor as a condition precedent to recovery against the surety, and the corporation is adjudicated a bankrupt, an order of the bankruptcy court restraining an action upon the bond by the creditor to whom it was given will be reversed, and the State court left free to deal with the action according to its own practice. *Matter of Mercedes Import Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 596, 166 Fed. 427, revg. 20 Am. B. R. 648.

39. *In re Cole* (D. C., N. Y.), 5 Am. B. R. 780, 106 Fed. 837; *In re Wollock* (D. C., Ill.), 9 Am. B. R. 685, 120 Fed. 516; *Mackel v. Rochester* (D. C., Mont.), 14 Am. B. R. 429, 135 Fed. 904.

40. *In re Lawrence* (D. C., Ala.), 20 Am. B. R. 698, 163 Fed. 131.

41. *Orr v. Tribble* (D. C., Ga.), 19 Am. B. R. 849, 158 Fed. 897; *Matter of Mercedes Import Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 590, 166 Fed. 427, revg. 20 Am. B. R. 648; *In re Federal Biscuit Co.* (C. C. A., 2d Cir.), 29 Am. B. R. 393, 203 Fed. 37.

permit them to prosecute their claims, although actions to enforce such claims were commenced subsequent to the proceedings in bankruptcy against the corporation.⁴² The stay should usually be granted (1) if the bankrupt is threatened with arrest or will be needlessly harassed;⁴³ (2) if the suit is not in judgment; and even after judgment, if the rights of the general creditors, not parties to the suit, will be jeopardized by further proceedings in the State courts;⁴⁴ or (3) if the judgment is founded on a transaction which is an act of bankruptcy, or a fraud upon the creditors or upon the law.⁴⁵

c. Power to stay should be exercised with caution.—It follows on the very nature of the power to stay that it should be exercised with caution. The right to enjoin has often been too broadly expressed.⁴⁶ There is nothing in the bankruptcy act, *per se*, which either requires or justifies the issuance of a writ of injunction under any circumstances less formidable than would be required to justify its issuance in any other equitable proceeding. It will be issued, and its use is intended, to prevent the infliction of threatened or imminent, and not mere possible injury.⁴⁷ Many of the cases are wayward guides. At the same time, it is impossible to phrase any exact rule. The present tendency is toward limitations on the power, rather than its opposite.⁴⁸

d. Effect of proof of debt on right of action.—This was much debated under the former law, which in terms provided that he who proved his debt in bankruptcy waived his right to enforce it by any other legal remedy. But the

42. In re Remington Auto & Motor Co. (D. C.), N. Y.), 9 Am. B. R. 533, 119 Fed. 441.

The discharge of a corporation does not prevent creditors from taking judgment in a State court against the corporation in such limited form as may enable them to reap the benefit of the stockholders' or directors' liability. The judgment rendered will not be against the person or property of the bankrupt, and has no further effect than to enable the plaintiff to charge the directors or stockholders in accordance with the State statute. In re Marshall Paper Co. (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872, overr. 2 Am. B. R. 653, 95 Fed. 419.

Enjoining sale of corporate property in equity suit.—Where a large majority of the creditors of the corporation desire a sale of its property, under an order of the court which appointed the receiver, and no rights of minority creditors who did not intervene in the equity action will be in any way affected, the bankruptcy court, upon the filing of a bankruptcy petition by them against the corporation, will not restrain such sale of its property. In re Edward Ellsworth Co. (D. C., N. Y.), 23 Am. B. R. 284, 173 Fed. 699.

The prosecution of a suit instituted by the stockholders of a bankrupt corporation, prior to bankruptcy, against a bankrupt corporation should not be stayed, where it appears that the receivers appointed in such suit have turned over to bankrupt's trustees all its assets, with the exception of certain choses in action against two of the bankrupt's directors against whom a suit by such receivers is pending, and there is a legitimate scope for the judgment of the State court, which might be limited so as not to interfere with the jurisdiction of the bankruptcy court. In

re United Wireless Telegraph Co. (D. C., N. Y.), 28 Am. B. R. 394, 196 Fed. 153.

43. In re Nuttall (D. C., N. Y.), 29 Am. B. R. 800, 201 Fed. 557, citing text.

44. Broach v. Mullis (D. C., Ga.), 35 Am. B. R. 841, 228 Fed. 551.

45. Southern Loan & Trust Co. v. Benbow (D. C., N. Car.), 3 Am. B. R. 9, 96 Fed. 514; In re Globe Cycle Works (Ref., N. Y.), 2 Am. B. R. 447. In both of these cases it was said that the injunction should never be granted if the judgment has ripened into an execution sale, provided the State court has or can be given jurisdiction of the parties interested in the distribution, including the general creditors represented by the trustee in bankruptcy.

46. In re Rogers (Ref., Ky.), 1 Am. B. R. 541; In re St. Albans Foundry Co. (Ref., Vt.), 4 Am. B. R. 594.

47. Mere possibility of action.—A bankruptcy court, upon the filing of an involuntary petition in bankruptcy, should not, as of course, and without any allegation or proof of a threatened invasion of the rights of any creditor, issue an injunction enjoining the further prosecution of a suit in a State court for a provable debt against the bankrupt, because of the mere possibility of action being taken which will be injurious to the rights of creditors, and in the absence of application to the State court for relief. Matter of Penn Development Co. (D. C., Cal.), 33 Am. B. R. 759, 220 Fed. 222.

48. In re Ward (D. C., Mass.), 5 Am. B. R. 215, 104 Fed. 985, a case, at least since the amendatory act of 1903, of doubtful authority on the point there decided. Compare In re Currier (Ref., N. Y.), 5 Am. B. R. 639.

better opinion was that the waiver endured only until a discharge was granted or refused. The amendatory act of 1874 made this view also the written law. That the same is the law to-day,⁴⁹ with the exception that a suit may probably be begun and, unless stayed, prosecuted to judgment, is undoubtedly true. So also is the old time rule that the remedy thus suspended comes into being the moment the discharge is granted or denied.⁵⁰ But the State court does not lose jurisdiction.⁵¹ The stay is directed to the suitor, not the court, and the latter may go on if the cause is moved by the person enjoined, and a judgment resulting will be valid.⁵² The remedy of a party thus aggrieved is in contempt proceedings. It is important, however, to note that, if a stay is not granted and the suit proceeds and judgment is entered *after* the discharge, the latter cannot be set up as a release to the judgment.⁵³ A stay of a suit pending in the State courts effected by an injunction issued by a court in bankruptcy is not a dismissal of the suit. It does not defeat the cause of action pending in the State court; it merely suspends the proceedings as long as the injunction is in force.⁵⁴

IV. SUITS OR PROCEEDINGS IN WHICH STAY MAY BE GRANTED.

a. Suits or proceedings in rem.—(1) IN GENERAL.—The general rule is that the court that has acquired jurisdiction of the *res* will retain it. If the property has come into the possession of the bankruptcy court any suit or proceeding tending to interfere with such possession may properly be stayed. Thus, a Federal court will restrain a replevin creditor proceeding in a State court against property in the custody of the Federal Court.⁵⁵ If the property sued for was not claimed by the bankrupt, nor included in his schedule, the bankruptcy court has no jurisdiction to stay a suit brought in a state court to recover the property from one who claimed to have purchased it from the trustee.⁵⁶

(2) PROPERTY IN POSSESSION OF STATE COURTS.—The court will refuse a stay in most cases where the State court is in possession,⁵⁷ or where the bankruptcy had no legal or equitable title to the property sought to be replevined.⁵⁸

⁴⁹ *Reed v. Equitable Trust Co.* (Sup. Ct. Ga.), 115 Ga. 780, 8 Am. B. R. 242, 42 S. E. 102; *Evans v. Rounsaville* (Sup. Ct. Ga.), 115 Ga. 684, 8 Am. B. R. 236, 42 S. E. 100.

⁵⁰ *In re Rosenberg*, Fed. Cas. 12,064.

Stay of suit in State court dissolved by discharge.—Where the district court stayed a suit in another State for the purpose of enabling the bankrupt to plead his discharge when he had obtained it, it becomes the duty of the court upon the granting of such discharge to the bankrupt to vacate its previous stay and remit both parties to their rights, remedies and defenses under the law. *In re Rosenthal* (D. C., N. Y.), 5 Am. B. R. 799, 108 Fed. 368.

⁵¹ *Bindell v. Smith* (Eq., N. J.), 61 N. J. Eq. 654, 5 Am. B. R. 40, 47 Atl. 456.

⁵² *Flanagan v. Pearson*, 14 N. B. R. 37; *Ewart v. Schwartz*, 48 N. Y. Super. 390; *Wood v. Hazen*, 15 N. B. R. 491; *In re Irving*, Fed. Cas. 7,073.

⁵³ *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. Ed. 994; *McDonald v. Davis*, 105 N. Y. 508, 12 N. E. 40.

⁵⁴ *New River Coal Land Co. v. Ruffner Bros.* (C. C. A., 4th Cir.), 21 Am. B. R. 474, 165 Fed. 881.

^{54a} Ejectment proceedings may be temporarily enjoined to give a receiver opportunity to decide whether or not to defend and try to re-

tain the lease for the benefit of the estate. *Matter of Lombardy Inn Co. Inc.* (D. C., Mass.), 44 Am. B. R. 444.

⁵⁵ *In re Russell* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248; *In re Chambers*, *Calder & Co.* (D. C., R. I.), 3 Am. B. R. 537, 98 Fed. 865; *In re Seebold* (C. C. A., 5th Cir.), 5 Am. B. R. 358, 105 Fed. 910.

⁵⁶ *In re Bluestone Bros.* (D. C. W. Va.), 23 Am. B. R. 264, 174 Fed. 53. See also *Matter of Amy* (C. C. A., 2d Cir.), 45 Am. B. R. 15, 263 Fed. 8.

⁵⁷ *Carter v. Hobbs* (D. C., Ind.), 1 Am. B. R. 215, 92 Fed. 594; *In re Price* (D. C., N. Y.), 1 Am. B. R. 606, 92 Fed. 987; *Keegan v. King* (D. C., Ind.), 3 Am. B. R. 79, 96 Fed. 758; *In re Seebold* (C. C. A., 5th Cir.), 5 Am. B. R. 358, 105 Fed. 910; *In re Russell* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248; *In re Wells* (D. C. Mo.), 8 Am. B. R. 75, 114 Fed. 222; *Abney-Barnes Co. v. Davy-Pocahontas Coal Co.* (W. Va. Sup. Ct. of App.), 43 Am. B. R. 269, 98 S. E. 293, citing *Collier on Bankruptcy* (11th ed.). 293. Compare also *In re Neely* (D. C., N. Y.), 5 Am. B. R. 836, 108 Fed. 371, as modified by s. c. on appeal, 7 Am. B. R. 312, 113 Fed. 210.

⁵⁸ *In re Smith* (D. C., R. I.), 9 Am. B. R. 590, 119 Fed. 1004; *Matter of Kanter & Cohen* (C. C. A., 2d Cir.), 9 Am. B. R. 372, 121 Fed. 964, 58 C. C. A. 280.

But the rule yields, however, where the possession of the State court is (1) the result of a fraud on the law, or (2) of a lien declared void or voidable under the law. But if the lien is by a judgment creditor's suit begun more than four months before the bankruptcy, a stay will not be granted.⁵⁹

(3) PROCEEDINGS OF LONG STANDING.—A distinction is drawn as to the power of a bankruptcy court to enjoin proceedings of long standing in a State court, in which such court has acquired complete jurisdiction of the person and property of the bankrupt before the bankruptcy proceedings were commenced and the power to enjoin proceedings instituted within four months of the filing of the petition in bankruptcy. In the latter case the power is properly exercised.⁶⁰ Where a proceeding was commenced long prior to the proceedings in bankruptcy, and the property in controversy was under the control and in the possession of a receiver appointed by the State court, a bankruptcy court cannot enjoin the proceedings or order the property turned over to the trustee in bankruptcy.⁶¹

(4) PROCEEDING TO ENFORCE A LIEN.—Where, within the four months, period, an action to enforce a lien is brought in a State court against a bankrupt, and his entire property is involved in the litigation, the bankruptcy court has jurisdiction to stay further proceedings in the action.⁶² But it has been held that where before filing a petition against an involuntary bankrupt, a creditor brings an attachment suit in a State court to enforce an asserted right *in rem* the bankruptcy court is without jurisdiction to stay such suit after the State court has acquired jurisdiction of the *res*.⁶³ Stays of proceedings

^{59.} *Metcalf v. Barber*, 187 U. S. 165, 9 Am. B. R. 30, 47 L. Ed. 122, revg. *In re Lesser* (C. C. A., 2d Cir.), 5 Am. B. R. 320, 106 Fed. 201, and *s. c.*, 3 Am. B. R. 815, 100 Fed. 433; *Abney-Barnes Co. v. Davy-Pocahontas Coal Co.* (W. Va. Sup. Ct. of App.), 43 Am. B. R. 269, 98 S. E. 298, citing *Collier on Bankruptcy* (11th ed.), 294; *Griffin v. Lenhart* (C. C. A., 4th Cir.), 45 Am. B. R. 221, 266 Fed. 671.

Stay of execution.—In the case of *White v. Thompson* (C. C. A., 5th Cir.), 9 Am. B. R. 653, 119 Fed. 868, 56 C. C. A. 306, it was held that an injunction restraining proceedings for the disposition of property duly levied on under an execution, issued upon a judgment more than a year prior to the adjudication in bankruptcy of the debtor is unwarranted. *Contra*: *In re Baughman* (D. C., Pa.), 15 Am. B. R. 23, 138 Fed. 742, where Judge Archbold holds that a sale of the bankrupt's property under an execution issued upon a judgment more than four months prior to his adjudication may be stayed; *In re Vastbinder* (D. C., Pa.), 13 Am. B. R. 148, 132 Fed. 718; *Matter of Pollman* (Ref., N. Y.), 16 Am. B. R. 144. See also *Nat. Bank v. Hobbs* (C. C., Ga.), 9 Am. B. R. 190, 118 Fed. 626.

^{60.} *New River Coal Land Co. v. Ruffner Bros.* (C. C. A., 4th Cir.), 21 Am. B. R. 474, 165 Fed. 881; *Virginia Iron, Coal & Coke Co. v. Olcott* (C. C. A., 4th Cir.), 28 Am. B. R. 321, 187 Fed. 730; *Bear & Co. v. Chase*, 3 Am. B. R. 746, 99 Fed. 920.

Enjoining prosecution of attachment suit.—Within four months prior to the defendant's bankruptcy, petitioner commenced an action in a State court upon a claim provable in bankruptcy. A warrant of attachment was issued in such action and the attachment made was discharged by a surety company's bond. One of the bankrupt's directors entered into an agreement with the surety company and to secure him against loss, bankrupt conveyed certain real estate to be held in trust for him.

Upon bankruptcy intervening, held, that since, in the circumstances, the prosecution of the suit might result in a depletion of the assets of the estate, a stay would be for the benefit of the estate and should be granted. *In re Federal Biscuit Co.* (C. C. A., 2d Cir.), 29 Am. B. R. 393, 203 Fed. 87.

^{61.} *Pickens v. Dent*, 187 U. S. 177, 9 Am. B. R. 47, 47 L. Ed. 123, affg. 5 Am. B. R. 644, 104 Fed. 663.

^{62.} *New River Coal Land Co. v. Ruffner Bros.* (C. C. A., 4th Cir.), 21 Am. B. R. 474, 165 Fed. 881.

After four months.—It has been held that the proceedings in the State court may be stayed even though they were begun more than four months before the institutions of bankruptcy proceedings. *Matter of Grafton Gas & Elec. Light Co.* (D. C., W. Va.), 42 Am. B. R. 568, 253 Fed. 668.

^{63.} *Tennessee Producer Marble Co. v. Grant* (C. C. A., 3d Cir.), 14 Am. B. R. 288, 135 Fed. 332. *Contra*. *Matter of Rodriguez* (D. C., Porto Rico), 40 Am. B. R. 685, 10 P. R. Fed. 200; *Matter of Lillenthal* (C. C. A., 9th Cir.), 43 Am. B. R. 665, 256 Fed. 819.

Proceeds of sale in possession of State court.—Where, prior to the filing of a petition in bankruptcy, lienors of the bankrupt commenced an action to foreclose their liens under the State statute, and the property was sold and the money paid into court after the petition was filed, and the State judge, prior to the issuance of a restraining order, had rendered his decision in favor of the lienors but had not signed the decree it was held that the entry of the formal judgment was a purely ministerial act and that a motion to dissolve the restraining order should be granted as no good purpose could be served by transferring the money from the State court to the bankruptcy court. *Matter of Bach* (D. C., Wash.), 32 Am. B. R. 512, 212 Fed. 576.

to enforce liens are usually sought to prevent either (1) the enforcement of an execution or an attachment levied within the four months' period or (2) the foreclosure of a valid mortgage. In the former, there seems little doubt about the power to halt the lien creditor or of the wisdom of exercising it.⁶⁴ In the case of a mortgage foreclosure, while the power exists, the mortgaged premises being in the custody of the court,⁶⁵ yet, provided the mortgage is valid, it will not as a rule be exercised, and certainly not unless it appears that the equity of redemption vested in the trustee is of some value.⁶⁶ But while the court will not usually enjoin the foreclosure of such mortgages it may direct the trustee to intervene in the action for the purpose of protecting all of the creditors of the bankrupt.⁶⁷ The decisions under the former class of cases are fairly uniform,⁶⁸ and where there is a difference, now that the doctrine of *Bardes v. Bank* has been eliminated, turn, as a rule, on whether the action sought to be stayed is based upon a transaction which is void or voidable under the present law. Those under the latter class declaring against the exercise of jurisdiction to stay the foreclosure of a valid mortgage, and remitting the party who seeks the stay to the State court, are equally

64. *In re Eastern Com. & Imp. Co.* (D. C., Mass.), 12 Am. B. R. 305, 129 Fed. 847; *Matter of Rodriguez* (D. C., Porto Rico), 40 Am. B. R. 685, 10 P. R. Fed. 260.

Garnishment.—Where an execution was issued pursuant to § 1391 of the New York Code of Civil Procedure as amended in 1908, which authorizes a judgment creditor to take under execution 10 per cent. of the salary of a judgment debtor, and two weeks thereafter the debtor was adjudicated a bankrupt, the enforcement of the judgment against any portion of the bankrupt's present salary will be enjoined until it is determined whether he shall be granted a discharge in bankruptcy; and his employers will be directed by an order to withhold a tenth of his salary until the question of his discharge is determined. *In re Van Buren* (D. C., N. Y.), 20 Am. B. R. 896, 164 Fed. 883; *In re Van Buren* (D. C., N. Y.), 21 Am. B. R. 338, 164 Fed. 883. A stay of garnishment proceedings under similar circumstances was denied in *In re Driggs* (D. C., N. Y.), 22 Am. B. R. 621, 171 Fed. 897; the effect of this decision was limited in the case of *In re Sims* (D. C., N. Y.), 23 Am. B. R. 899, 176 Fed. 645, so as to permit a stay of such proceedings as to salary earned after the adjudication of the bankrupt. See also Am. B. R. Dig., §§ 930, 933.

65. *Quære*: Whether the mortgagee, being a secured creditor, is not, under § 57-h, a party who is already within the jurisdiction of the court of bankruptcy? In the case of *In re Dana* (C. C. A., 8th Cir.), 21 Am. B. R. 683, 167 Fed. 529, it was held that where a court of bankruptcy is in actual possession of real property belonging to the bankrupt, it has jurisdiction to determine the amount and order of priority of liens thereon and to liquidate such liens, and in aid of its jurisdiction may, by injunction, restrain the prosecution of actions brought in a State

court before the institution of the bankruptcy proceedings but within the four months' period, to foreclose liens upon the property which are concededly valid.

Stay of foreclosure.—Where a bankrupt was in possession of mortgaged property at the time of the filing of an involuntary petition, but thereafter, and before the appointment of a receiver the mortgagee took possession for the purpose of foreclosure, the foreclosure proceedings should be stayed and the receiver allowed to sell the property subject to liens. *Charak v. Durphoe* (D. C., Mass.), 42 Am. B. R. 110, 262 Fed. 885.

66. *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 315; *In re Donnelly* (D. C., Ohio), 26 Am. B. R. 304, 188 Fed. 1001; Compare *In re Pittelhon* (D. C., Wis.), 1 Am. B. R. 472, 92 Fed. 901.

67. *In re Porter* (D. C., Ky.), 6 Am. B. R. 259, 109 Fed. 111; *In re Gerdes* (D. C., Ohio), 4 Am. B. R. 346, 109 Fed. 318; *In re Holloway* (D. C., Ky.), 1 Am. B. R. 659, 93 Fed. 638; *In re Rohrer* (C. C. A., 6th Cir.), 24 Am. B. R. 52, 177 Fed. 381; *In re Wagner* (D. C., Pa.), 30 Am. B. R. 396, 208 Fed. 364.

68. *In re Kimball* (D. C., Pa.), 3 Am. B. R. 161, 97 Fed. 29; *Bear v. Chase* (C. C. A., 4th Cir.), 3 Am. B. R. 746, 99 Fed. 920; *In re Seebold* (C. C. A., 5th Cir.), 5 Am. B. R. 358, 105 Fed. 910; *In re Lesser* (C. C. A., 2d Cir.), 5 Am. B. R. 320, 180 Fed. 201; *In re Kenney* (C. C. A., 2d Cir.), 5 Am. B. R. 355, 105 Fed. 897; *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906. Most of the cases contra rest on *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175, and since the amendatory act of 1903, are no longer the law (for instance, *In re Walls* [D. C., Mo.], 8 Am. B. R. 75, 114 Fed. 222, and *In re Shoemaker* [D. C., Va.], 7 Am. B. R. 437, 112 Fed. 648). But see *In re Ogles* (D. C., Tenn.), 1 Am. B. R. 671, 93 Fed. 426, and *In re Franks* (D. C., Ala.), 2 Am. B. R. 634, 95 Fed. 635. Even were this not so, the power to enjoin the consummation of a fraud on the law is by no means negated by *Bardes v. Bank*. Compare *Bryan v. Bernheimer*, 175 U. S. 274, 5 Am. B. R. 623. See also Am. B. R. Dig., § 930.

uniform,⁶⁹ and the earlier cases contra⁷⁰ are no longer controlling. Nor was this latter result appreciably affected by *Bardes v. Bank*.⁷¹ However, in extreme cases, such as was *In re Sabine*, and in cases where the mortgage itself is voidable under the terms of the law, the right to stay will usually be exercised.⁷² A stay of a sale of real property seized under a judgment rendered in an action to foreclose a mortgage prior to the four months before the filing of the petition should not be granted,⁷³ unless it is absolutely necessary, under the facts of the particular case, in order to protect the rights of the creditors or the trustee which would otherwise be lost or impaired.⁷⁴ Where the lien creditor voluntarily makes himself a party to the proceedings,⁷⁵ as when he appears at the first meeting and asks that his security be ascertained for the purpose of voting on that part of his debt which may be unsecured, the rule is, of course, different. Such a creditor may later be stayed. But not, if the suit is a creditor's bill of long standing.⁷⁶ It will be noticed that § 11-a a suit only may be stayed which rests upon a claim from which a discharge would be a release. It should be further noticed that the suit does not in any way affect a lien upon the bankrupt's property; it does not affect any suit maintained by a secured creditor to enforce a lien thereon. In recognition of this principle, a suit to enforce a mechanics' lien against real property of the bankrupt will not be stayed⁷⁷ and such a suit may be brought against the trustee without leave of the court.⁷⁸ Where distress has been made by a landlord and afterward the property has been transferred to another person who becomes a bankrupt, the result is to place the property under the control of the bankruptcy court, and such court may restrain further proceedings under the distress.⁷⁹ While courts of bankruptcy may, in the exercise of the discretion

69. *In re Holloway* (D. C., Ky.), 1 Am. B. R. 659, 93 Fed. 638; *Heath v. Shaffer* (D. C., Iowa), 2 Am. B. R. 98, 93 Fed. 647; *In re Gerdes* (D. C., Ohio), 4 Am. B. R. 346, 102 Fed. 318; *In re Porter* (D. C., Ky.), 6 Am. B. R. 259, 109 Fed. 111; *In re United Wireless Co.* (D. C., N. J.), 27 Am. B. R. 1, 192 Fed. 238; *Matter of Schmidt* (D. C., N. J.), 35 Am. B. R. 1, 224 Fed. 814; *McLoughlin v. Knop* (D. C., La.), 32 Am. B. R. 582, 214 Fed. 260. See also Am. B. R. Dig., § 926.

Stay permitted if necessary for administration.—Even in cases where State courts have obtained possession of the property of the bankrupt by the foreclosure of valid liens or by receivership proceedings prior to the filing of the petition in bankruptcy, the jurisdiction of the bankruptcy court is paramount, and such proceedings in State courts may be stayed if necessary to the proper administration of the estate of the bankrupt. *Cohen v. Nixon & Wright* (D. C., Ga.), 37 Am. B. R. 646; *Matter of Grafton Gas & Elec. Light Co.* (D. C., W. Va.), 42 Am. B. R. 568, 253 Fed. 666.

Suits, commenced in the State court by a decedent's creditors to enforce an equitable lien, which have not proceeded to judgment upon the bankruptcy of the decedent's wife, may be enjoined by the bankruptcy court. *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

70. *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 315; *In re Pittelkow* (D. C., Wis.), 1 Am. B. R. 472, 92 Fed. 901; *In re San Gabriel*

Sanitorium Co. (C. C. A., 9th Cir.), 4 Am. B. R. 197, 102 Fed. 310.

71. Compare, however, *In re San Gabriel Sanitorium Co.* (C. C. A., 9th Cir.), 7 Am. B. R. 206, 111 Fed. 892, where on reargument, the Circuit Court of Appeals of the Ninth Circuit superseded its former opinion, *supra*, on this ground.

72. *Carpenter Bros. v. O'Connor* (C. C., Ohio), 1 Am. B. R. 381, 16 Ohio Cir. Ct. 536. See also *Matter of U. S. Chrysotile Asbestos Co.* (D. C., N. Y.), 41 Am. B. R. 774, 253 Fed. 294.

73. *Sample v. Beasley* (C. C. A., 5th Cir.), 20 Am. B. R. 164, 158 Fed. 607, citing *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122; *Pickens v. Roy*, 187 U. S. 177, 9 Am. B. R. 47, 47 L. Ed. 128; *Matter of Schmidt* (D. C., N. J.), 35 Am. B. R. 1, 224 Fed. 814.

74. *Matter of Morse* (D. C., N. Y.), 32 Am. B. R. 207, 210 Fed. 900; *Broach v. Mullis* (D. C., Ga.), 35 Am. B. R. 841, 228 Fed. 551; *Matter of Patterson Lumber Co.* (D. C., Pa.), 36 Am. B. R. 186, 228 Fed. 916.

75. *In re Riker* (C. C. A., 2d Cir.), 5 Am. B. R. 720, 107 Fed. 96.

76. *Pickens v. Dent*, 187 U. S. 177, 9 Am. B. R. 47, 47 L. Ed. 128.

77. *Matter of Grissler* (C. C. A., 2d Cir.), 13 Am. B. R. 508, 136 Fed. 754; *In re Greater American Exposition* (C. C. A., 8th Cir.), 4 Am. B. R. 486, 102 Fed. 986. See also Am. B. R. Dig., § 927.

78. *In re Smith* (D. C., N. Y.), 9 Am. B. R. 603, 121 Fed. 1014.

79. *In re Lines* (D. C., Pa.), 13 Am. B. R. 318, 133 Fed. 803.

conferred by this section, stay proceedings where the property is in possession of an officer of a State court under a levy, yet such stay should not be granted unless the bankrupt's estate will be benefited thereby; if the property subject to the lien is insufficient to satisfy it, there will be no advantage to the general creditors from administration in bankruptcy, and the State court should be permitted to remain in possession.⁸⁰

b. Stay of proceedings under general assignments.—Prior to *Bardes v. Bank*, the cases were uniform in holding that, a general assignment being an act of bankruptcy and a constructive fraud on the law, the general assignee might be halted by an injunction from the court of bankruptcy.⁸¹ Whatever doubt resulted from that case was eliminated by the same court's decision in *Bryan v. Bernheimer*.⁸² Nor was the doubt restored by that court's decision in *Louisville Trust Co. v. Comminger*,⁸³ a case which applied the *Bardes* rule only to the assignee and his attorneys and that, too, only when they had become vested with an adverse title prior to the bankruptcy. Since the amendatory act of 1903, *Bardes v. Bank* being no longer the law, the question is stripped of all dogmatic limitations. There can now be no doubt about the power of a court of bankruptcy to restrain general assignment proceedings; indeed, it becomes its duty *proprio motu*, at once a petition, especially an involuntary petition, is filed.⁸⁴

c. Suits or proceedings in personam.—(1) IN GENERAL.—Much of what has already been said may be applied here. Two classes of suits and proceedings are peculiarly against the person,—(1) ordinary suits for the collection of simple debts, and (2) proceedings which may result in the attachment and detention of the body of the debtor. Stated broadly, the former, subject to limitations already discussed, especially where the debt proceeded on is the result of a fraudulent preference,⁸⁵ will always be stayed. On the other hand, the latter class of cases will rarely be stayed, for the reason that, as a rule, arrest on civil process rests on obligations which are not dischargeable in bankruptcy.⁸⁶ To this generalization there are, of course, exceptions, as where

Restraining landlord from interference with trustee.—Where, at adjudication, a tenant holds an unexpired lease of the store occupied by him, his trustee is entitled to a reasonable time within which to dispose of a valuable stock of goods which is not removable without serious loss to the estate, and the landlord to whom the trustee has given a bond against loss will be restrained by injunction from interfering with the trustee's possession of the premises. *In re Schwartzman* (D. C., S. Car.), 21 Am. B. R. 885, 167 Fed. 399.

⁸⁰ *Orr v. Tribble* (D. C., Ga.), 19 Am. B. R. 849, 158 Fed. 897; *Matter of Brinn* (D. C., Ga.), 45 Am. B. R. 74, 262 Fed. 527.

⁸¹ *In re Gutwillig* (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475, *affd.* 1 Am. B. R. 388, 92 Fed. 337; *Lea v. West* (D. C., Va.), 1 Am. B. R. 261, 91 Fed. 237; *affd. sub nom.* *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 467; *Davis v. Bohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 92 Fed. 322; *In re M. Solomon & Co.*, 2 N. B. N. Rep. 460. See also Am. B. R. Dig., § 935.

⁸² 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814.

⁸³ 184 U. S. 18, 7 Am. B. R. 421, 46 L.

Ed. 413. See also *In re Carver* (D. C., N. Car.), 7 Am. B. R. 539, 113 Fed. 128.

⁸⁴ **Power to restrain assignee from administering estate.**—In all cases where a petition in bankruptcy has been filed within four months of making a general assignment, the bankruptcy court has both the power and the absolute discretion to restrain the assignee from administering the estate. *Matter of Federal Mail & Express Co.* (D. C., N. Y.), 37 Am. B. R. 240, 233 Fed. 691.

Effect of insolvency proceedings pending in State court.—The jurisdiction of the bankruptcy court is essentially exclusive in administering the affairs of insolvent individuals and corporations; and such court, when properly applied to, cannot refuse to take jurisdiction because a proceeding to the same end is pending in a State court, but may stay all action in the State court in such proceeding. *In re Benwood Brewing Co.* (D. C., W. Va.), 29 Am. B. R. 759, 202 Fed. 326.

⁸⁵ *In re Nathan*, 92 Fed. 590.

⁸⁶ *In re Oole* (D. C., N. Y.), 5 Am. B. R. 780, 106 Fed. 837. For what debts are not discharged, see generally discussion under Section Seventeen of this work.

the remedy on a simple contract debt given by the State law includes arrest;⁸⁷ or the well-known Kentucky alimony case, where a stay was granted on a State court's enforcement of its mandate by contempt.⁸⁸

(2) WHEN SUCH STAYS WILL BE GRANTED.—Cases already cited under previous paragraphs indicate the conditions under which suits and proceedings *in personam* will be stayed. A stay should be granted where the proceedings may result in the arrest or imprisonment of the bankrupt.⁸⁹ Where the order sought to be restrained pertains to some act of the bankrupt consisting of an offense against the dignity of the State court, it should not be stayed,⁹⁰ nor should a stay be granted to prevent the punishment of the bankrupt for disobedience of a lawful order of a State court prior to filing a petition in bankruptcy.⁹¹ But where an attempt is made to enforce a dischargeable claim in a State court by proceedings to punish the bankrupt for contempt, the bankruptcy court may, in its discretion, restrain such proceedings,⁹² and it is immaterial whether the court's view of the probability of the claim is sound or unsound, as an erroneous decision does not make void the decision of the court in this respect.⁹³ An injunction restraining further proceedings in an action in a State court operates in restraint of proceedings in such court to punish the bankrupt for an alleged contempt committed before the adjudication in bankruptcy.⁹⁴

V. PRACTICE AND PLEADINGS.

a. Application to State court.—Subdivision *a* of this section is general in its effect; the jurisdiction thereby conferred on the courts of bankruptcy is not exclusive. Application may be made to a State court, and the mandatory provisions of the section are as binding on that court as on the Federal Court.⁹⁵ Where the suit is pending in a State court the application should ordinarily be made in that court in the first instance.⁹⁶ In that event, the practice will be that provided by the State law. The production of a certified copy of the

87. In re Grist (Ref., N. Y.), 1 Am. B. R. 89.

88. In re Houston (D. C., Ky.), 2 Am. B. R. 107, 94 Fed. 119; on appeal, Wagner v. Houston (C. C. A., 6th Cir.), 4 Am. B. R. 596, 104 Fed. 133.

89. In re Grist (Ref., N. Y.), 1 Am. B. R. 89.

90. Matter of Koronsky (C. C. A., 2d Cir.), 21 Am. B. R. 851, 170 Fed. 719, holding that the execution of an order of a State court to punish for contempt the procuring of a stay of proceedings upon a judgment by perjury and deceit should not be stayed by the bankruptcy court; People ex rel. Otterstedt v. Sheriff (D. C., N. Y.), 31 Am. B. R. 84, 206 Fed. 566.

91. In re Hall (D. C., N. Y.), 22 Am. B. R. 498, 170 Fed. 721; In re Sims (D. C., N. Y.), 23 Am. B. R. 899, 176 Fed. 645; Matter of Francisco (D. C., N. Y.), 41 Am. B. R. 87, 245 Fed. 216; Matter of Pyatt, (D. C., Nev.), 42 Am. B. R. 462, 257 Fed. 362.

92. In re Fortunato (D. C., N. Y.), 9 Am. B. R. 630, 123 Fed. 622; Matter of Adler (C. C. A., 2d Cir.), 16 Am. B. R. 414, 144 Fed. 195, holding that where judgment has been recovered against a bankrupt upon a dischargeable claim, the bankruptcy court may, in its discretion, restrain the judgment creditor from attempting to enforce its judgment, until twelve months after the date of the adjudication in bankruptcy, or until the

question of the bankrupt's discharge is determined.

93. Wagner v. Houston (D. C., Vt.), 4 Am. B. R. 596, 104 Fed. 133.

94. In re Fortunato (D. C., N. Y.), 9 Am. B. R. 630, 123 Fed. 622; In re De Lany & Co. (D. C., N. Y.), 10 Am. B. R. 634, 124 Fed. 280.

95. In re Rosenberg, Fed. Cas. 12,054; In re Metcalf, Fed. Cas. 4,494. The following are cases arising under the present law where applications were made to State courts for stays and refused because the proceedings were for the enforcement of liens: Reed v. Equitable Trust Co. (Sup. Ct., Ga.), 115 Ga. 780, 8 Am. B. R. 242, 42 S. E. 102; Taylor v. Taylor (N. J. Ch.), 59 N. J. Eq. 86, 4 Am. B. R. 211, 45 Atl. 440; Reed v. Cross (Super. Ct., Ill.), 1 Am. B. R. 34; Continental Nat'l Bank v. Katz (Super. Ct., Ill.), 1 Am. B. R. 19.

96. In re Geister (D. C., Iowa), 3 Am. B. R. 228, 97 Fed. 322; In re Siebert (D. C., N. J.), 13 Am. B. R. 348, 133 Fed. 781; Matter of Penn Development Co. (D. C., Cal.), 33 Am. B. R. 759, 220 Fed. 222; Hill v. Hareling, 107 U. S. 631, 27 L. Ed. 493, where the court, in speaking of a similar provision in the Act of 1867, said: "This provision, like all laws of the United States

petition or of the adjudication will be enough to establish the fact that such a proceeding has been begun. But it is in no sense the duty of the State court to stay merely because it hears of the bankruptcy of a suitor. It must be informed of the facts by proper pleadings.⁹⁷ The mere fact that a petition in bankruptcy has been filed does not operate *ipso facto* to relieve the bankrupt from complying with the orders of a State court.⁹⁸

b. Application to bankruptcy court.—The bankruptcy court has jurisdiction to stay proceedings in an action against the bankrupt upon motion of a creditor whose application in the State court for such relief has been denied.⁹⁹ If the application is made to the court of bankruptcy, it should be made to the judge. General Order XII (3) effectually limits the power of a referee to grant "an injunction to stay proceedings of a court or officer of the United States, or of a State," and requires an application therefor to be heard and decided by the judge.¹⁰⁰ The weight of authority is now apparently in favor of the doctrine that referees may not enjoin proceedings in a State court,¹⁰¹ although they may grant restraining orders and injunctions in other cases.¹⁰² Where the courts of bankruptcy have by their rules restricted the power of referees to the grant-

made in pursuance of the Constitution, binds the courts of each State as well as those of the nation. Upon the application of the bankrupt to the court, State or national, in which the suit is pending, it is the duty of that court to stay the proceedings."

97. *Johnson v. Bishop*, Fed. Cas. 7,373; *Boyn-ton v. Ball*, 121 U. S. 457, 30 L. Ed. 985; *Mat-ter of Vadner* (D. C., Nev.), 42 Am. B. R. 465, 259 Fed. 614; *Houston v. Shear* (Tex. Ct. of Civ. App.), 43 Am. B. R. 462, 210 S. W. 976.

98. Right of bankrupt to refuse to obey orders of State court.—The filing of a petition in bankruptcy and an adjudication does not operate as a stay of supplementary proceedings in a State court and hence where a bankrupt fails to appear at the time set for his examination he may be punished for contempt. *Norton v. Bielby* (Co. Ct., N. Y.), 86 N. Y. Misc. 644, 33 Am. B. R. 295, 149 N. Y. Supp. 592.

99. *New River Coal Land Co. v. Ruffner Bros.* (C. C. A., 4th Cir.), 21 Am. B. R. 474, 165 Fed. 881.

100. Application to referee.—In a former edition of this work, it has been said: "If the application is made to the court of bankruptcy it should be made to the judge if there has yet been no order of reference; otherwise to the referee in charge, under the former law, the register's functions were more clerical than judicial and he had no such power. It has been thought that General Order XII(3) is a limitation on the power to enjoin implied from § 38-a(4); but the latter authorizes courts of bankruptcy and not the Supreme Court, to abridge this power. Further, cases contra must be considered at least impliedly overruled by *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405, the power to issue an order to show cause why property should not be restored being an analogous exercise of jurisdiction, and of a higher class than a mere stay." It is submitted that this is a reasonable exposition of the law on the question. A num-

ber of referees have contended that they had jurisdiction in such cases. In *re White* (Ref., Ala.), 10 Am. B. R. 790, 799; In *re Sabine* (Ref., N. Y.), 1 Am. B. R. 315; In *re Northup* (Ref., N. Y.), 1 Am. B. R. 427. But the weight of authority seems to be opposed to this contention and we have reluctantly departed from the rule laid down in the former text, with the belief, however, that the question is not yet settled.

tion is not yet settled.

Effect of invalid order.—Where a restraining order is accepted by a sheriff as notice of pending bankruptcy proceedings, it is sufficient to stop a sale of the bankrupt's property, although not authoritatively issued by the clerk. *Matter of Miles Paint Mfg. Co.* (D. C., Pa.), 32 Am. B. R. 793.

101. *Matter of Epstein* (D. C., Pa.), 33 Am. B. R. 606, 219 Fed. 635. See also In *re Roger Brown & Co.* (C. C. A., 8th Cir.), 28 Am. B. R. 336, 196 Fed. 758.

Right of referee to enjoin proceedings in State court.—Judge Lowell discussed the subject to some extent in *Re Steuer* (D. C., Mass.), 5 Am. B. R. 214, 104 Fed. 976, but declined to decide the point. He says there, however, that: "It is strongly implied that the referee has some jurisdiction to issue injunctions to any party not an officer of the United States or of a State, unless the injunction stays the proceedings of the court." This opinion is approved in *Re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 255, 143 Fed. 598, holding that a referee may exercise the power of the judge except in certain specified cases, one of the exceptions being that he may restrain a court or officer of the United States or a State, unless there be a pressing necessity to act, to which a certificate of the clerk is the essential prerequisite.

See also Am. B. R. Dig., § 77.

102. In *re Steuer* (D. C., Mass.), 5 Am. B. R. 209, 104 Fed. 976. See § 2 (15) and discussion thereunder, *ante*, p. 76.

ing of temporary restraining orders only,¹⁰⁸ care should be taken to ask no more than the referee can grant. If the parties, upon an application for a stay, submit the question to a referee, they are bound; even if the right of a referee to award an injunction to stay suits and proceedings cannot be regarded as finally settled.¹⁰⁴

c. Papers and procedure.—Save in the interval between the filing of the petition and the adjudication, a stay is always discretionary. Suits, except those asserting remedies incident to valid liens, should, as a rule, be stayed. Unless there has been an abuse of discretion, the stay will not be interfered with on appeal.¹⁰⁵ Application is usually made by a petition setting out the jurisdictional facts, such as the name of the suit, in what court, for what it is brought, the names of the persons sought to be enjoined, of their attorneys of record, and the like, and, if on information and belief, accompanied by sustaining affidavits.¹⁰⁶ The petition for a stay should sufficiently show that the proceeding is pending in a district in which it is made.¹⁰⁷ It may be verified by the attorney where it is shown that the moving parties live at a distance and that the application is made by their attorney in their behalf and for their benefit, and states why it is so made.¹⁰⁸ The reasons why the stay should be granted must clearly appear. If there be a trustee, he should apply, though if he refuses or neglects so to do, or if a trustee be not yet appointed, any party in interest, including the bankrupt, may do so. Before adjudication, the petitioning creditors are the proper persons, but any party interested in the proceeding may also apply. The stay is granted *ex parte*, in the same manner as other Federal writs. If it be a stay proper, as distinguished from a mere temporary injunction coupled with an order to show cause, the granting of it may

103. Rules restricting powers of referees.—“When a motion for an injunction is pending or is about to be made the referee may, in order to prevent injury to the property of the bankrupt, or otherwise, grant a temporary restraining order staying proceedings until the hearing and decision of said motion. In case all parties in interest agree that said motion be heard by the referee in charge, they may file with the referee a written stipulation to that effect. The decision of the referee on such motion shall be filed with the clerk, and if the referee decides that an injunction shall issue, an order to that effect may be made by the judge.” (Rule XXI, Northern and Rule XXIII, Western District of New York.)

Under the rules of the district court of New Jersey a referee has no power to issue an injunction. Lanning, District Judge, in discussing this question said: “If, by consent of the parties in a case, he acquires jurisdiction to hear a motion for injunction, he may hear it, and advise the judge of his decision by filing it with the clerk of the court. The judge of the court, and he only, may then, if the decision of the referee be that an injunction should issue, make an order for injunction. The referee may also, without consent of the parties, in order to prevent injury to the property of the bankrupt, grant a temporary stay of judicial proceedings; but such stay should be but for a few days, and only until the applicant can

have an opportunity to move for an injunction before the judge. Such has been the general practice in the district of New Jersey.” In *re Siebert* (D. C., N. J.), 13 Am. B. R. 348, 133 Fed. 781.

104. In *re Benjamin* (D. C., Pa.), 15 Am. B. R. 351, 140 Fed. 320.

105. In *re Lesser* (C. C. A., 2d Cir.), 3 Am. B. R. 758, 99 Fed. 913; *New River Coal Land Co. v. Ruffner Bros.* (C. C. A., 4th Cir.), 21 Am. B. R. 474, 165 Fed. 881; *Virginia Iron, Coal & Coke Co. v. Olcott* (C. C. A., 4th Cir.), 28 Am. B. R. 321, 197 Fed. 730.

106. In *re Keiler*, Fed. Cas. 7,647. For forms of petition of petitions and orders staying suits and proceedings, see Hagar & Alexander's *Forms in Bankruptcy* (2d ed.), Nos. 258-265.

107. In *re Goldberg* (D. C., N. Y.), 9 Am. B. R. 156, 117 Fed. 692, holding that a petition in a pending bankruptcy proceeding, described as: “In the District Court of the United States for the Northern District of New York. In Bankruptcy No. 1,141,” and which stated that the petition in bankruptcy was filed on a certain date and a writ of subpoena issued “herein,” was sufficient to show that a proceeding in bankruptcy was pending in the Northern District of New York.

108. In *re Goldberg* (D. C., N. Y.), 9 Am. B. R. 156, 117 Fed. 692.

be indorsed on the petition by the judge or the referee, and the clerk must then issue a writ of injunction, which, in turn, must be served by the marshal, in the same manner as other Federal writs. If a temporary restraining order, the practice of the State courts usually controls as to recitals, the signature of the judge or referee, and the method of service.¹⁰⁹ Omnibus stays are not frequent and the writ or order will, as a rule, be addressed to the party stayed *eo nomine*; however, stays directed generally "to all other persons" seem to bind all persons served.¹¹⁰ Whether, if the person to be stayed is not a party to the proceeding, he must be brought in by a subpoena served at the same time, is a question. There is high authority for the practice,¹¹¹ even under the present law; but the wording of the subsection under discussion does not seem to make it necessary. In actual practice, it is rarely essential and much less rarely done. How far courts will investigate the merits of contested applications depends largely on the conscience and industry of the judge or referee. The better authority seems to be that a court of bankruptcy will, if necessary, determine such merits, even swearing witnesses or ordering a referee to ascertain the facts. It will, indeed must, determine whether the debt is dischargeable or not.¹¹² To do this it must often declare the legal effect of pleadings in the State court, and sometimes of a judgment there granted.¹¹³ The petition, if presented to a referee, should be filed in the office of the clerk of the district court.¹¹⁴

VI. DURATION, MODIFICATION AND VACATION OF STAY.

Motions to modify or vacate an order staying proceedings in a State court are made in the usual way, on notice and affidavits, and are often subject to district rules or the practice of the local State courts. If the application for a stay is made prior to adjudication the stay is granted until after an adjudication or the dismissal of the petition. When granted before adjudication it is dissolved by the adjudication, although it may subsequently be renewed. If granted after the adjudication the stay may be continued until "twelve months after the date of such adjudication," but, if within that time such person applies for a discharge, then until the question of such discharge is determined.¹¹⁵ If the year goes by and the bankrupt obtains the extension permitted by § 14-a, it is questionable whether another stay could be granted under the terms of this section of the law; but it probably could under the general equity powers of the court, already discussed under § 2 (15). It is thought, however, that the words "the question of such discharge is determined" are sufficient to embrace the time consumed on an appeal, seasonably taken and diligently prosecuted. Once the discharge is granted or refused, the stay is dissolved. No order to that effect is required. Better practice, however, suggests the application for and entry of such an order, though it is the duty of the court

^{109.} Useful forms will be found under "Supplementary Forms," *post*. See also Hagar and Alexander's *Bankruptcy Forms* (2d ed.), Nos. 258-265.

^{110.} Effect of order "abating" suit.—An order of the State court, made pending an appeal by a defendant from a judgment in favor of the plaintiff "abating" the suit because of the bankruptcy of said defendant, merely stays further action in the case until it is determined in the bankruptcy proceeding whether or not plaintiff was precluded from obtaining a judgment against the defendant. *Tutt v. Fighting Wolf Mining Co.* (Mo. Ct. of App.), 43 Am. B. R. 232, 209 S. W. 304; *Clark v. Fighting Wolf Mining Co.* (Mo. Ct. of App.), 43 Am. B. R. 238, 209 S. W. 307.

^{111.} *In re Lady Byron Mining Co.*, Fed. Cas. 7,980.

^{111.} *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814.

^{112.} *In re Baach* (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761.

^{113.} *Burnham v. Pldcock*, 58 N. Y. App. Div. 273, 5 Am. B. R. 590, 68 N. Y. Supp. 1007; *Knott v. Putnam* (D. C., Vt.), 6 Am. B. R. 80, 107 Fed. 907; *Matter of Lusch* (D. C., N. Y.), 42 Am. B. R. 246, 251 Fed. 316.

^{114.} *In re Gerdes* (D. C., Ohio), 4 Am. B. R. 346, 102 Fed. 318.

^{115.} Stay of proceedings pending discharge.—Pending the bankruptcy proceedings and before discharge, the bankrupt may plead to any suit pending at the time of his adjudication, or subsequently brought, a suggestion of the bankruptcy proceedings, and ask a stay in the State court until the question of his discharge has been finally determined in the bankruptcy

to make such entry, in any event.¹¹⁶ If a bankrupt fails to apply for his discharge within the statutory period, or if the same when applied for is denied, an order restraining the enforcement of a judgment expires by its own limitation.¹¹⁷ Where an action against a bankrupt was stayed by the bankruptcy court where the question of the bankrupt's discharge was pending, a motion to continue the stay after his discharge is granted should be denied.¹¹⁸ But whether or not the discharge, if granted, will release a judgment in respect to which a stay of execution has been granted, may not be determined on a motion to vacate such stay.¹¹⁹ On a motion to vacate an order staying the enforcement of a judgment on the ground that it is for a non-dischargeable debt the burden is on the judgment creditor to show that the judgment is within the exception of the act and not dischargeable.¹²⁰

VII. CONTINUANCE OF SUITS BY TRUSTEE.

a. Where bankrupt is defendant.¹²¹—Subdivision *b* of this section provides that "The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt." The words here used are not the same as those of the former law,¹²² but their effect is similar.¹²³ The trustee should exercise his own judgment with reference to defending a suit pending against the bankrupt at the time of the institution of bankruptcy proceedings and it is not necessarily his duty in such matters to follow the wishes of a majority in number and amount of the creditors, but when his own judgment concurs with that of a great majority of all the creditors, to the effect that the defense of such suit would probably be unsuccessful, delay the settlement of the estate and result in considerable expense, such judgment should control.¹²⁴ One option is with the trustee—he may or may not decide to defend¹²⁵—though, when

court. *Baltimore Bargain house v. Busby* (Ga. Sup. Ct.), 143 Ga. 734, 35 Am. B. R. 119, 85 S. E. 875; *Tutt v. Fighting Wolf Mining Co.* (Mo. Ct. of App.), 43 Am. B. R. 232, 209 S. W. 304.

Auxiliary bill.—By no auxiliary bill dependent upon the bankruptcy proceedings does the District Court get a wider power to stay suits than it would have had as a court of bankruptcy. *Pell v. McCabe* (D. C., N. Y.), 42 Am. B. R. 762, 254 Fed. 356.

116. *Matter of Federal Biscuit Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 612, 214 Fed. 221; *In re Rosenthal* (D. C., N. Y.), 5 Am. B. R. 799, 108 Fed. 368, holding that where the district court stayed a suit in another State for the purpose of enabling a bankrupt to plead his discharge when he had obtained it, it becomes the duty of the court upon the granting of such discharge to the bankrupt to vacate its previous stay and remit both parties to their rights, remedies and defenses under the law.

Reinstatement of case.—Where proceedings in a State court have been stayed until the determination of the right of a defendant to a discharge and such a defendant has failed to obtain its discharge and the time has elapsed precluding it from obtaining the same, the plaintiff is entitled by proper motion and notice to have an order setting aside the order staying the proceeding and to have the case reinstated for trial. *Clark v. Fighting Wolf Mining Co.* (Mo. Ct. of App.), 43 Am. B. R. 238, 209 S. W. 307.

117. *Matter of Levitan* (D. C., N. J.), 34 Am. B. R. 789, 224 Fed. 241.

Where no application for discharge is made. —If the bankrupt has made no application for a discharge, and the time has passed within which an application can be made, there is no right longer to restrain the proceedings in the State court, and the district court should vacate a stay previously granted for an in-

definite period. *Matter of Federal Biscuit Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 612, 214 Fed. 221.

118. *In re Flanders* (D. C., Vt.), 10 Am. B. R. 379, 121 Fed. 236.

119. *Matter of Levitan* (D. C., N. J.), 34 Am. B. R. 789, 224 Fed. 241, and see *In re Mussey* (D. C., Mass.), 3 Am. B. R. 592, 99 Fed. 71; *In re Marshall Paper Co.* (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872; *In re McCarty* (D. C., Ill.), 7 Am. B. R. 40, 111 Fed. 151, and cases cited in *Am. Bankr. Dig.*, §§ 933, 1081.

120. *Matter of Levitan* (D. C., N. J.), 34 Am. B. R. 789, 224 Fed. 241.

121. See also *Am. B. R. Dig.*, § 917.

122. *Act of 1867*, § 16, R. S., § 5,047.

123. *Price v. Price*, 48 Fed. 823.

124. *In re Kearney Bros.* (D. C., N. Y.), 25 Am. B. R. 757, 184 Fed. 190.

125. *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832; *Reade v. Waterhouse*, 53 N. Y. 587.

When there is a fair chance of success in the pending litigation, and its prosecution to judgment would benefit the estate by preventing the taking away of money or property, or by way of the establishment of some important fact or question of law necessary to the efficient administration of the estate, and the amount involved directly or indirectly is substantially more than the probable cost of the litigation, it would be the plain duty of the trustee to defend or prosecute as the case may be. *In re Kearney Bros.* (D. C., N. Y.), 25 Am. B. R. 757, 184 Fed. 190, quoting *Collier on Bankruptcy* (7th ed.), 221.

The trustee should intervene in a suit which is pending against the bankrupt at the time of his adjudication, as such, if the property of the bankrupt is at that time in the hands of a receiver appointed by a

in doubt, he should report at a meeting of creditors for instructions. If he decides to intervene in a pending suit he should secure the approval of the Federal court.¹²⁶ The other option is with the court; it may,¹²⁷ but need not, order the trustee to intervene. Where the suit affects the bankrupt estate and its determination, if adverse to the bankrupt, may deplete the assets, the trustee may properly be ordered to intervene;¹²⁸ and a court of bankruptcy may restrain an action in a State court for such time as will permit the trustee to prepare his papers and make a motion for an order allowing him to intervene.¹²⁹ The State court may not compel a trustee to intervene;¹³⁰ but a plaintiff may be entitled to have a trustee made a party defendant, although he cannot be compelled to answer unless by direction of the bankruptcy court.¹³¹ He can plead to the jurisdiction, or make any defense which the bankrupt could have made, or even any defense which any creditor could have asserted affirmatively.¹³² Once the trustee is a party to such suit, he is bound by the judgment therein,¹³³ but he does not voluntarily submit himself to the jurisdiction of the State court by protesting against its exercise of jurisdiction in an action.¹³⁴ If the judgment is already entered, and the State court refuses to open it on a motion of the trustee, the court of bankruptcy cannot, it seems, force the State court to open the case by restraining the enforcement of its judgment.¹³⁵ It would also seem that a trustee, when once a party, could, on showing the required facts, secure a removal of the cause to the proper Federal court; there are, however, no cases in point. If a trustee does not intervene, he is bound by the judgment to the same extent that any party acquiring an interest pending suit would be bound.¹³⁶ A trustee may not oust the jurisdiction of a State court by pointing out the pendency of the bankruptcy proceedings.¹³⁷ Where a trustee intervenes, he incurs no liability against the estate for costs which accrued before his intervention, and he is in no event personally liable for the costs if his intervention was in good faith.¹³⁸ The right of a

State court in a judgment creditor's action. In re Klein (D. C., Ill.), 3 Am. B. R. 174, 97 Fed. 31.

126. *Hahlo v. Cole*, 112 N. Y. App. Div. 636, 15 Am. B. R. 591, 98 N. Y. Supp. 1049; *Kessler v. Herklots*, 132 N. Y. App. Div. 278, 22 Am. B. R. 257, 117 N. Y. Supp. 45; *Drew v. Fort Payne Co.* (Sup. Ct., Ala.), 186 Ala. 285, 32 Am. B. R. 353, 65 So. 71, citing *Collier on Bankruptcy* (8th ed.), 221, 222.

127. In re *Porter & Bros.* (D. C., Ky.), 6 Am. B. R. 259, 109 Fed. 111.

Creditors against intervention.—It cannot be that the court must direct the trustee to intervene and prosecute a pending suit or defend a pending suit, regardless of the merits and prospects of success; and it cannot be that a trustee must defend such a suit when the creditors are appealed to and four-fifths in number and amount vote against such action. In re *Kearney Bros.* (D. C., N. Y.), 25 Am. B. R. 757, 184 Fed. 190.

128. *Heath v. Shaffer* (D. C., Iowa), 2 Am. B. R. 98, 93 Fed. 647; In re *New England Breeders' Club* (D. C., N. H.), 23 Am. B. R. 689, 175 Fed. 501.

129. In re *Klein* (D. C., Ill.), 3 Am. B. R. 174, 97 Fed. 31.

130. *Oliver v. Cunningham*, Fed. Cas. 10,-

493. But compare *Bear v. Chase* (C. C. A., 4th Cir.), 3 Am. B. R. 746, 99 Fed. 920.

131. *Victor Talking Machine Co. v. Hawthorne, etc., Co.* (C. C., Pa.), 23 Am. B. R. 234, 173 Fed. 617, citing *Collier on Bankruptcy* (7th ed.), p. 221.

132. *London v. Blandford*, 56 Ga. 150; *Sanford v. Sanford*, 58 N. Y. 67; *Knox v. Bank*, 12 Wall. 379, 20 L. Ed. 414.

133. In re *Skinner* (D. C., Iowa), 3 Am. B. R. 163, 97 Fed. 190; In re *Van Alstyne* (D. C., N. Y.), 4 Am. B. R. 42, 100 Fed. 929.

134. *Pugh v. Loisel* (C. C. A., 5th Cir.), 33 Am. B. R. 580, 219 Fed. 417.

135. In re *Franklin* (D. C., Mass.), 6 Am. B. R. 285, 106 Fed. 666, *affd. sub nom. Jacquith v. Rowley*, 188 U. S. 620, 9 Am. B. R. 525, 47 L. Ed. 620. Compare *Neiman v. Shoolbraid*, 2 N. B. N. Rep. 668.

136. *Thatcher v. Rockwell*, 105 U. S. 467, 26 L. Ed. 949.

137. *Des Moines Savings Bank v. Morgan Jewelry Co.*, 123 Iowa 432, 12 Am. B. R. 781, 99 N. W. 121; *Harris v. Luxury Fruit Co.* (Sup. Ct., Ga.), 142 Ga. 67, 32 Am. B. R. 652, 82 S. E. 447.

138. *Malloch v. Adams* (D. C., Mass.), 28 Am. B. R. 916, 199 Fed. 542.

trustee to intervene in a cause pending in a State court against the bankrupt is to be heard and determined under the practice and rules of the State court.¹³⁹

b. Where bankrupt is plaintiff.—Subsection c of this section permits the trustee, with the approval of the court, to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.¹⁴⁰ The words of this subsection are strikingly similar to those of the law of 1867.¹⁴¹ They have, however, been given a somewhat limited meaning. Thus, only such suits as may be beneficial to the estate should be continued by the trustee.¹⁴² If, then, actions not beneficial to the estate are pending, what may the bankrupt do? The authorities are not uniform.¹⁴³ The analogy between such a right of action and any other valueless or burdensome property is striking, and, it is thought, on proper application to the referee in charge, the trustee may be excused from prosecuting such a suit, and the bankrupt authorized to do so for his own benefit.¹⁴⁴ The consent of the bankruptcy court to the substitution of the trustee for the bankrupt in the State court should first be obtained and affirmatively shown.¹⁴⁵ The court whose approval is required is that which appointed the trustee.¹⁴⁶ A cause of action for damages arising out of a personal wrong suffered by the bankrupt does not pass to his trustee in bankruptcy and the trustee should not be permitted to continue the action, since this subsection only relates to actions that are a part of the bankrupt's estate, or in which his estate has an interest.¹⁴⁷ The statute is silent as to the right of the bankrupt to begin a suit in the time which intervenes between the filing of the petition and the election of a trustee; but the Supreme Court has held that the bankrupt's title to the property which

139. *Drew v. Fort Payne Co.* (Sup. Ct., Ala.), 186 Ala. 285, 32 Am. B. R. 353, 65 So. 71; *Bank of Commerce v. Elliott* (Sup. Ct., Wis.), 109 Wis. 648, 6 Am. B. R. 409, 85 N. W. 417.

140. *Griffin v. Ins. Co.* (Sup. Ct., Ga.), 119 Ga. 663, 11 Am. B. R. 622, 46 S. E. 870; *Earl v. Jacobs* (Sup. Ct., Mich.), 177 Mich. 163, 31 Am. B. R. 90, 142 N. W. 1079. See also Am. B. R. Dig., § 913.

141. Act of 1867, § 16, R. S., § 5,047.

142. *In re Haensell* (D. C., Cal.), 1 Am. B. R. 286, 91 Fed. 355; *In re Throckmorton* (C. C. A., 6th Cir.), 17 Am. B. R. 856, 149 Fed. 145; *Griffin v. Ins. Co.* (Sup. Ct., Ga.), 119 La. 633, 11 Am. B. R. 622, 46 S. E. 870; *In re Franks* (D. C., Ala.), 2 Am. B. R. 634, 95 Fed. 635, holding that the trustee may petition the State court to order a sheriff to pay over moneys from a sale under an execution, nullified by the adjudication in bankruptcy.

143. *Towle v. Davenport*, 16 N. B. R. 478; *Noonan v. Orton*, 12 N. B. R. 405; *Gilmore v. Bangs*, 55 Ga. 403; *Sutherland v. Davis*, 42 Ind. 26.

144. Effect of failure of trustee to prosecute.—In the case of *Griffin v. Mutual Life Insurance Co.*, 119 Ga. 663, 11 Am. B. R. 622, 46 S. E. 870, it was held that if no trustee is appointed, or if the bankruptcy court does not consider it to the interest of the estate to permit the trustee to prosecute the suit the action does not abate nor is the bankrupt's debtor discharged from liability

in the pending action; the bankrupt may have an interest in the recovery which he is entitled to protect.

An action by or against the bankrupt in the State court does not abate upon the adjudication in bankruptcy or appointment of a trustee, and in the absence of an application by the trustee for substitution it may be prosecuted or defended by the bankrupt. *Hahlo v. Cohn*, 112 N. Y. App. Div. 636, 15 Am. B. R. 591, 98 N. Y. Supp. 1049.

145. *Hahlo v. Cohn*, 112 N. Y. App. Div. 636, 15 Am. B. R. 591, 98 N. Y. Supp. 1049; *Kessler v. Herklotz*, 132 N. Y. App. Div. 278, 22 Am. B. R. 257, 117 N. Y. Supp. 45.

146. *Malloch v. Adams* (D. C., Mass.), 28 Am. B. R. 916, 199 Fed. 542.

147. Libel.—Under section 70-a(6) of the bankruptcy act, a trustee in bankruptcy cannot be substituted as plaintiff and continue the prosecution of a suit to recover damages for libel, which had been commenced by bankrupt prior to bankruptcy, although the injuries to the bankrupt from such libel may have been the cause of his bankruptcy. *Epstein v. Hardwecker* (Sup. Ct., Okl.), 29 Okl. 337, 26 Am. B. R. 712, 116 Fed. Pac. 789.

Malicious prosecution.—An action for malicious prosecution, if commenced before the adjudication of the insolvent debtor in bankruptcy, is not one which the trustee may continue with consent of the court of bankruptcy. *In re Haensell* (D. C., Cal.), 1 Am. B. R. 286, 91 Fed. 355.

will pass to the trustee, is sufficient to authorize the trustee to bring a suit for damages to such property.¹⁴⁸ If the trustee intervenes, the suit will be continued in his name;¹⁴⁹ but the trustee is liable only for costs after he intervenes, and for costs personally only when guilty of mismanagement or bad faith.¹⁵⁰

c. *Practice*.—The order to intervene and the consent to defend should be granted upon application made by petition or motion. This application, as a rule, may be heard at a meeting of creditors. It may, however, be granted *ex parte*. In some districts the practice is to grant the consent in the form of an order authorizing the trustee to apply to the proper State court for substitution.¹⁵¹ How far an adverse party in the State court should be heard in opposition to the motion is an open question. He certainly should not, if he is not a creditor, and any effort on his part summarily to determine the controversy on the merits should be checked; the State court is the forum for such determination. Permission once granted, the scene shifts to the State court, and the application there will, of course, be in accordance with the rules and practice of that court.¹⁵² Throughout, the practice under these subsections is closely analogous to that where a trustee initiates a suit, discussed under the appropriate sections, *post*.¹⁵³

VIII. LIMITATION ON SUITS BY TRUSTEES

a. *Effect of limitation*.—Subsection *d* provides that "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." It has reference to suits initiated by the trustee, rather than those pending at the time of the bankruptcy.¹⁵⁴ It is similar to the corresponding clause under the act of 1867 in period only. It constitutes an arbitrary limitation on all suits; as to computation of time at least superseding all statutes whether State or Federal,¹⁵⁵ provided the action

148. *Johnson v. Collier*, 222 U. S. 538, 27 Am. B. R. 454, 56 L. Ed. 306.

149. *Ames v. Gilman*, 51 Mass. 239.

150. *Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903; *Reade v. Waterhouse*, 52 N. Y. 587.

In *Murtaugh v. Sullivan*, 74 N. Y. Misc. 517, 27 Am. B. R. 431, 132 N. Y. Supp. 503, it was held that the trustee would not be substituted as plaintiff in an action to foreclose a mechanic's lien so far as his liability for costs was concerned, it appearing that the only purpose of such substitution was to avoid payment of a judgment properly obtained, the defendant no longer having opportunity to demand security for costs.

151. In *re Price* (D. C., N. Y.), 1 Am. B. R. 606, 92 Fed. 987; *Hahlo v. Cohn*, 112 N. Y. App. Div. 636, 15 Am. B. R. 591, 98 N. Y. Supp. 1049, citing *Collier on Bankruptcy* (5th ed.), p. 141.

152. *Drew v. Fort Payne Co.* (Sup. Ct., Ala.), 186 Ala. 285, 32 Am. B. R. 353, 65 So. 71, citing *Collier on Bankruptcy* (8th ed.), 223, 224; *Bank of Commerce v. Elliott* (Sup. Ct., Wis.), 6 Am. B. R. 409.

Action by trustee to recover stock subscriptions.—Before a trustee in bankruptcy, substituted as plaintiff in an action commenced by the receiver of an insolvent corporation prior to its bankruptcy to recover

unpaid stock subscriptions, can continue such action it is necessary that the defendant have notice and an opportunity to be heard upon the validity of the alleged debts of the corporation, and that an order be entered directing proceedings against the stockholders where subscriptions are unpaid for such amount as, together with the assets, will be sufficient to meet the liabilities of the corporation. Where the pleadings fail to allege such facts, they do not state a cause of action. *Chamberlain v. Piercy* (Sup. Ct., Wash.), 82 Wash. 157, 33 Am. B. R. 554, 143 Pac. 977.

153. See under Sections Sixty, Sixty-seven and Seventy of this work.

154. Compare *Maybin v. Raymond*, Fed. Cas. 9,338. See also Am. B. R. Dig., § 665.

155. *Effect of bankruptcy act on statute of limitations*.—In *Freelander v. Holloman*, Fed. Cas. 5,081, also reported in 9 N. B. R. 331, the question of the application of the statute of limitation was considered by the court. It is there said: "The Constitution of the United States conferred upon Congress the power to establish a uniform system of bankruptcy throughout the United States; and when Congress, in pursuance of this power, passed the Bankrupt Act, it at once superseded all laws in conflict with it. The bankrupt's estate and every thing and right connected with it, upon the bankruptcy, at

is not barred by the State statute at the time the petition in bankruptcy was filed.¹⁵⁶ It seems also that the character of the suit is immaterial, provided it amounts to the prosecution of a demand in a court of justice,¹⁵⁷ in respect to the property or rights of property of the bankrupt.¹⁵⁸ It applies also to writs of error sued out to review a judgment of a State court, as well as to suits initiated by the trustee.¹⁵⁹ It does not apply to an application to reopen a case upon the ground that the proceeding was closed before the estate was fully administered.¹⁶⁰ Under familiar principles, this limitation does not affect jurisdiction; to be available, it must be pleaded.¹⁶¹

b. When limitation begins to run; when estate is closed.—Under the present law the two-year limitation begins to run on and after the estate has been closed; under the act of 1867, the time began to run when the cause of action accrued in favor of or against the assignee.¹⁶² The phrase “after the estate has been closed” does not mean the date of the discharge or refusal to discharge; nor does it mean the date the referee remits the papers of a closed case to the clerk.¹⁶³ It rather refers to the date when the final decree approving the trustee's account and discharging him is granted.¹⁶⁴ Even this is, however, not accurate, for in no asset bankruptcies no trustee may be appointed and

once passed under the control and operation of the bankrupt law. After that the rights of those in interest may be contracted or enlarged, as Congress in its wisdom may provide. This provision, in the second section, provides that all rights of action barred upon the appointment of the assignee shall remain barred, whether in favor of or against the assignee, and give both to the assignee and those claiming an adverse interest to any property claimed by the assignee in the adverse possession of others, or claimed by others, to property in the hands or under the control of the assignee, two years in which to commence proceedings in equity or at law for its recovery. This is a separate and independent provision, and has no connection with any State statute on the subject. It may extend or may contract the time provided in the statute of limitations. Thus, if at the time of the appointment of the assignee but a few days remained of the time necessary to complete the bar, the time would be extended; or, if the statute had just commenced running, and under the State law would have ten years to run, as in case of actions of ejectment to recover real estate, it would be complete within two years.”

The limitation applies to suits for the recovery of preferences under § 60-b, exclusive of a State statute prescribing a different limitation. *Arnold Grocery Co. v. Shackelford* (Ga. Sup. Ct.), 140 Ga. 585, 31 Am. B. R. 119, 79 S. E. 470.

156. *Sheldon v. Parker* (Sup. Ct., Neb.), 66 Neb. 610, 11 Am. B. R. 152, 92 N. W. 923.

157. *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636; *Ames v. Gilman*, 51 Mass. 239; *Union Canal Co. v. Woodside*, 11 Pa. St. 176.

Summary proceedings.—The Statute of Limitations is applicable to summary proceedings instituted by a trustee in bankruptcy. *Matter of Franklin Brewing Co.* (C. C. A., 2d Cir.), 45 Am. B. R. 7, 263 Fed. 512.

158. *In re Connant*, Fed. Cas. 3,066; *Stevens v. Hauser*, 39 N. Y. 302.

159. *Jenkins v. Bank*, 106 U. S. 571, 27 L. Ed. 304; *Walker v. Towner*, Fed. Cas. 17,069.

160. An application to reopen a case, upon the ground that the proceedings were closed before the estate was fully administered, is not a “suit” within the meaning of section 11-d. A former trustee has no standing in court to seek the reopening of a bankruptcy proceeding. None but creditors who have proved their claims are entitled to that relief. *Matter of Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246.

161. *Chemung Bank v. Judson*, 8 N. Y. 254. See also *Gormley v. Bunion*, 138 U. S. 623, 630, 34 L. Ed. 1036; *Ritzer v. Wood*, 109 U. S. 187, 27 L. Ed. 900; *Upton v. McLaughlin*, 105 U. S. 640, 26 L. Ed. 1,197; *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847.

162. When limitation begins to run.—Where during the pendency of bankruptcy proceedings the trustee had, or might readily have had, knowledge that bankrupt had made a preferential transfer of property, and it appeared that the only reason that inquiries concerning the same were not prosecuted further was that, as there were mortgages on the property, further prosecution was deemed not worth while, the trustee cannot claim in a suit begun more than two years after the estate was closed, that the fraud had only been discovered about a month before the commencement of the suit, so as to have prevented the limitation of two years, contained in section 11-a of the bankruptcy act from having expired. *Kinder v. Scharf* (Sup. Ct., La.), 129 La. 218, 26 Am. B. R. 765, 55 So. 769.

In an action by a trustee in bankruptcy to compel a stockholder of the bankrupt to pay an assessment upon stock of the bankrupt held by him in compliance with an order of the referee, the statute of limitations does not begin to run until the order of the referee. *Journey v. Youngs* (Miss. Sup. Ct.), 42 Am. B. R. 67, 168 N. W. 441.

For a somewhat remarkable example of the effect of the limitation under the former law, see *Scott v. Devlin*, 59 Fed. 970.

163. See Bankr. Act, § 39-a (7).

164. See Bankr. Act, § 2 (8).

When estate deemed “closed.”—Where the final account of a trustee in bankruptcy has been proved, the trustee discharged and all the funds of the estate distributed, the estate

yet a cause of action may develop; while in many cases when a trustee is appointed he finds himself unable to find assets and, there being no funds with which to pay the expenses incident to a meeting for his discharge, files no report and is not discharged. There are as yet no decisions construing the meaning of this phrase. It is suggested that, where no trustee is appointed, the two years will begin to run from the day when the order dispensing with a trustee is granted, and that, when a trustee is appointed who does not report or seek a final discharge, it will not begin until such discharge is granted. It has been held that where an estate is declared closed, but is subsequently reopened, the two-year period begins to run from the subsequent closing of the estate.¹⁶⁵ Failure to commence the action within the required time because of inability to serve process is no excuse.¹⁶⁶

will be deemed "closed" within the meaning of § 11-d and § 2(8) of the bankruptcy act, and the trustee after the reopening of the estate and his reappointment cannot assert, in a suit brought to set aside as preferential a conveyance made by bankrupt within the four months' period, that the estate had not been "fully administered," because the property sued for had not been included in the

administration, as such property, although fraudulently conveyed, would form no part of the estate until the conveyance had been set aside. *Kinder v. Scharff* (Sup. Ct., La.), 129 La. 218, 26 Am. B. R. 765, 55 So. 769.

165. *Bilafsky v. Abraham*, 183 Mass. 401, 67 N. E. 318.

166. *Amey v. Watertown*, 130 U. S. 320, 32 L. Ed. 953.

SECTION TWELVE.

COMPOSITIONS, WHEN CONFIRMED.

§ 12. Compositions, When Confirmed.—*a* A bankrupt may offer, either before or after adjudication, terms of composition to his creditors, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts. *In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation of conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.**

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

* The amendment of 1910 is in italics.

Analogous provisions: In U. S.: R. S., § 5103-A (Act of June 22, 1874).

In Eng.: Act of 1890, § 3, which supersedes Act of 1883, § 18. See also Act of 1833, § 23. See also Deeds of Arrangement Acts of 1887 and 1900.

In Can.: Act of 1919, § 13.

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a. *The English and Canadian systems.*—Not until 1825, was a composition with creditors permitted in England, nor did this first statute discharge the debts of dissentient creditors. The act of 1849, which required the bankrupt

to make a *cessio bonorum*, provided for a discharge available against all creditors whether consenting or not. The act of 1869, § 126, is concededly the progenitor of our system of composition. Since then, two statutes have been passed in England, that of 1883 and that of 1890. The latter repeals the former's provisions concerning compositions, and is now the law. By it, in connection with § 23 of the act of 1883, a scheme of composition may be offered either between the entry of the receiving order (petition) and the adjudication, or after that date. When the offer is after that date, the practice seems not unlike our own; but a composition outside of, *i. e.*, before an actual bankruptcy, is not possible under our law.¹ The English statutes also provide for "deeds of arrangement" with creditors, a procedure something like those of our State insolvency laws that require the assent of creditors in advance.² In actual practice, these deeds of arrangement are more general than compositions proper.³ In England schemes of arrangement as distinguished from compositions are possible even after bankruptcy proceedings are commenced. The Canadian statute is similar in its provisions to our own although more elaborate.^{3a}

b. Continental systems.—The laws of the continental countries distinguish between compositions without the relinquishment of assets, and compositions with relinquishment. The first class differs from the English method in that it cannot take place until after a bankruptcy proceeding has been begun, and results in a part payment and the creation of a "debt of honor" for the balance, the bankrupt being restored to his business, but compelled to perform the terms of his composition agreement. In effect, this is merely an extension, but, when consented to by certain percentages of the creditors, is binding on all. It is, on the Continent, decidedly the more general and more popular method. The other kind of composition resembles that in vogue here, but seems to be possible only in France and Greece. Besides, some countries permit an arrangement with creditors before bankruptcy, to prevent or avoid bankruptcy, and, therefore, properly called "preventive compositions." These correspond to the English deeds of arrangement, either in or out of the proceeding proper, if made before the actual adjudication.⁴ The modern tendency is toward arrangements or compositions between the creditor and debtor, as distinguished from the harsher rules of the older bankruptcy laws. The section now under discussion will, therefore, become increasingly important as the years go on.

c. Compositions under act of 1867 as amended in 1874.⁵—Our first and second bankruptcy laws did not provide for compositions. Nor did the law of 1867, until amended by the act of June 22, 1874.⁶ The corresponding section of the present law is not only more terse, but, in effect, in several particulars unlike that of the law of 1874. The latter, and the adjudicated cases under it, are, therefore, not always in point. Its main features should, however, be understood and will be briefly outlined here, the foot-notes indicating the leading cases. The discussion of the present section, *post*, is confined, as far as possible,

1. Compare § 23, Eng. Act of Bankruptcy, 1883, with § 3, Act of 1890.

2. See N. Y. Debtor and Creditor Law, §§ 50-86.

3. See Eng. Deeds of Arrangement Acts of 1887 and 1890. The popularity of deeds of arrangement in England is, from our point of view, difficult to understand. Our insolvency laws, requiring in advance the assent of creditors, are practically dead letters.

3a. Canadian Bankruptcy Act of 1919, § 13.

4. The writer is greatly indebted in this connection to "Bankruptcy, a Study in Comparative Legislation," by S. Whitney Dunscomb, Jr., Esq., of the New York Bar; being No. 2, Vol. II, of the Columbia College Studies in History, Economics, and Public Law.

5. R. S., § 5103-a (Act of June 22, 1874, Ch. 390, § 17, 18 Stat. at Large, 182), *post*.

6. The parentage of this act is made clear in *re Scott*, Fed. Cas. 12, 519, where the English and American laws on compositions are set out in parallel columns.

to the meaning of the words of the statute, whether or not already interpreted by the courts. Under the act of 1874, a composition could be offered in a pending proceeding either before or after the adjudication.⁷ If offered, a meeting of creditors was called,⁸ at which the debtor was obliged to be present and answer all inquiries made of him, and also to produce a statement of assets and liabilities with the names and addresses of his creditors.⁹ At such meeting, a resolution accepting the proposed composition became operative if passed by a majority in number and three-fourths in amount of creditors present or represented,¹⁰ and binding if confirmed by the signatures of the debtor and two-thirds in number and one-half in value of all his creditors.¹¹ Creditors on fifty dollars or less were counted as to amount but not as to number;¹² and secured creditors were not counted unless they relinquished their security.¹³ The resolution, if thus operative and confirmed, with a statement of assets and liabilities,¹⁴ was submitted to the judge, who thereupon calling a meeting of creditors,¹⁵ and, if (a) satisfied that the resolution was lawfully passed,¹⁶ and (b) that it was for the best interests¹⁷ of all concerned, caused it to be recorded. A composition once agreed to could be varied by a similar procedure.¹⁸ Compositions provided for the *pro rata* satisfaction in money of all debts not secured or entitled to priority.¹⁹ When accepted, they were binding on all creditors scheduled in the statement produced by the debtor at the meeting at which the resolution was passed,²⁰ and could be enforced by the court summarily or by contempt proceedings.²¹ If a composition was not ordered, or, when ordered, could not be carried out, the bankruptcy proceeding went on.²²

II. COMPOSITIONS UNDER THE PRESENT LAW.

a. *In general.*—The more important changes made by the present law are discussed later. A few of them are: (1) the composition, when offered after adjudication, cannot be offered until the bankrupt has filed his schedules and been examined, and the proposed terms have been accepted in writing by a

7. In re Reiman, Fed. Cas. 11,673; *affd.*, s. c., Fed. Cas. 11,674; In re Morris, Fed. Cas. 9,824; In re Odell, Fed. Cas. 10,427.

8. In re Spades, Fed. Cas. 13,196; In re Haskell, Fed. Cas. 6,192; In re Spencer, Fed. Cas. 13,229; *Lieke v. Thomas*, 116 U. S. 605, 29 L. Ed. 744.

9. In re Haskell, Fed. Cas. 6,192; In re Holmes, Fed. Cas. 6,632; In re Dobbins, Fed. Cas. 3,943; In re Proby, Fed. Cas. 11,439; In re Little, Fed. Cas. 8,392.

10. In re Holmes, Fed. Cas. 6,632; In re Spades, Fed. Cas. 13,196; In re Gilday, Fed. Cas. 5,422; *Ex parte Jewett*, Fed. Cas. 7,303; In re Keller, Fed. Cas. 7,654.

11. In re Gilday, Fed. Cas. 5,422; In re Spillman, Fed. Cas. 13,242; In re Scott, Fed. Cas. 12,519; *Home Nat. Bank v. Carpenter*, 129 Mass. 1.

12. In re Wald, Fed. Cas. 17,054.

13. In re Spades, Fed. Cas. 13,196; In re Van Auker, Fed. Cas. 16,828; In re O'Neil, Fed. Cas. 10,528; *Flower v. Greenbaum*, 50 Fed. 190.

14. In re Haskell, Fed. Cas. 6,192.

15. In re Scott, Fed. Cas. 12,519.

16. In re Sawyer, Fed. Cas. 12,395; In re Walshe, Fed. Cas. 17,118; In re Cavan, Fed. Cas. 2,528; In re Greenbaum, Fed. Cas. 5,769.

17. In re Haskell, Fed. Cas. 6,192; In re Weber Furniture Co., Fed. Cas. 17,330; In re Reiman, Fed. Cas. 11,673; In re Whipple, Fed. Cas. 17,513; In re Welles, Fed. Cas. 17,377.

18. In re McDowell, Fed. Cas. 8,776; In re Reiman, Fed. Cas. 11,673. See *Matter of Kinnane Co. (D. C., Ohio)*, 33 Am. B. R. 243, 221 Fed. 762. Citing *Collier on Bankruptcy* (10th ed.) 287.

19. In re Reiman, Fed. Cas. 11,673; In re Langdon, Fed. Cas. 8,058; In re Louis, Fed. Cas. 8,528; In re Clapp, Fed. Cas. 2,785; In re McNab, Fed. Cas. 8,906; In re Hurst, Fed. Cas. 6,925; In re Wilson, Fed. Cas. 17,781.

20. In re Hurst, Fed. Cas. 6,925; In re Reiman, Fed. Cas. 11,673; In re Lytle, Fed. Cas. 8,650; In re Bechet, Fed. Cas. 1,210; In re Hamlin, Fed. Cas. 5,994.

21. In re McKeon, Fed. Cas. 8,858; In re Tooker, Fed. Cas. 14,096; In re Renisen, Fed. Cas. 11,698; In re Waetzfelder, Fed. Cas. 17,048.

22. In re Bayly, Fed. Cas. 1,144; *Bidwell v. Bidwell*, 92 Pa. St. 61; *Whittemore v. Stephens*, 48 Mich. 573, 12 N. W. 858; In re Kohlstaad, Fed. Cas. 7,918.

majority in number and amount of all claims allowed, and the consideration to be paid to creditors and the money necessary to pay debts entitled to priority and the expenses of administration shall have been deposited in court; (2) there are now three available objections to a composition, the first only being the same as that under the former law, and any available objection to the debtor's discharge being equally effective to prevent a composition. The court, and not the debtor, distributes the consideration. The practice, too, is necessarily different. Further, the section is silent as to some things specifically stated in the former law.

b. Constitutionality.—The objection was raised as to the constitutionality of the act of 1874. But, if the present section amounts, as it does, to a *cessio bonorum*, whence each creditor obtains substantially as great a *pro rata* as he would through distribution in bankruptcy, the sections on compositions are clearly within the power given Congress to establish a uniform system of bankruptcy.²³ Nor does the fact that the question whether the bankrupt shall be released from his debts depends upon a majority vote by his creditors, render the law unconstitutional. The discharge and the manner of awarding it are mere incidents.²⁴ The essential purpose of bankruptcy law is *pro rata* distribution of assets,²⁵ and this being brought about by composition under this section, it is constitutional.

c. Section, how construed.—Since it is in derogation of the common law, and compels any dissenting creditors to accept the percentage accepted by the majority and deprives them of their remedies on the balance thereafter, this section is strictly construed.²⁶ There must be the utmost good faith on the part of a bankrupt in offering a composition; and any attempt on his part to "trade" with the creditors or the court by offering a larger sum after he finds his first offer to be unsatisfactory, is quite contrary to the spirit of the statute.²⁷ Where the parties and the referee follow a course of procedure utterly at variance with the law, confirmation may be refused.

d. Who may offer composition.—Any "bankrupt," that is, any person, copartnership, or corporation against whom an involuntary petition has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt, can offer a composition.²⁸ This seems to have been so under the former law, though the word then was "person."²⁹ An offer of composition made by a third party is not authorized by the bankruptcy act.³⁰

23. In re Belman, Fed. Cas. 11,673; In re Chamberlain, Fed. Cas. 2,580.

24. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1, 46 L. Ed. 1113.

25. See U. S. v. Fisher, 2 Cranch, 359, 396, 2 L. Ed. 304; McCulloch v. Maryland, 4 Wheat, 316, 321, 4 L. Ed. 579.

26. In re Shields, Fed. Cas. 12,784; In re Rider (D. C., N. Y.), 3 Am. B. R. 178, 96 Fed. 808; In re Frear (D. C., N. Y.), 10 Am. B. R. 199, 120 Fed. 978. Text cited with approval in Broadway Trust Co. v. Mannheim, 47 N. Y. Misc. 415, 195 N. Y. Supp. 83, 14 Am. B. R. 122; Matter of Kinnane Co., (D. C., Ohio), 34 Am. B. R. 119, 221 Fed. 762; Matter of Goldstein (D. C., Conn.), 32 Am. B. R. 402, 213 Fed. 115, quoting above text with approval.

In re Rider (D. C., N. Y.), 3 Am. B. R. 178, 96 Fed. 808, the court said: "The effect of a composition is to supersede the bankruptcy proceedings and reinvest the bankrupt with all his property free from the claims of creditors. As an abstract proposition considered for a moment apart from the provisions of the statute, it is entirely clear that a condition so plainly in derogation of common-law rights

should not be permitted unless it is reasonably certain that the creditors approve and that they will fare at least as well as they would were the estate administered in the usual course."

See also Am. B. R. Dig. § 688.

27. Matter of Cockshaw (D. C., N. Y.), 34 Am. B. R. 278, 220 Fed. 239.

28. Corporation.—Matter of O'Gara Coal Co. (C. C. A., 7th Cir.), 44 Am. B. R. 206, 260 Fed. 742. Compare Bankr. Act, § 1 (4), with § 1 (19). And see §§ 4 and 5.

29. In re Weber Furniture Co., Fed. Cas. 17,381; affd. on appeal s. c., Fed. Cas. 17,331; Pool v. McDonald, Fed. Cas. 11,268.

30. Offer by third party.—An order providing that upon deposit by a tenant in possession of and claiming the bankrupts' real estate of a sufficient amount to pay unsecured creditors, costs of administration, and attorney's fees, the petition in bankruptcy shall be dismissed and the property delivered to the tenant, is unauthorized and contrary to the bankruptcy act and the practice thereunder. Luxury Fruit Co. v. Harris (C. C. A., 5th Cir.), 33 Am. B. R. 228, 217 Fed. 740.

c. General purpose and effect.³¹—A composition in bankruptcy is not alone a contract between the bankrupt and his unsecured creditors, but also, on its confirmation, a judgment of the court, having definite legal results.^{31a} The act itself seems to recognize that composition is in some respects outside of bankruptcy, for it is provided in § 12 (e) that if composition is not confirmed "the estate shall be administered in bankruptcy as herein provided."³² If the judge refuses to confirm the composition, the bankruptcy proceeding *per se* is revived and must be proceeded with as if no offer of composition had been made. If it is confirmed a formal order is entered to that effect.³³ This order and that dismissing the case are not the same. A certified copy of the order of confirmation constitutes evidence of the revesting of the title and, if recorded, imparts the same notice as a deed from a trustee to the bankrupt.³⁴ The effect of a composition is to supersede the bankruptcy proceedings and reinvest the bankrupt with all his property free from the claims of creditors.³⁵ It either extinguishes the legal liability or is a bar to the remedy, and in either event the bankrupt can no longer be compelled to pay.^{35a} Not only the title to the property, but also its accretion and proceeds revests in the bankrupt. Thus where a trustee leases certain property of the bankrupt estate, upon a confirmation of a composition, the rights in the leases accrue to the bankrupt.³⁶ Provable claims are discharged^{36a} though the holders thereof did not actually prove the same or participate with the other creditors in taking action upon the composition.³⁷ But it does not affect the debtor's obligation created as a part of the composition;³⁸ and, if notes given as the consideration are not paid, they are payable in their original amount.³⁹ The composition is only effective to release claims which are provable in bankruptcy, so that if a claim is not provable, as, for instance, where it is for rent accruing under a lease after the commencement of bankruptcy proceedings, attachment will lie against property of the bankrupt, the title of which has revested in him because of the confirmation of composition.⁴⁰

31. See also Am. B. R. Dig. §§ 714-716.

31a. *Cobb v. First Nat. Bank of Livonia* (D. C., Ga.), 45 Am. B. R. 48, 263 Fed. 1000.

32. *In re Lane* (D. C., Mass.), 11 Am. B. R. 137, 125 Fed. 772; *Cumberland Glass Mfg. Co. v. DeWitt* (U. S. Sup. Ct.), 236 U. S. 238, 34 Am. B. R. 723, 50 L. Ed. 583, which cited with approval the opinion of Judge Lowell in the case of *In re Laine*, *supra*. Compare *Matter of Bickmore Shoe Co.* (D. C., Ga.), 45 Am. B. R. 24, 263 Fed. 926.

33. Form No. 62.

34. Bankr. Act, § 21-g. See *Mandell & Co. v. Levy* (N. Y. Sup. Ct.), 47 N. Y. Misc. 147, 14 Am. B. R. 549, 93 N. Y. Supp. 544.

35. Bankr. Act, § 70-f; *Cumberland Glass Mfg. Co. v. DeWitt*, 236 U. S. 238, 34 Am. B. R. 723, 50 L. Ed. 583; *In re August*, Fed. Cas. 645; *In re Shaw*, Fed. Cas. 12,716; *In re Rodgers*, Fed. Cas. 11,992; *In re Winship Co.* (C. C. A., 7th Cir.), 9 Am. B. R. 638, 120 Fed. 93, 56 C. C. A. 45; *In re Rider* (D. C., N. Y.), 8 Am. B. R. 178, 96 Fed. 808; *Stone v. Jenkins*, 176 Mass. 544, 4 Am. B. R. 568, 57 N. E. 1002; *Matter of Maytag-Mason Motor Co.* (D. C., Ia.), 35 Am. B. R. 160, 223 Fed. 684; *Am. Improvement Co. v. Lillenthal* (Cal. Dist. Ct. of App.), 44 Am. B. R. 365, 184 Pac. 692.

Action by trustee to recover for conversion of property.—Where a trustee in bankruptcy commences an action to recover for the conversion of certain goods in which the bankrupt had an interest, and thereafter the bankrupt enters into a composition with his creditors and the trustee is discharged, the bankrupt becomes the real party in interest in such action, but the litigation may be carried on in the name of the trustee. *Stone v. Jenkins*, 176 Mass. 544, 4 Am. B. R. 568, 57 N. E. 1002.

Assets in possession of third parties.—When an offer of composition is confirmed by the court, moneys and accounts in the possession of bankers, which they obtained from the bankrupt prior to the bankruptcy, revests in the bankrupt and becomes subject to attachment. *Matter of Frischnecht* (C. C. A., 2d. Cir.), 34 Am. B. R. 530, 223 Fed. 417.

Attachment liens are dissolved by confirmation of an offer of composition made by the bankrupt prior to the adjudication. *Matter of Lillenthal* (C. C. A., 9th Cir.), 43 Am. B. R. 665, 256 Fed. 819.

36a. *Matter of American Paper Co.* (C. C. A., 3d Cir.), 41 Am. B. R. 141, 246 Fed. 790.

36. *Bracklee Co. v. O'Connor* (N. Y. Sup. Ct.), 67 N. Y. Misc. 599, 24 Am. B. R. 499, 122 N. Y. Supp. 710, holding that it is immaterial whether the trustee has been discharged.

36a. Claim of indorser on note proved by indorsee.—Where notes have been given by a bankrupt and transferred by the holder thereof to third persons the liability of the maker is absolutely discharged when the indorsee proves his claim and participates in the composition settlement. *Matter of American Paper Co.* (D. C., N. J.), 40 Am. B. R. 121, 243 Fed. 753.

37. *Glover Grocery Co. v. Dorne*, 116 Ga. 216, 8 Am. B. R. 702, 42 S. E. 347; *Cobb v. First Nat. Bank of Livonia* (D. C., Ga.), 45 Am. B. R. 48, 263 Fed. 1000.

38. Bankr. Act, § 14-c. See also as to debts not affected discussion Section Seventeen of this work.

39. *In re Reiman*, Fed. Cas. 11,673 and 11-675; *In re Hurst*, Fed. Cas. 6,925; *In re Negley*, 20 Fed. 449; *In re Carton & Co.*, 148 Fed. 63;

It has been held in New York that creditors who enter into a composition with a debtor thereby release the debt and lose the right to retain securities held for the debt, unless there be an agreement to the contrary.⁴¹ Composition being outside of bankruptcy, a creditor who has received his composition dividend without protest, is not entitled to set off his claim against the bankrupt⁴² or to proceed to recover upon the unpaid balance of his claim,⁴³ and after confirmation of the composition he may not plead *res judicata* in an action against him on the debt due the bankrupt.⁴⁴ The order of confirmation becomes in effect a discharge and may be pleaded in bar with like effect.⁴⁵ But like a discharge, a composition, if not pleaded, is deemed waived.⁴⁶ The effect of a composition or discharge on the liability of a codebtor is discussed elsewhere.⁴⁷ After an order of confirmation, the bankrupt takes back his property in the same condition that it was in when bankruptcy was initiated, and liens which would be valid and unassailable in the ordinary course of bankruptcy proceedings are protected in composition arrangements and are not discharged or affected.^{47a}

f. Practice.—This is detailed in subsequent paragraphs. The law is not as instructive on this point as was the act of 1874. Nor are the general orders exactly illuminating,⁴⁸ or the forms prescribed by the Supreme Court reliable.⁴⁹ The amendment of 1910 has modified the practice where composition is offered prior to adjudication. It would seem to require the bankrupt to formally petition the court and file therewith the schedules of his property and creditors. In this respect the practice will be much the same

Beck v. Wittenman Bros. (N. Y. App. Div.), 42 Am. B. R. 647, 185 App. Div. (N. Y.), 643.

40. Matter of Frischnecht (C. C. A., 2d Cir.), 34 Am. B. R. 530, 223 Fed. 417.

41. McDonald v. Taylor & Co., 144 N. Y. App. Div. 329, 26 Am. B. R. 635, 637, 128 N. Y. Supp. 1048 (citing the text).

Liability of surety on injunction bond.—The fact that a creditor, the payment of whose claim had been enjoined, voted for and received dividends under a composition by the bankrupt debtor, does not release the surety on the injunction bond from liability. Martin Furniture Co. v. Massey (Tenn. Sup. Ct.), 37 Am. B. R. 380, 186 S. W. 451.

42. Cumberland Glass Mfg. Co. v. DeWitt, 236 U. S. 288, 34 Am. B. R. 723, 59 L. Ed. 583; Hunt v. Holmes, Fed. Cas. No. 6,890, in which Judge Lovell ruled that a creditor who took his composition dividend after the composition was finally passed over his objections, making no attempt to have mutual claims adjusted and set off, thereby waived his claim of set-off; there being no evidence that he received the amount under protest or by mistake, or under any other circumstance which would entitle him to a rehearing or adjustment.

43. In re Ballance (C. C. A., 2d Cir.), 33 Am. B. R. 642, 219 Fed. 537, where a creditor filed a petition to vacate a composition upon the ground of fraud, it was held that the petitioner, after a demurrer to his petition had been overruled, could not take the amount of the composition and also take the chance of proving the allegations of his petition to set aside the composition for fraud, but that he must make election as to which form of relief he would accept, and that he could not take his share of the composition as a partial payment, and proceed to recover upon the unpaid balance of his claim.

44. Cumberland Glass Mfg. Co. v. DeWitt, 236 U. S. 288, 34 Am. B. R. 723, 59 L. Ed. 583, holding that where a creditor in composition proceedings fails to invoke the power of the court to determine whether the right of set-off exists, he may not plead *res judicata* in an action on a claim against him.

45. Cumberland Glass Mfg. Co. v. DeWitt,

236 U. S. 288, 34 Am. B. R. 723, 59 L. Ed. 583; Glover Grocery Co. v. Dorne, 116 Ga. 216, 8 Am. B. R. 702, 42 S. E. 347; Ross v. Saunders (C. C. A., 1st Cir.), 5 Am. B. R. 350, 105 Fed. 915; Broadway Trust Co. v. Mannheim, 47 N. Y. Misc. 415, 14 Am. B. R. 122, 95 N. Y. Supp. 93 (citing the text with approval); Mandell & Co. v. Levy (N. Y. Sup. Ct.), 47 Misc. 147, 14 Am. B. R. 549, 93 N. Y. Supp. 544; Herschman v. Bolster 220 Mass. 137, 33 Am. B. R. 747, 107 N. E. 543; Greenberger v. Schwartz (Pa. Sup. Ct.), 42 Am. B. R. 239, 104 Atl. 574; Oilfields Syndicate v. American Imp. Co. (C. C. A., 9th Cir.), 44 Am. B. R. 490, 260 Fed. 906, affg. 43 Am. B. R. 325, 256 Fed. 979. See also In re Merriman, Fed. Cas. 9,479; In re Becket, Fed. Cas. 1,210. For its effect on a claim for deficiency by a record creditor, see In re Stowell, 24 Fed. 468; Paret v. Ticknor, Fed. Cas. 10,711.

Revival of discharged debt.—A proceeding resulting in the discharge of a debtor from liability, based upon a composition after bankruptcy proceedings are instituted, is not in its nature such a voluntary act of the creditor as is considered in law as being a voluntary assent of the creditor to the satisfaction of the debt and a subsequent written promise to pay the debt is enforceable. Herrington v. Davitt (Ct. of App., N. Y.), 39 Am. B. R. 93, 220 N. Y. 162.

The confirmation of a composition shall discharge the bankrupt from his debts other than those agreed to be paid by the composition, and those not affected by the discharge. Bankr. Act, § 14-c. See post.

Unscheduled creditor.—Where an unscheduled creditor acquires no notice or actual knowledge of the bankruptcy proceedings until after the bankrupt's application for the confirmation of the composition, though he does before the final order of confirmation, he is not bound by the composition. Broadway Trust Co. v. Mannheim, 47 N. Y. Misc. 415, 14 Am. B. R. 122, 95 N. Y. Supp. 93.

46. In re Tooker, Fed. Cas. 14,066; Dimock v. Revere Copper Co., 117 U. S. 559, 29 L. Ed. 904; Hirschman v. Bulster, 220 Mass. 137, 33 Am. B. R. 747, 107 N. E. 543.

as that followed under the act of 1874.⁵⁰ Supplementary forms will, however, be found among the "Supplementary Forms," *post*.⁵¹

III. INFORMAL COMPOSITIONS.

A practice of compromising debts outside of the proceeding in bankruptcy which is sometimes attempted in an informal way should be condemned. A bankrupt's estate can be wound up under the statute in but two ways: (1) by distribution in bankruptcy, or (2) by distribution in composition. The effort is sometimes made to start a proceeding in bankruptcy and then settle with creditors outside the proceeding; either letting the latter die of inanition or else asking for a sale of the assets at a nominal figure to him who furnishes the consideration for the informal settlement. The difficulties attending such an effort are indicated in *In re Lockwood*. It can never be entirely successful until every creditor has accepted the settlement offered. As an attempt to evade the law, fruitful in possibilities of wrong to creditors who may not have notice, it will usually be checked when brought to the attention of the court. Nothing short of positive proof that every creditor has been ascertained and, without exception, paid the same *pro rata*, will warrant an order for the sale of the assets, even to him who comes into court claiming to be subrogated to the rights of the creditors; indeed, it may be doubted whether the court, thus informed of an attempted evasion of the law, will set the machinery of that law in motion for the benefit of him who admits such an attempt.⁵²

IV. OFFERING COMPOSITION.

a. *In general*.⁵³—It has been said that a composition arises from the acceptance of an offer to the creditors to purchase the estate.⁵⁴ The offer of terms should be made as directed by the statute. All the creditors must have notice of the proposal, whether they have proved their claims at the time of the offer or not; the composition must be offered and sufficiently explained to all alike and they must have reasonable opportunity to consider it. They must be fully and honestly advised of the true condition of the debtor's affairs, so they can act intelligently and understandingly in view of the facts and with a knowledge of their rights in the premises. Unless these conditions are met by the bankrupt the composition must fail, for the provisions of the bankruptcy act prescribing the requisites of a composition are to be strictly construed as against those who seek by such means to deprive non-assenting creditors of their right to have the debtor's property administered and distributed in the ordinary course of bankruptcy proceedings.⁵⁵

47. See discussion under Section Sixteen of this work.

47a. *Oilfields Syndicate v. American Imp. Co.* (C. C. A., 9th Cir.), 44 Am. B. R. 490, 260 Fed. 906, affg. 43 Am. B. R. 325, 256 Fed. 979; *Am. Improvement Co. v. Lillenthal* (Cal. Dist. Ct. of App.), 44 Am. B. R. 365, 184 Pac. 682.

48. General Orders XII (3), XXXII.

49. Forms Nos. 60, 61, 62, 63.

50. Under the former law the debtor was required to be present at the meeting and submit to an examination, and produce a statement of assets and liabilities with the names and address of his creditors. *In re Haskell*, Fed. Cas. 6,192; *In re Holmes*, Fed. Cas. 6,632; *In re Dobbins*, Fed. Cas. 8,948; *In re Proby*, Fed. Cas. 11,439; *In re Little*, Fed. Cas. 8,392.

51. See Supplementary Forms, *post*, and Hagar and Alexander's Bankruptcy Forms, (2d Ed.) Nos. 290-310.

52. (D. C., N. Y.), 4 Am. B. R. 731, 104 Fed.

794, wherein the court said: "The parties concerned in adopting this method of settlement took the risk of having its execution interfered with by any additional creditors who might appear within a year and before the provisions of the order were fully executed. Such creditors, proceeding regularly within the time limit of the act, are entitled to their day in court, and to their ratable share in any assets not already distributed."

See also *Matter of Malkan* (C. C. A., 2d Cir.), 44 Am. B. R. 433, 261 Fed. 894.

53. See also Am. B. R. Dig., §§ 690-693.

54. *Matter of Atlantic Construction Co.* (D. C., N. Y.), 35 Am. B. R. 838, 228 Fed. 571; if made after adjudication it is in effect an offer by the bankrupt to purchase the estate from the trustee. *Matter of Spiller* (D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490.

55. *In re Rider* (D. C., N. Y.), 3 Am.

b. Amendment of offer.—The present law contains no provision relating to amended or substituted offers of composition, but amendments have been permitted, and in such a case, the amended or substituted offer supersedes the original offer and must be submitted to the several creditors in the manner prescribed by law for the original offer.⁵⁶ While the amendment of a composition offer should be allowed only in the rarest cases, it should be allowed when the only change in the offer is an increase in the cash offered, and the bankrupt has not trifled with the court, but has at all times acted in good faith.⁵⁷

c. When offer should be made.—(1) **IN GENERAL.**—Subsection *a* provides that the offer to his creditors may be made either before or after adjudication, and after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the required schedules.⁵⁸ A bankrupt will not be allowed to withdraw his offer after it has been accepted, the consideration deposited, and an application for confirmation filed.^{58a}

(2) **AFTER DISCHARGE.**—It has been suggested that since a person ceases to be a bankrupt after he has obtained a formal discharge, the provisions of the law as to compositions are not effectual after such discharge. The statute does provide that the offer be made by the bankrupt, but so long as the estate is being administered in bankruptcy, he continues as the bankrupt so far as such estate and the incidents relating thereto are concerned, notwithstanding his discharge prior to the closing of the estate. There seems to be no reasonable grounds for refusing to a debtor the privileges accorded him by the act in respect to the settlement of the claims against him by composition proceedings, after his discharge, provided the estate is in such condition that it may be returned to him without detriment to the interests of his creditors.⁵⁹

(3) **EFFECT OF AMENDMENT OF 1910.**—Some doubt arose under the law as it existed prior to the amendatory act of 1910 as to whether the examination here referred to may be made after the proceedings are instituted and before the adjudication. Under the amendatory act of 1874 composition was permitted "whether an adjudication had been had or not." The act as amended by the amendatory act of 1910 contains a similar provision and it is now provided that an offer of composition may be made "either before or after adjudication," thus effectually nullifying the effect of decisions holding that composition may not be offered until the bankrupt has submitted to an examination under § 7 (9) at the first meeting of his creditors which under § 55-a may only be held after an adjudication.⁶⁰

B. R. 178, 96 Fed. 806; Matter of Kinnane Co. (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488.

In form of assignment for creditors.—A composition offer made after bankruptcy though the substantial equivalent in results to the creditors of a general assignment for the benefit of creditors had it been carried out before bankruptcy, is not necessarily, in law, no composition at all. *Matter of Graham & Sons (C. C. A., 7th Cir.), 42 Am. B. R. 52, 252 Fed. 93.*

56. Matter of Kinnane Co. (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488.

57. Matter of Cockshaw (D. C., N. Y.), 34 Am. B. R. 278, 220 Fed. 239.

Good faith.—A bankrupt or alleged bankrupt, who, after having made and unsuccessfully endeavored to carry through an offer in composition of a certain amount, makes a new offer of a larger amount, undertakes a considerable burden of explanation as to his good faith. The practice of trading with the court and creditors on offers in composition is not to be encouraged. *Matter of Griffith Stillings Press (D. C., Mass.), 39 Am. B. R. 813, 244 Fed. 315.*

58. See Bankr. Act, § 7(8). The schedules

and lists of creditors are properly filed with the referee. In re Bloodworth-Stembridge Co. (D. C., Ga.), 24 Am. B. R. 156, 178 Fed. 372.

See also Am. B. R. Dig. § 692

58a. Matter of Agree (D. C., Mich.), 40 Am. B. R. 773, 247 Fed. 590.

59. Matter of Spiller (D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490, in which the court says: "If the bankrupt, at the time of making the offer, has not received his discharge, the confirmation operates as one, and secures to him both his former property, and his discharge. In the present case the bankrupts received one of these before making the offer. It is difficult to see why that fact should restrict their right to redeem their property. The creditors could have objected to the discharges, but did not, and the grant of them completed one of the two principal branches of the case. The creditors could still object to a disposal of the estate in accordance with the offer in composition upon any ground specified in the statute. The fact that the discharges were obtained in the usual course seems to me no sufficient reason for denying the right to settle the estate through proceedings in composition."

d. Meeting of creditors.—The statute does not require the offer to be made at a meeting of creditors. Form No. 60 indicates the practice, for it provides for a petition for a meeting of creditors to act upon a proposal for composition. If the offer is made before adjudication, the amendment of 1910 requires the bankrupt to file the required schedules, and thereupon the court is required to call a meeting of the creditors for the allowance of claims, examination of the bankrupt, and preservations or conduct of estates, at which meeting the judge or referee shall preside. If the offer is made after adjudication it may be made at the first meeting of creditors,⁶¹ and it may even be oral; provided there has been an examination of the bankrupt begun at such meeting. But where there has been a reference, the offer and its acceptance should, in the first instance, be filed with the referee. It would seem also that such acceptance by the required number of creditors can be tendered immediately after the offer. This was not so under the former law. A special meeting of creditors, on not less than ten days' notice, was required whenever the bankrupt proposed a composition.

e. Acceptance by creditors.⁶²—(1) **WHEN OFFER TO BE MADE.**—But though the offer may be made, application for its confirmation cannot be made until after the offer has been accepted in writing by a majority in number of all creditors whose claims have been allowed representing a majority in amount. Claims can be allowed only in the way prescribed by the law.⁶³ It results, therefore, that, before application can be made for confirmation, an adjudication must be had, else there can be no allowed claims. Thus is accomplished the first wide gap between the former and the present law. There is no statutory limitation as to time of acceptance, and it is thought the consents of creditors can be obtained at any time after the petition for bankruptcy is filed, and, within the usual limitations as to laches, even after the year for the proving of claims has expired.⁶⁴ They could even be obtained at the first meeting, provided a majority in number and amount were present.

(2) **HOW ACCEPTANCE OBTAINED.**—Any paper containing an unqualified acceptance of the bankrupt's offer and signed by the creditor or a proxy duly authorized to that end, will comply with the statute. The usual method is to send printed forms of acceptance to the creditors. But there must be no improper influences or false representations used to secure signatures, lest the composition be refused confirmation on that ground.⁶⁵ A creditor who has once accepted cannot, in the absence of fraud or misrepresentation, withdraw his acceptance.⁶⁶

60. In re Back Bay Automobile Co. (D. C. Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33.

Effect of amendment of 1910.—The idea of Congress in amending section 12a of the bankruptcy act so that a bankrupt may offer a composition before adjudication, but after he has been examined in open court and that upon filing schedules and suggesting a composition, the court shall call a meeting for such examination shows that the words "after but not before he has been examined in open court" were made to mean that the bankrupt might advance the time of examination and thereafter might present at once the offer of composition. Thus the purpose was plainly to shorten the time necessary in cases of honest composition, and to do away with the necessity of waiting for adjudication, first meeting, and subsequent notice of the meeting to prove claims and of the offer of composition. Hence, an offer of composition and the approval of certain creditors, may be presented as soon as the first meeting and the examination of the bankrupt have been com-

pleted, where notice that the offer would be made and considered has been given to creditors. Matter of Fox (D. C., N. Y.), 34 Am. B. R. 812, 222 Fed. 135.

Procuring acceptances before examination of bankrupt is irregular and a reason for denying confirmation of the composition. Matter of Berler Shoe Co. (D. C., N. Y.), 40 Am. B. R. 470, 246 Fed. 1018.

61. In re Hilborn (D. C., N. Y.), 4 Am. B. R. 741, 104 Fed. 866.

To whom offer is made.—Where an offer of composition is made before the year is up within which claims may be proved it can only be interpreted as made at that time to all those who are shown on the schedules. Matter of Atlantic Construction Co. (D. C., N. Y.), 35 Am. B. R. 833, 228 Fed. 571.

62. See also Am. B. R. Dig. §§ 695-700.

63. Compare Bankr. Act, § 55-b, with § 57-d.

64. Bankr. Act, § 57-n.

65. See "Because of Absence of Good Faith" under this section, *post*.

66. In re Levy (D. C., Pa.), 6 Am. B. R. 290, 110 Fed. 744.

(3) **WHO MAY ACCEPT.**—Only those creditors who have proved their claims before the application to conform is made are allowed to vote on the acceptance of a composition.⁶⁷ A creditor whose right to prove his claim is barred by the one-year limitation has no voice in a composition proceeding.⁶⁸ Priority claims are "allowed" like other claims, but, as the cash to pay them in full must be deposited as a condition precedent, the injustice of counting such claims is apparent. Secured claims will be counted only to the amount unsecured; they can be "allowed" only to such an amount.⁶⁹ Mortgagees whose debts are dependent solely upon the contingency of a deficiency arising upon foreclosure are neither necessary nor proper parties to a proposed composition.⁷⁰

(4) **HOW MANY MUST ACCEPT.**—Here the present statute is widely different from its predecessor. A majority only of claims allowed, constituting a majority in amount of such claims, is sufficient for the consent required by this subsection;⁷¹ and the assignee of a large number of creditors will be counted as one creditor only.⁷² An individual composition of a bankrupt partner of a bankrupt firm cannot be effected by the consent of the firm creditors and without the consent of a majority in number and amount of his individual creditors, even though the consenting majority of the firm creditors be more than a majority of number and amount of all creditors, firm and individual.⁷³ A bankrupt will not be permitted to select a time when but few creditors have proven their claims and then present his terms only to creditors friendly to his interests. Indeed, it has been thought that the phrasing of Form No. 60 implies that a court of bankruptcy should notify creditors of a meeting at which it is proposed to offer a composition; and such a practice in cases where but a small number of creditors or creditors apparently controlled by the bankrupt have proven, should usually be followed.⁷⁴

1. Deposit of consideration.—(1) **IN GENERAL.**—Not only must there be a requisite acceptance, but the consideration of the composition must have been deposited in such place as shall be designated by and subject to the order of the judge.^{74a} That this has been done will, if the acceptance is filed in the first instance with the referee, usually be shown by a certificate from the clerk. Whatever the nature of the consideration, it should in value be substantially as much as the property can reasonably be expected to yield to the creditors.⁷⁵

67. In re Rider (D. C., N. Y.), 3 Am. B. R. 178, 96 Fed. 808; Matter of Atlantic Construction Co. (D. C., N. Y.), 35 Am. B. R. 574, 228 Fed. 571.

See also Am. B. R. Dig. § 698.

Attorney for receiver voting.—Where, after the bankrupt had been thoroughly examined, he proposed terms of composition which to a majority seemed best for the creditors, it was not improper for the attorney for the receiver to represent creditors and to vote in favor of said composition having secured powers of attorney to that end. In re McLellan (D. C., N. Y.), 30 Am. B. R. 325, 204 Fed. 482.

68. In re French (D. C., Mass.), 25 Am. B. R. 77, 181 Fed. 558.

69. In re Spades, Fed. Cas. 13,196; In re Scott, Fed. Cas. 12,519; In re O'Neill, Fed. Cas. 10,528; In re Van Auker, Fed. Cas. 16,828.

70. Matter of Kahn (D. C., N. Y.), 9 Am. B. R. 107, 121 Fed. 412.

71. Matter of Goldstein (D. C., Conn.), 32 Am. B. R. 402, 213 Fed. 115; In re Rider (D. C., N. Y.), 3 Am. B. R. 178, 96 Fed. 808; Matter of Silverstein (D. C., N. Y.), 34 Am. B. R. 479, 225 Fed. 665; See also Am. B. R. Dig., § 697.

Withdrawal of claim by creditor.—There is nothing in section 12b which prevents a cred-

itor from withdrawing a claim at any time he pleases, provided such withdrawal is in good faith and without fraud or other wrongful agreement or means. Matter of M. & H. Gordon (D. C., N. Y.), 40 Am. B. R. 301, 245 Fed. 905.

72. In re Messingill (D. C., N. Car.), 7 Am. B. R. 660, 113 Fed. 366.

73. Matter of Uhlman (D. C., N. Y.), 24 Am. B. R. 755, 180 Fed. 944.

74. Compare In re Rider (D. C., N. Y.), 3 Am. B. R. 178, 96 Fed. 808, with In re Hilborn (D. C., N. Y.), 4 Am. B. R. 741, 104 Fed. 866.

74a. Matter of Newbold (D. C., Utah), 40 Am. B. R. 296, 244 Fed. 888.

75. It was, however, held under the former law that, since assets in the hands of the failing debtor were worth more than in the hands of assignees, the existence of a reasonable margin which could be saved by the debtor through composition proceedings was immaterial. In re Weber Furniture Co., Fed. Cas. 17,330 and 17,331; In re Whipple, Fed. Cas. 17,513.

Return of deposit on disaffirmance.—Matter of Morris & Rice (D. C., Mass.), 44 Am. B. R. 146, 258 Fed. 712.

(2) NATURE AND AMOUNT OF CONSIDERATION.—Under the former law, where money was required to be deposited, it was frequently held that notes or other evidences of indebtedness could be deposited in lieu of money.⁷⁶ Whether this can be done under the present law was doubted by a previous editor of this work.⁷⁷ However, the setting-off of the word "consideration," as applied to common creditors, against the word "money," as applied to priority creditors, is significant; and the word "paid" but little affects the result. It is not doubted, therefore, that any consideration which would have been sufficient under the former law will be under this.⁷⁸ It seems established that the creditors may waive the actual deposit of money required to meet the terms of the composition, where it appears for the best interests of the creditors;⁷⁹ and this being so it would follow that notes or other evidences of indebtedness, postponing the payment of the amounts required, may be deposited.⁸⁰ The considerations tendered by a bankrupt should be substantially equivalent to what his estate would pay, were it fully administered in bankruptcy,⁸¹ and must be sufficient to cover the stipulated percentage on all claims of creditors, both those already filed and also those scheduled by the bankrupt and not filed.⁸² Secured claims, not liquidated, should not be considered in determining the amount.⁸³ While the section makes no reference to taxes, by § 64 they are made preferred claims, and the bankrupt must deposit a sufficient sum for their payment.⁸⁴ The fact that a creditor has received a preferential

76. In re Reiman, Fed. Cas. 11,673 and 11,675; In re McNab, Fed. Cas. 8,906; In re Hurst, Fed. Cas. 6,925.

77. Compare, however, careful review of this and kindred branches of the law of compositions in the opinion of Mr. Referee Judson, in In re Rider, 1 N. B. N. 483.

78. See also Bankr. Act, § 14-c, which exempts from the effect of the discharge, following the confirmation of a composition, "those agreed to be paid by the terms of the composition."

79. Kinkead v. Bacon & Sons (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362.

Waiver of deposit.—Where attorneys for the bankrupt, for the trustees and petitioning creditors, and for the trustee himself, all waive in writing the deposit in a composition proceeding of a sum sufficient to pay their fees, in order to expedite and facilitate the proceeding, they may not thereafter insist on payment out of the estate. It seems that if the bankrupt be benefited by the waiver he himself should pay the attorneys. Matter of Frischknecht (C. C. A., 2d Cir.), 34 Am. B. R. 530, 223 Fed. 417.

80. Notes on mortgages.—In Matter of Kinnane Co. (D. C., Ohio), 34 Am. B. R. 119, 217 Fed. 488, it was held that a note or mortgage was a sufficient consideration for a composition; Kinkead v. Bacon & Sons (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362; Matter of Batterman (C. C. A., 2d Cir.), 36 Am. B. R. 695, 231 Fed. 699; Compare In re Frear (D. C., N. Y.), 10 Am. B. R. 199, 120 Fed. 978, wherein Judge Ray (N. D., N. Y.), refused to confirm a composition where promises to pay money or merchandise at a future day had been substituted for money.

81. Matter of Kinnane Co. (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488.

82. In re Fox (Ref., Ohio), 6 Am. B. R. 525; In re Harvey (D. C., Pa.), 16 Am. B. R. 345, 144 Fed. 901; Matter of Atlantic Construction Co. (D. C., N. Y.), 35 Am. B. R. 838, 228 Fed. 571.

Unscheduled claims.—It may be that the bankrupt will be compelled to increase the deposit so as to cover unscheduled claims proved after the offer of composition. See Matter of Ennis (D. C., N. Y.), 25 Am. B. R. 383, 183 Fed. 859.

Expenses on failure of composition.—Money loaned to a bankrupt and deposited by him for the purpose of a composition, is liable, in case the composition fails, for expenses reasonably incurred, but not for expenses resulting from the opposition of a creditor to the composition. Matter of Wiener (D. C., N. Y.), 33 Am. B. R. 355, 217 Fed. 173.

Time within which changes may be proven.—When an estate is to be administered it is necessary to put a time limit to the proving of claims, because the rate of dividend depends upon what claims are proven, but this is not so in a composition because the dividend is necessarily fixed by the bankrupt upon the schedules alone. Matter of Atlantic Construction Co. (D. C., N. Y.), 35 Am. B. R. 838, 228 Fed. 571.

83. In re Harvey (D. C., Pa.), 16 Am. B. R. 345, 144 Fed. 901.

84. In re Flynn (D. C., Mass.), 13 Am. B. R. 720, 134 Fed. 145; In re Fisher & Co. (D. C., N. Y.), 14 Am. B. R. 366, 135 Fed. 223.

transfer within the four months' period does not deprive him of his rights as a creditor, and the amount due on his claim may be considered in determining the amount of the deposit.⁸⁵

(3) **WHEN DEPOSIT IN CASH IS NECESSARY.**—Clearly, sufficient cash "to pay all debts which have priority and the cost of the proceedings" must be deposited.⁸⁶ This was not so under the former law, if there were no appreciable assets.⁸⁷ There can be no doubt, however, that now in all cases this cash deposit must be made. How the "cost of the proceeding" is to be ascertained in advance is a bit puzzling. It includes the referee's, and, since the amendatory act of 1903, the trustee's commission, and the allowances to the attorneys for the bankrupt at least, and may include receivers' and appraisers' fees, and allowances to the attorneys for petitioning creditors. The only safe practice would seem to be to deposit such a sum as will certainly be larger than the total of all possible expenses, allowances, and fees.⁸⁸

85. *Matter of Ghinesin* (Ref., Mich.), 34 Am. B. R. 818, in which Referee Joslyn held that where preferential payments have been made, creditors have the right in determining whether or not they will accept a composition offer, to take into consideration to what extent the bankrupt's assets might be increased by the recovery through the trustee of such preferential payments, but when a composition has once been accepted, every creditor of the bankrupt has a right to prove, file and have allowed any valid claim against the bankrupt without reference to whether or not such creditor has received a preference within the meaning of the Bankruptcy Act.

86. *In re Fisher & Co.* (D. C., N. J.), 14 Am. B. R. 366, 135 Fed. 223; *In re Fox* (Ref., Ohio), 6 Am. B. R. 525; *In re Harvey* (D. C., Pa.), 16 Am. B. R. 345, 144 Fed. 901.

87. *In re Chamberlain*, Fed. Cas. 2,580.

88. Interest on money deposited by a bankrupt pursuant to an offer in composition, earned pending litigation by minority stockholders, should be returned to the bankrupt. *Matter of Kelley* (D. C., Mass.), 35 Am. B. R. 127, 223 Fed. 383.

Compensation of referee.—Where a bankrupt upon application for the confirmation of a composition has filed with the court certain obligations in lieu of a portion of the cash deposit required, and has agreed with the court to pay costs and expenses the same as if the money were actually in court, the referee is entitled to the commissions under section 40 of the Bankruptcy Act, based upon the amount paid. *Matter of White & Co.* (D. C., Ga.), 35 Am. B. R. 670, 225 Fed. 793.

In the case of *Kinhead v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 302, it was held that a referee is entitled to a commission of one-half of one per cent on the amount "to be paid by the bankrupt to creditors" regardless of the fact that payment was not made directly by the bankruptcy court. The amount to be paid "may include sums to which certain note-holders were entitled by virtue of the composition proceedings." And see *Matter of*

Batterman (C. C. A., 2d Cir.), 36 Am. B. R. 695, 231 Fed. 699, holding that where cash deposits for the whole amount agreed to be paid are waived by the creditors, and a part is taken in notes to be paid by third parties, the referee is entitled to his commission on all claims actually paid. See also under § 40, *post*.

Expense chargeable against funds on failure of composition.—Upon an application for withdrawal of a fund deposited by a bankrupt for the purpose of composition, which he had procured, from a third person after adjudication, expenses incurred during the pendency of the composition offer, which would not have been incurred if the orders of the court previous to composition had been carried out, and if the property had been sold in the usual manner, should be paid out of such fund. *Matter of Wiener* (D. C., N. Y.), 32 Am. B. R. 777, 215 Fed. 278.

Expenses of composition.—Where a bankrupt has voluntarily deposited for his attorneys and for the attorney for the petitioning creditors an amount exceeding the total maximum fees of the receiver, said amount may be used to meet the expenses of the composition and of the bankruptcy proceedings. *Matter of Miller* (D. C., N. Y.), 40 Am. B. R. 153, 243 Fed. 242.

Cost of proceedings.—In the case of *In re Harris* (D. C., Tenn.), 9 Am. B. R. 20, 117 Fed. 575, the court said: "Composition is wholly a matter of arrangement by the bankrupt and his creditors, and the negotiations should always comprehend a disposition of all the costs, with a definite understanding of amounts and the method of their payment. If there be an attorney's fee not waived, the attorney should agree with the parties on the amount, or if disagreed, application should be made to the court to fix the fee, and so of the receiver or the trustee; and with every item not distinctly fixed by the statutes or rules of practice, this should be done, as a preliminary of the composition agreement and as a part of it. When the amounts are ascertained, the parties should agree whether the costs come out of the deposit for creditors, or whether the bankrupt provides an additional sum to meet costs."

Counsel and referee fees.—In a case where the bankrupt, by a mortgage of his wife's property, had raised a sufficient amount to offer a composition of 40 cents on the dollar, the attorney for the petitioning creditors was allowed \$50, the attorney for the bankrupt \$20, and the referee was refused an al-

(4) **DEPOSIT OF ASSETS OF ESTATE.**— Under the present law, title to the assets of the estate generally passes from the bankrupt before he offers the composition; it may even have vested in a trustee. Thus, where there has been a sale of perishable property by an assignee, which is ratified by the trustee and the avails turned over to him. The difficulty is, however, more theoretical than real, for the offer of composition could provide for notes payable on a day certain, and on that day, the composition having been meanwhile confirmed, the court could order the notes surrendered to the bankrupt in exchange for cash in the hands of the trustee, and that the latter be disbursed in place of notes. Section 12-e has been thought an insuperable obstacle to this practice; but, it is suggested that a court of bankruptcy will not dismiss the proceeding until its work is done, and that, therefore, the express provisions of the former law, requiring the enforcement of the composition by the court, by implication at least, still survive.⁸⁹ The opposite view would, in the nature of things, make compositions impossible, save through a loan on the security of property to which the bankrupt has not title. In effect, it would render a beneficent and wise system of arrangement between the debtor and his creditors but an exasperating illusion. It can safely be asserted, then, that, even under the present law, the assets of the bankrupt, after the same are vested in the trustee, can be used by him, if not by direct deposit, at least by indirection, to accomplish a composition.⁹⁰

g. Practice before confirmation.— (1) **IN GENERAL.**— Much that has gone before indicates the steps in composition proceedings up to the application for confirmation.

(2) **"EXAMINED."**— This does not necessarily mean that the examination of the bankrupt must be completed, but that there must have been a sufficient examination. If creditors so desire, the judge or referee will, in proper cases, adjourn the meeting to permit an extended examination, before allowing the offer to be made. If there is no meeting pending, and there has been no previous examination, one must be called for the purpose of examination, and the regular procedure to that end must be observed.⁹¹

(3) **ASCERTAINING WHETHER A MAJORITY HAS CONSENTED.**— This seems to be the duty of the referee, where the case has been referred. Only those creditors may accept a composition who could vote for trustee. This excludes,

allowance as special master in the composition proceedings where he was well paid in the bankruptcy proceedings, his fees amounting to \$40. In re Talton (D. C., N. Car.), 14 Am. B. R. 617, 137 Fed. 178.

Costs of attorney of bankrupt.— An application to confirm a composition made by an involuntary bankrupt is no part of the administration of the estate, so as to authorize the payment under section 64(3) of the bankruptcy act of a claim for the fees and disbursements of an attorney employed by bankrupt upon the contest of such an application. In re Fogarty (C. C. A., 8th Cir.), 26 Am. B. R. 568, 187 Fed. 773.

Expenses of continuing bankruptcy proceeding.— After an offer of composition by a bankrupt, the expenses of continuing the bankruptcy proceeding for the purpose of the composition, instead of for liquidation of the estate, should be secured by the bankrupt, and, if necessary, paid out of the amount deposited for the purpose of the composition. Matter of Miller (D. C., N. Y.), 40 Am. B. R. 155, 243 Fed. 242.

⁸⁹. See In re Fox (Ref., Ohio), 6 Am. B. R. 525.

⁹⁰. But see, as tending to disapprove of the statement in the text, In re Frear (D. C., N. Y.), 10 Am. B. R. 190, 120 Fed. 978.

Proceeds of bond by private banker to people.— Under section 25 of the General Business Law of the State of New York providing that private bankers shall give a bond to the People and that "in the event of the insolvency of bankruptcy of the applicant, upon the payment of the full amount of such bond to the assignee, receiver or trustee of the applicant, as the case may require, for the benefit of the persons making such deposits and of such persons as shall deliver money to the applicant for transmission to another," moneys, paid under a bond upon the bankruptcy of an applicant, may be used by his trustee for the purpose of increasing the estate or saving assets for the benefit of the depositors, but cannot be used in carrying out a composition agreement. Matter of Deutsche Brothers (D. C., N. Y.), 33 Am. B. R. 853, 220 Fed. 532.

⁹¹. For instance, notice must be given, see Bankr. Act, § 53-a(1).

⁹². See p. 319, *ante*. And compare In re Scott, Fed. Cas. 12,519.

besides priority creditors and secured creditors to the amount of their securities,⁹² preferred creditors also, for the reason that their claims, if presented, will not be allowed unless accompanied by a surrender.⁹³

(4) **REPORTING TO THE JUDGE.**—Only the judge has power to confirm a composition.⁹⁴ If the offer and acceptance are made after reference, the referee will arrest the proceedings and report the proposed composition to the judge. This may be done by handing up a transcript of his record-book, showing (1) the filing of the debtor's schedules, (2) his examination, (3) his offer, (4) its acceptance by the required majority in number and amount of claims allowed, (5) the consideration to be deposited, and (6) a list of creditors and their addresses, the referee meanwhile, however, keeping the meeting of creditors alive by repeated continuances, so as to permit a prompt resumption of administration in case the proposed composition is not confirmed. If it is, the referee has no other duty, save subsequently, to report the case closed. The proper practice is detailed in the "Supplementary Forms," *post*.⁹⁵

V. CONFIRMING OR REJECTING COMPOSITION.⁹⁶

a. **Who may oppose composition.**—Creditors may oppose a composition irrespective of the number or amount of their claims.⁹⁷ The assignee of an original claim against a bankrupt is entitled to object to the confirmation of a composition.⁹⁸

b. **Objections to confirmation.**—(1) **IN GENERAL.**—The objection that the composition is not offered in accordance with the law (as where it is asserted that a majority in number and amount has not consented), which was a statutory objection under the former law, should probably now be taken specially; and, in that event, opportunity to correct the error will probably be given. It seems that only grounds which can be alleged in the formal written objections are those stated in subsection d.⁹⁹ The court is only concerned with the bankrupt estate; it has nothing to do with that part of the agreement which provides for raising funds which do not come out of the estate.¹⁰⁰

(2) **BECAUSE AGAINST THE BEST INTERESTS OF THE CREDITORS.**—This was an objection under the former law and useful precedents will be found in the reported cases. The English rule seems to be that, unless fraud is shown, the decision of the creditors will be final.¹⁰¹ That this is not the rule in this country is emphasized by the requirement of the present statute that the judge must be "satisfied." The court should confirm, "if satisfied" that the composition does not run counter to any of the three conditions named in § 12-d.¹⁰² That an offer of composition may, on its face, be suggestive of disadvantage to the creditors as compared with the bankruptcy proceedings does not *per se* stamp it with invalidity, nor make it proper for the court to reject it without opportunity for its consideration.^{102a} If, however, the composition proceedings are not in accordance with the provisions of the bankruptcy act, if they are irregular, the court cannot confirm.¹⁰³ The

Evidence that creditor accepting had been paid.—Upon a hearing on an offer of composition evidence by an objecting creditor to show that a creditor which had proved a claim upon a promissory note having two indorsers, and which assented to two offers, had, before assenting to the second offer, been paid in full by the indorsers and was no longer a creditor of the bankrupt, was properly excluded by the referee, where the holder of the note acted with the knowledge and without the objection of the indorsers. *Matter of Griffith Stillings Press* (D. C., Mass.), 89 Am. B. R. 813, 244 Fed. 315.

⁹² Bankr. Act, §§ 57-g and 60-b.

⁹⁴ *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117; *In re Bloodworth-Stembridge Co.* (D. C., Ga.), 24 Am. B. R. 156, 178 Fed. 372.

⁹⁵ See *Supplementary Forms, post*, and *Hagar and Alexander's Bankruptcy Forms*, (2d Ed.), No. 290-310.

⁹⁶ See also Am. B. R. Dig. §§ 702-712.

⁹⁷ *Matter of Rivkin* (D. C., Conn.), 33 Am. B. R. 170, 216 Fed. 218. See also Am. B. R. Dig. § 704.

⁹⁸ *In re Comstock* (D. C., R. I.), 19 Am. B. R. 65, 154 Fed. 747.

point usually made is that the offer is less than would be realized on a sale of the assets in bankruptcy. It is the duty of the court to investigate the facts, independently of any agreement or composition the creditors may have made.¹⁰⁴ In deciding whether the composition should be approved or rejected the sum offered should be compared with what the creditors would receive through the trustee and not with what the debtor might be able to pay them. In the absence of fraud and concealment, the question for the court is not whether the debtor might have offered more, but whether his estate will pay more in bankruptcy.¹⁰⁵ The mere fact that an estate will, on full administration, pay more than the offer in composition, is not sufficient cause for refusing confirmation; if the amount offered is very considerably less than the amount which might be expected reasonably to be realized from administration, the composition is not for the best interests of the creditors and should not be approved.¹⁰⁶ The approval of the majority of the creditors is evidence, *prima facie*, that the composition is for the best interests of the creditors and the burden is upon those who attach it to show the contrary.¹⁰⁷ There must be a positive showing to rebut the presumption that the action of the majority is for the interest of all;¹⁰⁸ yet any gross discrepancy between the offer and the amount to be reasonably expected from the sale of the assets will justify a refusal to confirm;¹⁰⁹ but where the difference is but slight and necessarily problematical, the composition should be confirmed.¹¹⁰ A *bona fide* offer of a substantially larger sum for the assets than the bankrupt, through the composition, is willing to pay, would seem sufficient to warrant a rejection of the composition.^{110a} That part of a composition agreement which provides for a

99. In re Rudwick (D. C., Mass.), 2 Am. B. R. 114, 93 Fed. 787.

100. In re Linderman (D. C., Pa.), 22 Am. B. R. 131, 166 Fed. 593.

101. Adler v. Jones (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967. See *Ex parte* Jewett, Fed. Cas. 7,303; In re Morris, Fed. Cas. 9,824.

102. Matter of Kinnane Co. (D. C., Ohio), 34 Am. B. R. 119, 221 Fed. 762.

102a. Matter of Graham & Sons (C. C. A., 7th Cir.), 42 Am. B. R. 52, 252 Fed. 93.

103. Matter of Kinnane Co. (D. C., Ohio), 34 Am. B. R. 119, 221 Fed. 762; Matter of Berier Shoe Co. (D. C., N. Y.), 40 Am. B. R. 470, 246 Fed. 1018.

104. In re Waynesboro Drug Co. (D. C., Ga.), 19 Am. B. R. 487, 157 Fed. 101.

105. Matter of Kinnane Co. (D. C., Ohio), 34 Am. B. R. 243, 217 Fed. 488.

Determination of question.—In *Ex parte* Jewett, 2 Low, 393, Fed. Cas. 7,303, Judge Lowell said: "In the absence of fraud and concealment, the question for the court seems to be, not whether the debtor might have offered more, but whether his estate would pay more in bankruptcy." Cited in In re Hoxie (D. C., Me.), 25 Am. B. R. 32, 34, 180 Fed. 508. See also Adler v. Jones (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967, 48 C. C. A. 761; United States ex rel. Adler v. Hammond (C. C. A., 6th Cir.), 4 Am. B. R. 736, 104 Fed. 862, 44 C. C. A. 229; In re Waynesboro Drug Co. (D. C., Ga.), 19 Am. B. R. 487, 157 Fed. 101; Matter of Dozier Grocery Co. (D. C., Ala.), 37 Am. B. R. 633, 234 Fed. 169.

106. Matter of Spiller (D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490; Matter of Morris (D. C., Mass.), 39 Am. B. R. 352, 246 Fed. 1021; Matter of Weintraub (D. C., N. Car.), 39 Am. B. R. 407, 240 Fed. 532.

107. City Nat. Bank v. Doolittle (C. C. A., 5th Cir.), 5 Am. B. R. 736, 107 Fed. 236; In re Hoxie (D. C., Me.), 25 Am. B. R. 32, 180 Fed. 508; In re Waynesboro Drug Co. (D. C., Ga.), 19 Am. B. R. 487, 157 Fed. 101; In re Barde &

Levitt (D. C., Ore.), 31 Am. B. R. 161, 207 Fed. 654; Matter of Goldstein (D. C., Conn.), 32 Am. B. R. 402, 213 Fed. 115; Matter of Rivkin (D. C., Conn.), 33 Am. B. R. 170, 216 Fed. 213; Matter of Kinnane Co. (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488; Matter of Spiller (D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490; Matter of Griffith Stillings Press (D. C., Mass.), 39 Am. B. R. 813, 244 Fed. 315. See also Am. B. R. Dig. § 706.

Best interest of all.—"A composition must appear to be for the best interest of all creditors and not merely for the best interest of certain ones of a certain class." Matter of Kinnane Co. (D. C., Ohio), 34 Am. B. R. 119, 221 Fed. 762.

108. In re Weber Furniture Co., Fed. Cas. 17,330 and 17,331; In re Greenbaum, Fed. Cas. 5,769.

Vague and general objections.—Where a bankruptcy proceeding has been delayed for more than five years without accomplishing anything, and specifications of objection to a composition are vague and general in character, and only one creditor out of a hundred objects to the composition, a confirmation should be ordered. Matter of Soloway & Katz (C. C. A., 2d Cir.), 37 Am. B. R. 257, 234 Fed. 67.

109. In re Whipple, Fed. Cas. 17,513; *Ex parte* Williams, 10 L. R. Eq. C. 55; Adler v. Jones (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967; In re Waynesboro Drug Co. (D. C., Ga.), 19 Am. B. R. 487, 157 Fed. 101; In re Hoxie (D. C., Me.), 25 Am. B. R. 32, 180 Fed. 508.

110. In re Arrington Co. (D. C., Va.), 8 Am. B. R. 64, 113 Fed. 498, and in In re Criterion Watch, etc., Co. (Ref., N. Y.), 8 Am. B. R. 206; Bolles v. Kelley (C. C. A., 1st Cir.), 34 Am. B. R. 704, 222 Fed. 63; Matter of Spiller (D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490; Matter of Berier Shoe Co. (D. C., N. Y.), 40 Am. B. R. 470, 246 Fed. 1018.

110a. Matter of Kilgerman (D. C., Pa.), 43 Am. B. R. 670, 253 Fed. 778.

provisional order of adjudication will not be approved.¹¹¹ In the nature of things, each case must turn on its own facts.

(3) **BECAUSE OF COMMISSION OF ACTS OR FAILURE TO PERFORM DUTIES WHICH WOULD BAR A DISCHARGE.**—This objection was not available under the former law. But since the confirmation of a composition discharges the bankrupt,¹¹² it is reasonable that the same grounds which prevent a discharge on a direct petition should also prevent a discharge on an application for confirmation of a composition.¹¹³ The intention clearly is to prevent one who cannot get a discharge from securing its equivalent through a composition.¹¹⁴ If a bankrupt has committed an offense available as an objection to his discharge the court will refuse to confirm the proposed composition without regard to the interests of the creditors, and the fact that but one creditor objects is of no importance,¹¹⁵ as where it appears that the bankrupt has failed to keep books from which his true financial condition might be ascertained,¹¹⁶ or made a false oath to his schedules,^{116a} or where it appears that the bankrupt by a materially false financial statement in writing obtained property from the objecting creditor,¹¹⁷ or where partners take all the money available from the firm's assets immediately before the appointment of a receiver in a State court with the intent to hinder, delay and defraud creditors.¹¹⁸ But a preferential payment on an existing indebtedness does not necessarily constitute a fraudulent conveyance so as to bar the confirmation of a composition.¹¹⁹ The new objections to discharges¹²⁰ will make this subsection more valuable. It is thought that the provision that a petition for a discharge cannot be filed after a year

111. *In re Linderman* (D. C., Pa.), 22 Am. B. R. 131, 166 Fed. 593.

112. Bankr. Act, § 14-c.

113. *In re Comstock* (D. C., R. I.), 19 Am. B. R. 65, 154 Fed. 747; *Matter of Burman and Welling* (D. C., Mass.), 32 Am. B. R. 62, 210 Fed. 512; *Matter of Weintrob* (D. C., N. Car.), 69 Am. B. R. 407, 240 Fed. 532.

114. This proposition was quoted with approval in *In re Comstock* (D. C., R. I.), 19 Am. B. R. 65, 154 Fed. 747; *Matter of Goldstein* (D. C., Conn.), 32 Am. B. R. 402, 213 Fed. 115.

115. *In re Godwin* (D. C., Pa.), 10 Am. B. R. 252, 122 Fed. 111.

116. *In re Olman* (D. C., Ohio), 13 Am. B. R. 895, 134 Fed. 681; *In re Godwin* (D. C., Pa.), 10 Am. B. R. 252, 122 Fed. 111; *In re Barde & Levitt* (D. C., Ore.), 31 Am. B. R. 161, 207 Fed. 654; *In re Wilson* (D. C., Pa.), 5 Am. B. R. 849, 107 Fed. 83; *Matter of Gottlieb* (C. C. A., 2d Cir.), 44 Am. B. R. 464, 262 Fed. 732.

Failure to keep books of account.—Where a bankrupt, whose sales were for cash, kept a merchandise ledger showing his purchases on credit, which were his most important transactions, but kept no other books, except his check-book and pass-book, the court should not refuse to confirm a composition, although no record was kept by the bankrupt of loans to friends and relatives. *Matter of Silberstein* (D. C., N. Y.), 34 Am. B. R. 479, 225 Fed. 665.

116a. *Matter of Gottlieb* (C. C. A., 2d Cir.), 44 Am. B. R. 464, 262 Fed. 732.

117. *In re Griffin* (D. C., Ga.), 25 Am. B. R. 206, 180 Fed. 792, wherein it appeared that the bankrupt had claimed to own a house which, in fact, was the property of his wife.

False statement to commercial agency for purpose of rating.—The confirmation of a composition should not be refused upon the ground that the bankrupt had made a false statement in writing of his financial condition, where it appears that the statement was made a long time previous for the purpose of securing a

rating from a commercial agency and not for the specific purpose of obtaining credit on any particular sale, and sales were made under circumstances where inquiry of the bankrupt himself was possible. *Matter of Witman* (D. C., N. Y.), 32 Am. B. R. 780, 215 Fed. 286.

False statement to procure credit.—Where a debtor, who had credit with a trust company not exceeding \$1,000, rendered a financial statement to it in order to increase his credit, and stipulated that such statement should be considered as continuing in force until the company was notified to the contrary, and the officers of the company testified that they were not notified of any changes in the financial condition of the debtor, and relied upon his statement, which was false, in all subsequent transactions with him, and at the time of the debtor's bankruptcy he owed the company only \$500, an objection by the company to the bankrupt's offer of composition must be sustained. *Matter of Levenson* (D. C., Mass.), 35 Am. B. R. 260, 223 Fed. 874.

Where a statement of assets made by a bankrupt a year prior to his adjudication is not shown to have been materially false, and to have been made to obtain credit, a composition consented to by all the creditors, except the objecting creditor, who had once consented, will be approved, it not appearing that the interests of the creditors would be advanced by a refusal to confirm. *In re Seligman* (D. C., N. Y.), 20 Am. B. R. 774, 163 Fed. 549. See also *In re Griffin* (D. C., N. Y.), 20 Am. B. R. 774, 163 Fed. 549; *International Trust Co. v. Myers* (C. C. A., 1st Cir.), 40 Am. B. R. 71, 245 Fed. 110; *Matter of Keiner* (C. C. A., 2d Cir.), 41 Am. B. R. 507, 250 Fed. 993, revg. 40 Am. B. R. 183, 245 Fed. 807.

118. *Matter of Burman and Welling* (D. C., Mass.), 32 Am. B. R. 62, 210 Fed. 512.

119. *Matter of Rivkin* (D. C., Conn.), 33 Am. B. R. 170, 216 Fed. 218.

120. Bankr. Act, § 14-b (3) (4) (5) (6).

subsequent to the adjudication does not apply to compositions. A composition has primarily to do with administration, and that may, from one cause or another, be delayed for years. For available objections to a discharge, see under sections fourteen and twenty-nine of this work.

(4) **BECAUSE OF ABSENCE OF GOOD FAITH.**—Where the entire course of conduct of a bankrupt is consistent only with an intent to keep his creditors and his trustee in ignorance, and to defraud them by a concealment of his assets, the court cannot confirm a composition.¹²¹ Fraud is sufficient to warrant a refusal to confirm,¹²² but it must be fraud connected with the offer or acceptance of the composition. Cases cited under the succeeding section will also be found in point. Fraud on the part of a single creditor is sufficient,¹²³ as where a creditor proves a false claim.¹²⁴ The giving of money to induce a creditor to sign vitiates the composition,¹²⁵ and, if it is extorted by the creditor, is a crime also.¹²⁶ Any secret advantage given one creditor over his fellows accomplishes the same result.¹²⁷ Where it clearly appears that preferential payments have been made, which, if recovered, would result in a greater percentage than that obtained by the composition, such composition should not be affirmed.¹²⁸ Purchasing claims for the purpose of using them to accomplish a composition is not necessarily fraudulent, but will be so held unless an honest motive appears.¹²⁹ Procuring acceptance of a composition before the examination of the bankrupt is an irregularity for which confirmation of the composition will be denied.^{129a} Improperly inducing a creditor to withdraw has the same effect as improperly persuading him to join in the composition. The good faith of both debtor and creditors must be of the highest order.

c. **Withdrawal of objections.**—Where specifications of objections to the confirmation of a composition are withdrawn, the proposed composition will not be confirmed until after a hearing before the referee to inquire whether the creditors who withdrew their objections were related to the bankrupt, whether objections were well founded, and what grounds there are for believing that the composition will be for the best interests of the creditors.¹³⁰ Objections to an offer in composition cannot be withdrawn after they have been sustained, under an agreement by which the objecting creditor received, directly or indirectly, a larger amount on its claim than other creditors of the same class.¹³¹

121. In re Comstock (D. C., R. I.), 19 Am. B. R. 65, 154 Fed. 747; Matter of Morris (D. C., Mass.), 39 Am. B. R. 352, 246 Fed. 1021; Matter of Weintrob (D. C., N. Car.), 39 Am. B. R. 407, 240 Fed. 532.

The assignee of an original claim against a bankrupt is entitled to object to the confirmation of a composition upon the ground of a fraudulent concealment and disposal of assets, and that the claim was bought for the purpose of forcing a settlement or discontinuance of a suit by the trustee against another person, by threats of opposition to the confirmation, is immaterial. In re Comstock (D. C., R. I.), 19 Am. B. R. 65, 154 Fed. 747.

122. Bankr. Act, § 13.

123. In re Sawyer, Fed. Cas. 12,395; In re Whiting, Fed. Cas. 17,580.

124. Compare Bankr. Act, § 29-b (3).

125. In re Sawyer, Fed. Cas. 12,395.

126. Bankr. Act, § 29-b (5).

127. In re Jacobs, Fed. Cas. 7,159; Bean v. Amsinck, Fed. Cas. 1,167, on appeal s. c. Bean v. Amsinck, 10 Blatchf. 361; Bean v. Brookmire, Fed. Cas. 1,170; Citizens National Bank v. Kerney, 59 Ind. App. 96, 35 Am. B. R. 574, 106 N. E. 139; Matter of M. & H. Gordon (D. C.,

N. Y.), 40 Am. B. R. 301, 245 Fed. 905.

A bond exacted by one creditor as a condition of signing the composition agreement by which the creditor is to receive a certain percentage of his claim regardless of what the other creditors may receive, is unenforceable. Nole v. Abate (N. Y. App. Div.), 44 Am. B. R. 608, 190 App. Div. 705.

128. In re McLellan (D. C., N. Y.), 30 Am. B. R. 325, 204 Fed. 482.

129. In re Sawyer, Fed. Cas. 12,395.

129a. Matter of Berler Shoe Co. (D. C., N. Y.), 40 Am. B. R. 470, 246 Fed. 1018.

130. In re Levy (D. C., Mass.), 22 Am. B. R. 769, 172 Fed. 780.

131. Inducement to withdraw objections.—The court will not permit objections to an offer in composition which have been heard and sustained to be withdrawn after the decision, under any agreement or transaction by which the objecting creditor received, directly or indirectly, a larger amount on its claim than other creditors of the same class. Matter of Levinson (D. C. Mass.), 35 Am. B. R. 260, 223 Fed. 874.

d. Effect of fraud on a composition already confirmed.—Not only may the composition be objected to, but if obtained by fraud, it is void and unenforceable, and the consideration may be recovered.¹³² It would seem, however—a certified copy of the order confirming a composition being evidence of the jurisdiction of the court, the regularity of the proceedings and the fact that the order was made,¹³³ that a composition if attacked for fraud must be so attacked in a court of bankruptcy. It must appear that there was actual fraud, and not mere suspicion of it, to justify setting aside a composition which has been confirmed.¹³⁴

e. Rules of evidence.—A creditor objecting to the confirmation of a composition, has the burden of proving his allegations. But when a set of facts is shown which, unexplained, would lead a reasonable man to believe the allegations of the objecting creditor, the bankrupt must explain.^{134a}

f. Practice.—The practice, from the time the referee's report reaches the judge, is identical with that on contested applications for discharge,¹³⁵ except perhaps, as modified by subsection c "parties in interest" is a broader term than "creditors." The same phrase is used in § 14-b. It is difficult to suppose a case when it will include others than those persons who have proved or may prove their claims. Ordinarily, after the time to enter appearances has expired, and there are none and no objections, there is a reference in any event to the referee in charge, as special master,¹³⁶ it being the duty of the court to satisfy itself as to the three facts set out in subsection d.¹³⁷ In this the practice differs from that on discharges. When objections are filed, there must be a hearing, and the same reference to a special master is customary. The date and place fixed for the hearing must be convenient, but the former is usually set after conference with the respective attorneys. Where the specifications of objections to the confirmation of a composition are meritorious they may be amended to conform to the proof.¹³⁸ The court may allow costs in its discretion. A bankrupt, after composition, including payment of all costs, has been confirmed, must pay his attorney in the matter.¹³⁹ Upon the refusal to confirm a composition the court has no jurisdiction to order that a deed of the trustee be expunged from the records.^{139a} It is discretionary with a referee, whether or not to call a final meeting after a composition has been accepted and confirmed by the court.^{139b} An application to the Circuit Court of Appeals for a writ of mandamus to compel the district judge who has filed an opinion confirming a composition, to sign and docket a decree or order confirming the composition for the purpose of allowing the petitioners a further opportunity to appeal, is not to be granted unless a clear case of necessity, is made out.^{139c}

¹³². *Bean v. Amsinck*, Fed. Cas. 1,167. See also § 13 of this work.

¹³³. Bankr. Act, § 21-f.

¹³⁴. *Union Furniture Co. v. Walker-Cooley Furniture Co.* (D. C., Ga.), 31 Am. B. R. 73, 206 Fed. 217, holding that a composition duly confirmed by the court will not be set aside on the ground of fraudulent representations where it appears that the bankrupt disclosed fully the extent of his assets, and that the creditors with knowledge of the alleged fraud accepted the composition.

Agreement by trustee to guarantee dividend.—An agreement by a trustee in bankruptcy, whereby, without the knowledge of other creditors, he personally guarantees to one cred-

itor the payment of a certain dividend, in order to induce such creditor to sign a composition agreement, constitutes a secret preference to such creditor, and, although it does not render void the composition, it is void itself, as being against public policy. *Jacobs v. Siff*, 74 N. Y. Misc. 53, 27 Am. B. R. 189, 131 N. Y. Supp. 656.

^{134a}. *Matter of Gottlieb* (C. C. A., 2d Cir.), 44 Am. B. R. 464, 262 Fed. 732.

¹³⁵. See discussion under Section Fourteen of this work. See also Am. B. R. Dig. § 707.

¹³⁶. Note General Orders XII(3) and XXXII and § 38-a(4).

¹³⁷. *In re Levy* (D. C., Mass.), 22 Am. B. R. 706, 172 Fed. 780.

VI. DISTRIBUTION IN COMPOSITION.

a. *In general.*—Subsection *e* provides that “upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed.” It will be noticed that the judge is to direct as to the manner of distribution, and the referee has no jurisdiction unless delegated to him by the judge.¹⁴⁰

b. *Practice.*—The law is silent as to the practice on distribution. The consideration has been deposited “in such place as shall be designated by the judge.”¹⁴¹ It can only be distributed “by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge.”¹⁴² But the distribution may be made “as the judge shall direct.” Form No. 63 seems to imply that it shall be made by the clerk, and this practice, amplified by district rules, has been generally adopted. At the same time, a convenient method is to make the referee in charge a distributing agent to the extent of performing the clerical work required;¹⁴³ the checks, however, to be signed by the clerk. Otherwise, the referee should furnish the clerk with a list of claims allowed, specifying the names, amounts, addresses, and the like.¹⁴⁴ As to the proof of claims the course of proceeding is the same whether there be composition, or the proceedings are carried through in ordinary course. Claims not proved within one year from the date of adjudication are not to share in the composition funds,¹⁴⁵ and the bankrupt may be heard to object to the allowance in composition of a claim offered for proof after the expiration of such year.¹⁴⁶ Where an unscheduled claim is not proved until after the deposit for a composition is made though proved within one year from the adjudication and before confirmation, the claimant is not entitled to share *pro rata* with the other creditors in the funds deposited but if there is any balance left after the other payments, it is

The facts and circumstances which bear upon the advisability of confirming the offer are no part of the offer itself, but are properly presentable at the hearing of the offer and the objections thereto. *Matter of Graham & Sons* (C. C. A., 7th Cir.), 42 Am. B. R. 52, 232 Fed. 93.

138. *Matter of Burman and Welling* (D. C., Mass.), 32 Am. B. R. 62, 210 Fed. 512.

139. *In re Martin* (D. C., N. Y.), 18 Am. B. R. 250, 152 Fed. 582. See also Am. B. R. Dig. § 711.

Allowances to attorney of bankrupt.—In the case of *In re Fogarty* (C. C. A., 8th Cir.), 26 Am. B. R. 568, 187 Fed. 773, the court said: “If, because the professional services in this case were rendered in the bankruptcy court—in the administration of the bankruptcy law—the attorney’s fees are therefore costs of administration within the meaning of section 64, nevertheless such fees are not payable from the estate unless the services were rendered to the bankrupt while he was in the performance of some duty prescribed by the act. No duty was laid upon him to try to settle the case and get back his property. That was a privilege, not a duty. If it be said that an application for a discharge is likewise merely a privilege, that the bankrupt’s costs in connection with the hearing upon his application for a discharge are payable from the estate, that the confirmation of a composition is equivalent to a discharge, and that therefore his costs in connection with the prosecution of his composition offer should also be payable from the estate, we think the following considerations are a sufficient answer. Attendance in

the one case is made by the letter of the statute the bankrupt’s duty; in the other, not. Though a confirmed composition has the effect of a discharge, and though confirmation may be opposed on grounds that would prevent a discharge, the first question for the judge is whether the composition is for the best interests of the creditors, and this question has nothing to do with the right to a discharge. This question might be clearly determinable without the attendance of the bankrupt. Upon the judge is laid the duty of becoming “satisfied” that the composition offer is fair. If questions should arise which the judge thought might not be rightly solved without the attendance of the bankrupt and his attorney to aid in determining what was for the best interests of the creditors, it is possible that under section 7-a (2) he might make a “lawful order” requiring the attendance of the bankrupt and his attorney at the expense of the estate. But the issue here is whether the bankrupt can recover from the estate the fees and disbursements of his attorney in endeavoring to force a dismissal of the case and a restoration of the seized property when neither the letter of the statute nor an order of the court imposed upon the bankrupt the obligation to make such a contest. Our interpretation of the sections herein referred to, in connection with the spirit of the act as an entirety, is against the bankrupt’s contention.”

Expenses of inquiring into bankrupt’s affairs.—Where a creditors’ committee accepted the terms of a composition upon the understand-

to be applied to the claim of such claimant to the extent of his dividend.¹⁴⁷ It seems that none of the officers named in the act can collect additional fees for making the distribution, their fees being limited by both it and the general orders. Now that the trustee may receive an allowance in composition cases,¹⁴⁸ such officer, if appointed, may properly be called upon to distribute the consideration.

c. **Dismissal of the case.**—Not until the distribution is completed, should the case be dismissed. If scheduled debts remain unproved or claimants cannot be found, the case proceeds to final distribution as in cases of unclaimed dividends.¹⁴⁹ Section 12-e does not mean that after confirming a composition the court has lost all further power over the case except to distribute the consideration. The case is to be dismissed, but "dismissed" in this connection can mean no more than that the court is not to proceed further with its administration of the estate under the bankruptcy act. It does not mean that there is to be no longer any case before the court. Immediate dismissal is neither directed nor intended. Dismissal is to be when everything remaining for the court to do has been done, and not before, and until that time has arrived the referee has power to act in the case for any proper purpose.¹⁵⁰

VII. NONPERFORMANCE OF COMPOSITION.

If the consideration for the composition has not for any reason been paid by it, the remedy of the creditor for the recovery thereof is against it as upon a new cause of action, which is not affected by the discharge.¹⁵¹ In New York a failure to carry out to the letter a composition agreement revives the original debts.¹⁵²

VIII. APPEALS.

Whether there may be an appeal from the order of a judge confirming or refusing to confirm a composition has already been somewhat debated. The word "satisfied" suggests a discretion from which no appeal will lie; the words of § 25-a emphasize this impression. That an appeal will not lie has been held,¹⁵³ though that ruling was reversed by the Circuit Court of Appeals of the sixth circuit.¹⁵⁴ The latter decision has already been departed from in the first circuit;¹⁵⁵ indeed, it may be suggested that it loses sight of the funda-

ing that a certain sum expended in the payment of counsel who conducted inquiries into the affairs of the bankrupt and disclosed facts leading to the discovery of preferences, without the request of the receiver, but with his knowledge and without his dissent, should be repaid, the District Court, in confirming the composition, properly declined to allow the payment of said sum. *Matter of Siegel* (D. C., N. Y.), 41 Am. B. R. 753, 252 Fed. 197.

139a. *Matter of Kligerman* (D. C., Pa.), 42 Am. B. R. 670, 253 Fed. 778.

139b. *Matter of McNeil Corporation* (D. C., Mass.), 41 Am. B. R. 162, 249 Fed. 765.

139c. *Matter of Brookstone Mfg. Co.* (C. C. A., 1st Cir.), 39 Am. B. R. 552, 239 Fed. 697.

140. *In re Fox* (Ref., Ohio), 6 Am. B. R. 526. See also *In re Lane* (D. C., Mass.), 11 Am. B. R. 136, 125 Fed. 772. See also Am. B. R. Dig. § 713.

141. Bankr. Act, § 12-b.

142. General Order XXIX.

The judge of the court is at liberty to designate any suitable place or person to hold the consideration pending confirmation, and is at liberty to designate any suitable person to make the distribution after confirmation. *Mat-*

ter of Newbold (D. C., Utah), 40 Am. B. R. 298, 244 Fed. 888.

143. *Matter of Newbold* (D. C., Utah), 40 Am. B. R. 298, 244 Fed. 888. Compare *In re Hamlin*, Fed. Cas. 5394.

144. Perhaps this is his duty under General Order XXIV, though that rule being merely an inheritance from the rules in force under the former law, it is quite generally ignored.

145. *In re French* (D. C., Mass.), 25 Am. B. R. 77, 181 Fed. 533; *In re Brown* (D. C., Col.), 10 Am. B. R. 538, 123 Fed. 336; *Matter of Bickmore Shoe Co.* (D. C., Ga.), 45 Am. B. R. 24, 263 Fed. 926. Compare *Matter of Atlantic Construction Co.* (D. C., N. Y.), 35 Am. B. R. 833, 228 Fed. 571; *Matter of Aarons* (D. C., N. J.), 40 Am. B. R. 229, 243 Fed. 634. See Bankr. Act, § 57, *cl. n. post*.

146. *In re Lane* (D. C., Mass.), 11 Am. B. R. 136, 125 Fed. 772; *In re French* (D. C., Mass.), 25 Am. B. R. 77, 181 Fed. 533; *Matter of Bickmore Shoe Co.* (D. C., Ga.), 45 Am. B. R. 24, 263 Fed. 926.

147. *Matter of Ennis* (D. C., N. Y.), 25 Am. B. R. 583, 183 Fed. 859.

148. See Bankr. Act, § 48-a, as amended by the Act of 1903.

mental difference between a discharge¹⁵⁶ and a composition, which, strictly, is a branch of administration, and, for convenience only, has the effect of a discharge. Even if confirmation is refused, the bankrupt is not aggrieved, for his rights were exercised when he made the offer, and he may still apply for a discharge in the bankruptcy proceeding. He, at least, should not be heard on the appeal. If he cannot, creditors surely cannot, as not within the words or intendment of § 25-a. The question is, however, still an open one.¹⁵⁷ It has been held that the creditors assenting to a composition, and who have received the amount due them thereunder, are necessary parties to an appeal from the order of confirmation.¹⁵⁸

149. See Bankr. Act, § 66. *United States v. Sondheim* (D. C., Mass.), 33 Am. B. R. 217, 188 Fed. 378. Compare *In re Hinsdale*, Fed. Cas. 6,526.

150. *United States v. Sondheim* (D. C., Mass.), 33 Am. B. R. 217, 188 Fed. 378, citing text. *Matter of Bickmore Shoe Co.* (D. C., Ga.), 45 Am. B. R. 24, 263 Fed. 926.

A formal order of dismissal should be entered, and the referee notified, that he may file the case as closed. It is not thought that the requirement of § 58-a (8) makes a notice to creditors of a proposed dismissal of this kind necessary.

151. *Matter of Maytag-Mason Motor Co.* (D. C., Iowa), 35 Am. B. R. 160, 223 Fed. 684; *Matter of Kinnane Co.* (D. C., Ohio), 34 Am. B. R. 119, 221 Fed. 762, wherein it was held that if a mortgage given as a part of a proposed composition was not paid by the bankrupt at maturity the whole debt of the creditor would become due and payable.

The majority of the creditors are without power to bind the minority to look to the real estate only, or to deprive such minority from recourse to the bankrupt's personal assets for the satisfaction of their claims should the bankrupt default in the performance of the proposed agreement. *Matter of Kinnane Co.*

(D. C., Ohio), 34 Am. B. R. 119, 221 Fed. 762.

152. *In re A. B. Carton & Co.* (D. C., N. Y.), 17 Am. B. R. 343, 148 Fed. 63.

153. *In re Adler* (D. C., Tenn.), 4 Am. B. R. 583, 103 Fed. 444.

154. *U. S. v. Adler* (D. C., Tenn.), 4 Am. B. R. 736, 104 Fed. 862. See also *Adler v. Jones* (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967.

155. *Ross v. Saunders* (C. C. A., 1st Cir.), 3 Am. B. R. 350, 105 Fed. 915.

156. A discharge proper may be appealed from. See Bankr. Act, § 25-a(2).

157. *Matter of Brookstone Mfg. Co.* (C. C. A., 1st Cir.), 39 Am. B. R. 552, 239 Fed. 607.

When appeal entertained.—An objecting creditor who has filed restrictions against discharge and not withdrawn them is entitled to be heard before the Circuit Court of Appeals on their merits; his rights cannot be prejudiced by the vote of a majority of the other creditors expressing satisfaction with a proposed compromise of conflicting claims. *Matter of Doyle* (C. C. A., 2d Cir.), 34 Am. B. R. 28, 220 Fed. 434.

158. *Field & Co. v. Wolf & Bros., Dry Goods Co.* (C. C. A., 8th Cir.), 9 Am. B. R. 693, 129 Fed. 815, 57 C. C. A. 326.

SECTION THIRTEEN.

COMPOSITIONS, WHEN SET ASIDE.

§ 13. **Compositions, When Set Aside.**—*a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has to come to the petitioners since the confirmation of such composition.

Analogous provisions: In U. S.: R. S., § 5103-A (Act of June 22, 1874).

In Eng.: Act of 1890, § 3 (15).

In Can.: None.

Cross-references: To the law: Jurisdiction of court to set aside compositions, § 2(9).

Compositions, when allowed, § 12.

Certified copy of order setting aside composition as evidence, § 21-f.

Appointment of trustee after composition has been set aside, § 44.

Application of property to payment of debts after composition is set aside, § 64-c.

Title to property to vest in trustee upon setting aside composition, § 70-d.

SYNOPSIS OF SECTION.

COMPOSITIONS, WHEN SET ASIDE.

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I. WHEN COMPOSITION WILL BE SET ASIDE.

a. *In general.*—The striking similarity between this section and § 15, relative to the revocation of a discharge, should be noted at the outset.¹ The marked difference between it and the corresponding clauses of the former law will also

1. For what degree and kind of fraud will sustain a proceeding to set aside a discharge, see under § 15.

be observed.² Then, a composition could be set aside, if it appeared that, in consequence of legal difficulties, or for any sufficient cause, it could not proceed without injustice or undue delay. This, with the added objection that "the approval of the court was obtained by fraud," is the law in England to-day.³ This added objection stands alone in our present law. Those available under the law of 1867 have been discarded. Most of the cases under that law are thus of little value.⁴

b. What constitutes fraud.—Fraud as a reason for refusing to confirm a composition has been discussed under section twelve, *ante*.⁵ Such fraud as would warrant the refusal of confirmation to a composition will warrant its setting aside, with this difference: the fraud must have been discovered since the confirmation of the composition.⁶ It must, of course, have been practiced in the procuring of the composition. In this respect § 13 is clearly a limitation on § 2 (9).⁷ Only when a fraud, as thus restricted, appears and is proven, can the jurisdiction to set aside a composition and reinstate the case be exercised.⁸ The court may annul the composition where it appears that the fraud was that of the trustee and the bankrupt in inducing creditors to accept it by misrepresentation and concealment.⁹ The making of a false schedule, and a false oath to a schedule, and the concealment of property by the bankrupt constitute fraud "practiced in the procuring of such composition."¹⁰ It is fraud sufficient to justify the setting aside of a composition, to assure a creditor that his claim will be included, while it was the purpose of the bankrupt to secure a confirmation of the composition without the consideration of such claim.¹¹ In considering an application to set aside a composition the court may determine whether the fraud shown is such that, had the circumstances been known at the time of the confirmation, the composition would have been rejected.¹² The utmost good faith must be observed by all the parties to the composition, and a secret promise by the debtor to pay one creditor more than others is

2. Act of 1867, as amended by Act of June 22, 1874; U. S. R. S., § 5,103-a, *post*.

3. Eng. Act of Bankruptcy of 1890, § 3 (15).

4. For instance, *In re Dupee*, Fed. Cas. 4,183, has already been declared inapplicable in *In re Rudwick* (D. C., Mass.), 2 Am. B. R. 114, 93 Fed. 787, though this ruling may be doubted. Compare *In re Dietz* (D. C., N. Y.), 3 Am. B. R. 316, 97 Fed. 563.

5. See p. 326, *ante*. See also *Elfelt v. Snow*, Fed. Cas. 4,342; *In re Sturgess*, Fed. Cas. 13,565. For reasons for setting aside compositions. See Am. Bankr. Digest, § 720.

6. *In re Roukous* (D. C., R. I.), 12 Am. B. R. 128, 128 Fed. 645.

7. *In re Rudwick* (D. C., Mass.), 2 Am. B. R. 114, 93 Fed. 787, holding that a composition will not be set aside on the ground that a creditor has failed to receive notice of the proceedings because his address was by mistake misstated in the bankrupt's schedule.

8. *Matter of Cooper Bros.* (D. C., N. Y.), 20 Am. B. R. 634, 159 Fed. 956; *Matter of Abrams & Rubins* (D. C., N. Y.), 23 Am. B. R. 25, 173 Fed. 430; *Matter of Slegel* (C. C. A., 2d Cir.), 43 Am. B. R. 73, 256 Fed. 226.

False statements of third person.—A composition offered by a banker and accepted and confirmed cannot be set aside on the ground that the state superintendent of banks who was appointed a receiver of the bank, and his assistant made false statements as to the assets of the bankrupt. *Matter of Kass* (D. C., N. Y.), 45 Am. B. R. 301, 263 Fed. 138.

9. *In re Wrisley Co.* (C. C. A., 7th Cir.), 13 Am. B. R. 193, 133 Fed. 388.

Misrepresentation as to value when all of the bankrupt's property is turned over to a corporation organized for the purpose of administering the same under the composition does not require the composition to be set aside at the instance of a creditor. *Matter of Kass* (D. C., N. Y.), 45 Am. B. R. 301, 263 Fed. 138.

10. *In re Roukous* (D. C., R. I.), 12 Am. B. R. 128, 128 Fed. 645; *In re Kaplan* (D. C., Pa., Ref.), 29 Am. B. R. 54, holding that a bankrupt knowingly and fraudulently concealing from his trustee assets to a large amount and making a false oath in having sworn that his schedules were correct and that they contained a true statement of all his assets, constitute fraud "practiced in the procuring of such composition" within the meaning of section 13, and warrant the setting aside of the composition upon a petition, filed within six months after its confirmation, by creditors who had no knowledge of such fraud at the time of the confirmation, or at any time prior thereto.

11. *Matter of Abrams & Rubins* (D. C., N. Y.), 23 Am. B. R. 25, 173 Fed. 430.

12. *Matter of Sacharoff & Kleiner* (D. C., N. Y.), 20 Am. B. R. 814, 163 Fed. 664, in which case it appeared that on a composition certain creditors received promissory notes in excess of their *pro rata* share, and because of inability to pay any of the composition notes a second petition in bankruptcy had been filed against the bankrupt, and the motion of a creditor who had himself received a preference was denied, and the notes declared void.

unenforceable and may affect the validity of the composition.¹³ A failure to fulfill the terms of the composition agreement will not of itself be sufficient basis for setting aside the composition. A bankrupt may by his acts deprive himself of the benefit of a composition; he may so behave that the composition order ceases to be a shield, but that furnishes no reason why the order should be vacated in any other manner or for any other reason than that specified in the act.¹⁴

II. PRACTICE ON APPLICATION TO SET ASIDE COMPOSITION.

a. Who may make application.—The application to set aside a composition must be made by the parties in interest. This will generally be deemed equivalent to the "creditors" of the bankrupt, although often meaning more.¹⁵ A creditor who has assigned his claim, although induced to do so by the bankrupt's misrepresentations, is not a "party in interest."¹⁶ But the assignee of an original claim against a bankrupt is entitled to object to the confirmation of a commission on the ground of fraudulent concealment and disposal of assets.¹⁷

b. To whom and when made.—The application should be made to the judge, and should be filed within six months after the composition has been confirmed.¹⁸ The judge only has power to hear the application, not, however, because of the limitation on analogous proceedings found in § 38-a (4), but because only "the judge . . . may set . . . aside a composition." A referee to whom a petition to set aside a composition has been referred may grant an order reopening the estate.¹⁹

c. Petition; practice as on discharge.—The petition should show (1) that the petitioner is a party in interest, (2) that the composition was confirmed not more than six month before, (3) that fraud was practiced in procuring it and the nature and perpetrators of such fraud, and (4) that such fraud was not discovered by the petitioner until after the confirmation of the composition.²⁰ It is not necessary to allege that the petitioner restored, or offered to restore, the consideration on the discovery of the fraud, nor need he tender the same into court.²¹ Leave to file the petition should be granted unless from the facts

13. *Citizens Nat. Bank v. Kerny* (Ind. App. Ct.), 59 Ind. App. 96, 35 Am. B. R. 574, 108 N. E. 139.

14. *Matter of Eisenberg* (D. C., N. Y.), 16 Am. B. R. 776, 148 Fed. 325, wherein the court said: "This bankrupt has a right to maintain the existence of his composition, but the effect thereof may well depend upon proof of its fulfillment."

15. But compare *In re Scott*, Fed. Cas. 12,519. As to practice on setting aside compositions, see Am. Bankr. Dig. § 721.

16. *In re Wrisley & Co.* (C. C. A., 7th Cir.), 13 Am. B. R. 193, 133 Fed. 388. As to meaning of phrase "parties in interest," see under § 14, "Who may file specifications," *post*.

17. *In re Comstock* (D. C., R. I.), 10 Am. B. R. 65, 154 Fed. 747.

18. *Matter of Ennis* (D. C., N. Y.), 25 Am. B. R. 383, 183 Fed. 859; *Matter of Eisenberg* (D. C., N. Y.), 16 Am. B. R. 776, 148 Fed. 325; *In re Jersey Island Packing Co.* (D. C., Cal.), 18 Am. B. R. 417, 154 Fed. 839; *Matter of Graft* (D. C., N. Y.), 40 Am. B. R. 205, 242 Fed. 577; *Matter of Kass* (D. C., N. Y.), 45 Am. B. R. 301, 263 Fed. 138.

19. *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117, wherein the court said: "The pendency of a petition to set aside a composition does not operate to prohibit the referee from exercising his right independently of, or in conjunction with, such application, to reopen an estate, and such reopening is not an interference with the administration of said estate."

20. See *In re Roukous* (D. C., R. I.), 12 Am. B. R. 128, 128 Fed. 645; *Matter of Ennis* (D. C., N. Y.), 25 Am. B. R. 383, 183 Fed. 859; *In re Wilkins* (D. C., N. Y.), 27 Am. B. R. 235, 191 Fed. 94; *Matter of Kass* (D. C., N. Y.), 45 Am. B. R. 301, 263 Fed. 138. For form of petition to set aside composition, see *Hagar & Alexander's Bankr. Forms* (2d Ed.), No. 309.

21. *In re Roukous* (D. C., R. I.), 12 Am. B. R. 128, 128 Fed. 645. Compare *Marshall Field & Co. v. Wolfe Dry Goods Co.* (C. C. A., 8th Cir.), 9 Am. B. R. 663, 120 Fed. 816.

Explanation of rule.—In *In re Roukous* (D. C., R. I.), 12 Am. B. R. 128, 128 Fed. 645, the court, in so holding, said: "The object of the petition is to secure additional

therein alleged it is clear that the petitioner cannot be afforded the relief asked for.²² Where a petition by a creditor to vacate a composition upon the ground of fraud has been sustained after a demurrer was interposed thereto, the petitioner must elect whether to accept his share of the composition or to take his chance of proving the allegations of his petition.²³ In the absence of rules of practice, the procedure followed when application is made to revoke a discharge, perhaps, even the practice on application for a discharge, may be adopted.²⁴

d. Notice to creditors.—Notice should be given to all creditors,²⁵ they, and not the bankrupt, being the real parties in interest; but not necessarily the notice required by § 58-a. The former law prescribes the practice on notice. It is thought that an order to show cause, similar to that used on an application for discharge, will be sufficient. But the judge can change the form or method of service, and make it returnable when or where he wishes; but, from the analogy of other sections, both time and place should, however, be convenient for the parties in interest.

e. Trial.—It has been thought that the word "trial" makes a jury necessary. Not only is the proceeding a purely equitable remedy, but, elsewhere in the statute, the same word is used in such ways as to negative, in connection with the clear meaning of § 566 of the Revised Statutes as limited by § 19 of the law, such a view. The hearing required in §§ 12 and 14 is, therefore, no different from the trial made mandatory by §§ 13 and 15. In actual practice, these trials will usually be before the referee sitting as a special master.

f. Impeaching the order setting aside.—This cannot be done collaterally. A certified copy is evidence of jurisdiction, regularity, and that the order was made.²⁶

III. EFFECT OF SETTING ASIDE.

Setting aside the composition reverts the title in the trustee; but, it does more. It takes from the debtor all property acquired since the adjudication and applies it in payment of debts contracted while the composition was in force.²⁷ This is the only approximation in our statute to the English doctrine that results in drawing in all property acquired after the receiving order and before the discharge. The rule, too, is eminently just. As to payments made under the composition, it seems that they are not affected.²⁸ The order setting aside also reinstates the case, and provision is made elsewhere in the statute for the election of a trustee in such cases.²⁹ A trustee once elected, the case proceeds as though there had been no composition, and every one is restored, so far as possible, to the rights and remedies existent at the time the composition was confirmed.

payments. There is no apparent reason why a petitioner who has received less than his due should surrender this as a condition precedent to getting the full amount to which he is entitled. The setting aside of a composition will not ordinarily have the effect of invalidating *pro rata* payments made in pursuance of the composition."

²² In re Wrialey Co. (C. C. A., 7th Cir.), 13 Am. B. R. 193, 133 Fed. 386.

²³ Matter of Ballance (C. C. A., 2d Cir.), 33 Am. B. R. 642, 219 Fed. 537.

²⁴ See under §§ 14 and 15, *post*.

²⁵ Ex parte Hamlin, Fed. Cas. 5,994; In re Diggles, Fed. Cas. 3,905; In re Dunn et al., 53 Fed. 341.

²⁶ Bankr. Act, § 21-f.

²⁷ See Bankr. Act, § 64-c.

²⁸ Ex parte Hamlin, Fed. Cas. 5,994; In re Roukous (D. C., R. I.), 12 Am. B. R. 128, 128 Fed. 645, citing text. Compare Marshall Field & Co. v. Wolf & Bro. Dry Goods Co. (C. C. A., 8th Cir.), 9 Am. B. R. 693, 120 Fed. 816.

²⁹ See Bankr. Act, § 44.

SECTION FOURTEEN.

DISCHARGES, WHEN GRANTED.

§ 14. Discharges, when Granted.—*a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by *the trustees or other** parties in interest at such time as will give *the trustee or*† parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with¹ intent to conceal his² financial condition,³ destroyed, concealed, or failed to keep books of account or records from which *such*⁴ condition might be ascertained; or (3) obtained *money or** property on credit upon a materially false statement in writing made *by him** to any person or *his representative*† for the purpose of obtaining *credit from such person*; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court:† *Provided, That a trustees shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.**

1. Here the word "fraudulent" was stricken out by the amendatory act of 1903.

2. Here the word "true" was stricken out by the same.

3. Here the words "and in contemplation

of bankruptcy" were stricken out by the same.

4. Here the word "such" takes the place of the words "his true" in the original act.

* Amendments of 1910 in italica.

† Amendment of 1903 added clauses 3 to 6, inclusive.

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Analogous provisions: In U. S.: As to the application and hearing, Act of 1867, § 29, R. S., §§ 5108 (as amended by Act of July 26, 1876), 5109; Act of 1841, § 4; As to objections to discharge, Act of 1867, §§ 29, 30, 33, R. S., §§ 5110, 5112, 5112-A (added by the Act of June 22, 1874), 5116; Act of 1841, § 4; Act of 1800, §§ 36, 37; As to proofs and pleadings, Act of 1867, § 21, R. S., § 5111; Act of 1841, § 4; As to oaths and verification, Act of 1867, § 29, R. S., § 5113; As to proceedings, certificate of discharge and second applications, Act of 1867, §§ 30, 32, R. S., §§ 5114, 5115, 5116; Act of 1841, § 12; Act of 1800, § 57.

In Eng.: As to application, hearing, objections, and procedure, Act of 1890, § 8 (1)-(8).

In Can.: Act of 1919, §§ 58, 59, 60, 61, 62.

Cross-references: To the law: Jurisdiction of the court to discharge or refuse to discharge bankrupt, § 2(13).

Fraudulent transfers, concealments, etc., § 3-a(1).

Examination of bankrupt, § 7-a(9).

Stay of suit dependent upon dischargeability of debt, § 11-a.

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See also Hagar & Alexander's Bankruptcy Forms (2d Ed.) Nos. 266-285.

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I. HISTORY AND COMPARATIVE LEGISLATION.

a. **Discharges under Roman and continental systems.**—Republican Rome punished the bankrupt with slavery, and, it is said, in some cases, even permitted the creditors to prorate the debtor's body, as well as his estate; Rome under the emperors, however, granted a discharge to the honest insolvent. The savagery of the early Latins, though much softened, still survives in the

continental bankruptcy systems of to-day. Thus, in France, not only must a bankrupt in effect pay his debts in full, but there are three classes of bankrupts: (1) those whose condition is due to misfortune, and who are, therefore, not liable to imprisonment; (2) those who have been guilty of misconduct not tantamount to an actual fraud, who may be imprisoned from one month to two years; and (3) those whose bankruptcy is fraudulent, who may be sentenced to penal servitude for not less than five nor more than twenty years. These restraints on the liberty of the dishonest trader are characteristic of all European laws. They are a survival of the time when inability to pay a debt was a crime.

b. Discharges under English and Canadian systems.—England stands about midway between the above referred to systems and our own. Fraudulent bankruptcy is a crime,⁵ but, except as against certain well-defined statutory objections, a discharge may generally be obtained whatever be the rate per cent. paid.⁶ The Canadian act is similar in effect to the English statute as regards discharges.^{6a}

c. Origin and nature of the discharge.—We have grown to look upon the discharge feature as the primal element of bankruptcy jurisprudence. Being too easily obtained, it has resulted in abuse, and, therefore, reprobation. The fact is, however, that the discharge feature was not grafted on our Anglo-Saxon bankruptcy system until the fourth year of Anne, two hundred and fifty years after England's first bankruptcy law, and that, in its inception, it was a device to keep bankrupts in England.⁷ Strictly speaking, it is no more a part of a bankruptcy law — which concerns itself with the equitable division of a debtor's assets — than are those sections which define bankruptcy crimes. It is unfortunate that our legislators and jurists have so long overlooked its origin. Else we would not to-day, from this point of view, seem a people given to financial jubilees.⁸ The fundamental and original element of every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt's property equally among his creditors; latterly a second element was added in the provisions for discharge upon such terms and conditions as the act may provide.⁹

5. See English Debtors Act of 1869, Part II.

6. **English law as to discharge.**—Since the bankruptcy act of 1890 in England, the court has, on proof of certain facts like our objections to a discharge, four options, (1) to refuse the discharge absolutely, (2) to suspend it for not less than two years, (3) to suspend it until a dividend of not less than 50 per cent has been paid, or (4) to require the bankrupt to permit entry of judgment for the balance unpaid, execution, however, not to issue thereon without leave of court. Act of 1890, § 8 (2).

The facts, or objections to discharge as we would call them, are (1) that, save in cases of misfortune not amounting to misconduct, the assets do not amount to ten shillings in the pound, or (2) the bankrupt's omission to keep proper books of account within three years, or (3) continuance in trade after knowing himself to be insolvent, or (4) the contracting of a debt without at the time having reasonable ground or expectation of ability to pay it, or (5) the failure to account satisfactorily for deficiency in assets, or (6) that the bankruptcy was brought on by rash speculation, extravagances in living,

gambling or culpable neglect of business, or (7) his interposing any frivolous or vexatious defense to any action properly brought, or (8) within three months incurred unjustifiable expense in so doing, or (9) while insolvent and within three months gives an undue preference, or (10) within three months incurred liabilities for the purpose of making his assets equal to ten shillings in the pound, or (11) had a previous bankruptcy, composition or arrangement with creditors, or (12) been guilty of fraud or fraudulent breach of trust. Act of 1890, §§ 8 (3) (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l).

6a. Canadian Bankruptcy Act of 1919, §§ 58 62.

7. See 4 Anne, chap. 17. See also interesting article on "The Early History of English Bankruptcy" by Mr. Louis E. Levinthal in 67 Univ. of Pa. Law Rev. p. 1. See also matter of Braus (C. C. A., 2d Cir.), 40 Am. B. R. 668, 249 Fed. 55; Feder v. Goetz (C. C. A., 2d Cir.), 45 Am. B. R. 57, 264 Fed. 619.

8. Compare the Hebrew Jubilee in Leviticus, Chap. XXV.

9. In re Neeley (Ref., N. Y.), 12 Am. B. R. 407; In re Gutwillig (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475; In re Salmon (D. C., Mo.), 16 Am. B. R. 122, 134, 143 Fed. 395; In re Hall Co. (D. C., Conn.), 10 Am. B. R. 88, 95, 121 Fed. 992; In re Curtis (D. C., Ill.), 1 Am. B. R. 440, 91 Fed. 737; In re Marshall Paper Co. (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872.

d. Discharges in the United States.—Each of our laws, save that of 1800, was the result of agitation in the interest of the hopeless insolvents of well-known periods of financial depression. Our first law required the consent of two-thirds in number and value of the creditors, and a discharge might be withheld for concealment of assets, fraud, losses in gambling, and the like.¹⁰ Available objections under the law of 1841, among others of less importance, were fraud, concealment of assets, preference of creditors, wilful omission or refusal to obey orders of the court, misappropriation of trust funds, or, if a merchant, failure to keep books of account; nor could a discharge be granted—subject, however, to a judicial inquiry as to its justness—where a majority in number and value of creditors filed a written dissent.¹¹ The law of 1867, modeled in this feature after the then English law, went further and denied a discharge to him who had wilfully sworn falsely in the proceeding, or concealed assets, or been guilty of fraud or negligence as to his property, or destroyed or falsified his books, or secreted his assets with intent to defraud, or given a fraudulent preference, or made a fraudulent transfer, or lost property in gaming, or admitted or failed to disclose a fictitious debt, or if a merchant, had not kept proper books, or procured the assent of a creditor by a pecuniary consideration, or in contemplation of bankruptcy made a preference, or been convicted of a crime under the act, or been guilty of any fraud contrary to the true intent of the law.¹² After the first year, and until 1874, the debtor was obliged to pay fifty cents on the dollar, unless he had the consent of a majority in number and value of creditors to take a less sum;¹³ a restriction which, after 1874, was abolished in involuntary cases, and modified in voluntary cases to a required dividend of thirty per cent., save with the assent of one-fourth of the creditors in number and one-third in amount.¹⁴ Nor, save by consent of creditors, was a bankrupt granted a second discharge, short of paying seventy cents on the dollar to all creditors.¹⁵ There were undoubtedly frauds on creditors, followed by discharges, under that law, but, if so, it was not the fault of the law-making power.

II. DISCHARGES UNDER PRESENT LAW.

a. Definition; nature and purpose.—(1) **DEFINITION.**—Under our present act a discharge is defined as “the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act.”¹⁶

(2) **NATURE OF RIGHT.**—The discharge of a debtor from his debts was grafted upon bankruptcy proceedings as an incident wrought by an advanced civilization. It is not an absolute right existing at the time of filing the petition in bankruptcy. The right or privilege arises subsequently and is granted upon the conditions of the statute, and is dependent in part upon the conduct of the bankrupt after the filing of his petition in bankruptcy. Those conditions cannot be applied until application has been made for a discharge.¹⁷

(3) **PURPOSE OF DISCHARGE.**—A discharge is granted to an honest bankrupt in order that he may reinstate himself in the business world; it is refused to a dishonest bankrupt as a punishment for his fraud and to prevent its con-

10. Act of 1800, §§ 36, 37.

11. Act of 1841, § 4.

12. Act of 1867, § 29, R. S., § 5,110.

13. Act of 1867, § 29, R. S., § 5,112.

14. Act of June 22, 1874, R. S., § 5,112-a.

15. Act of 1867, § 30, R. S., § 5,116.

16. Bankr. Act, § 1(12). U. S. ex rel. Adler v. Hammond (C. C. A., 6th Cir.), 4 Am. B. R. 736, 739, 104 Fed. 862. The debts not dis-

chargeable are specified in Bankr. Act, § 17-b. *post.*

17. In re Little (C. C. A., 7th Cir.), 13 Am. B. R. 640, 137 Fed. 521.

Construction of Act.—The right given to secure a discharge in bankruptcy ought to be liberally construed. Matter of Jacobs (C. C. A., 6th Cir.), 39 Am. B. R. 385, 241 Fed. 620.

tinuance in the future.¹⁸ Where a bankrupt has been brought into court at the instance of his creditors, and all his property is being applied to the payment of his debts, he has paid the price of a discharge, and must be accorded the relief which he seeks, unless he has been guilty of conduct which, under the act, deprives him of such relief.¹⁹

b. Discharges under original and amended act.—It is conceded that the act of 1898 was woefully weak in its discharge features. The bill as introduced was not,²⁰ but, in the compromises that accompanied its passage, nearly all the objections to discharges, not amounting to bankruptcy crimes, disappeared. As the law was passed, a discharge could be refused only on a showing of (1) concealment of assets, (2) false swearing in the progress of the proceeding, and (3) destruction of, concealment of, or failure to keep, books of account, accompanied by fraudulent intent to conceal financial condition and a purpose of going into bankruptcy. Even these meager bars on dishonesty have been necessarily cut through by judicial constructions; and the country has witnessed the spectacle of a commercial jail delivery. This condition was subsequently met by the amendatory act of 1903, which added four new objections to a discharge, discussed in detail later. The amendment of 1910 further strengthened the act by withholding a discharge where money as well as property was obtained by a false financial statement by the debtor to the representative of the creditor, as well as when made to the creditor himself. The amendment also provides for objections to be made by the trustee, in behalf of the creditors, when authorized by them at a creditors' meeting.^{20a}

c. Constitutionality of restrictions.—Congress may prescribe any regulations concerning discharges in bankruptcy that are not so unreasonable as to be incompatible with fundamental laws, and there is nothing in the act relative to discharges which renders it unconstitutional.²¹

d. Jurisdiction.—(1) **IN GENERAL.** The jurisdiction of courts of bankruptcy in respect to discharges is expressly conferred by § 2 (12) and is sub-

18. *In re Hammerstein* (C. C. A., 2d Cir.), 26 Am. B. R. 757, 189 Fed. 37.

The purpose of releasing an honest debtor from the burden of debts which he is unable to longer carry is to give freer play to his energies and enterprises, that he may thereafter be better able to support himself and those dependent upon his earnings, and thereby be in a position to render a better service to the State and to society. *Barton Bros. v. Produce Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 502, 136 Fed. 355. The release of the unfortunate and insolvent debtor from the burden of his debts and his restoration to business activity in the interest of his family and the general public, are the main, if not the most important objects of the bankruptcy act. *Hardie v. Swafford Bros. Dry Goods Co.* (C. C. A., 5th Cir.), 21 Am. B. R. 457, 165 Fed. 588.

Relief of bankrupt.—In the case of *In re Hammerstein* (C. C. A., 2d Cir.), 26 Am. B. R. 757, 189 Fed. 37, the court said: "A discharge is granted to an honest bankrupt in order that he may reinstate himself in the business world; it is refused to a dishonest bankrupt as a punishment for his fraud and to prevent its continuance in the future. In

a sense the question has passed beyond the creditors and is one of public policy, but when the charge is that the bankrupt has defrauded his creditors the fact that they have ceased to assert their charge cannot be wholly ignored by the court." In the case of *Williams et al. v. U. S. Fidelity Co.*, 236 U. S. 549, 34 Am. B. R. 181, 59 L. ed. 713, revg. 28 Am. B. R. 802, the court said: "It is the purpose of the Bankruptcy Act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."

19. *Matter of Johnson*, (D. C., Pa.), 32 Am. B. R. 448, 215 Fed. 748.

20. See *Torrey bill*, S. 1,035, 55th Congress, 1st Session, introduced by Senator Lindsay, March 22, 1897, § 51; also the *Henderson bill*, § 13, p. 2,030, Vol. 31, Cong. Record, 55th Congress, 2d Session.

20a. *Feder v. Goets* (C. C. A., 2d Cir.), 45 Am. B. R. 57, 264 Fed. 619.

21. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1. See also *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 385.

ject to the same restrictions, territorially and otherwise, as in other matters pertaining to bankruptcy. By subsection *a* of this section the application is to be filed in the court in which the proceeding is pending. Jurisdiction is conferred where it appears that the applicant resided within the district for practically all of the six months preceding the filing of the petition in bankruptcy.²² It has been held that a creditor who has participated in all the proceedings without objection cannot raise the question of lack of jurisdiction on the bankrupt's application for a discharge.²³ Unless the application for a discharge is filed within the required time the court is without jurisdiction.²⁴

(2) COURT BUT NOT REFEREE.—The section contemplates that the application shall be made to the judge and by § 38-a (4) questions arising out of applications for discharges are expressly excepted from the jurisdiction conferred upon referees. All such questions are original questions for the court,²⁵ although after application reference may be made to the referee as a special master to hear and report on the facts.²⁶ In such a case the reference is not by consent and the report of the referee is advisory merely.²⁷

c. Law governing proceedings.—The proceedings are to be governed by the law as it existed when the bankrupt filed his petition for adjudication.²⁸

22. *Matter of Harris* (Ref., N. J.), 11 Am. B. R. 649.

Jurisdiction.—Where a court did not have jurisdiction to adjudicate as to the bankruptcy because of lack of residence, it cannot grant a discharge, the question being first raised on the application therefor. In *re Cladell* (Ref., N. Y.), 2 Am. B. R. 424.

23. Objections going to the jurisdiction must be raised at the first, or, at least, an early opportunity. A creditor who received notice of the first meeting of creditors, who appeared thereat, nominated the trustee, and exhaustively examined the bankrupt, cannot, on the bankrupt's application for a discharge thereafter, urge, for the first time, that the court is without jurisdiction to entertain the bankrupt's application for a discharge, on the ground that the adjudication was made by the referee, and not by the judge. In *re Polakoff* (Ref., N. Y.), 1 Am. B. R. 359.

24. In *re Fahey* (D. C., Ia.), 8 Am. B. R. 354, 116 Fed. 239. In this case the judge said: "The power and right to grant a discharge effectual to bar the enforcement of debts is conferred by the statute, and is governed by the limitations found in the statute; and therefore, unless it is petitioned for within the time limit fixed by section 14 of the act, the court of bankruptcy is without the power and jurisdiction to grant a discharge. If the court, yielding to the equitable considerations pressed upon it, should grant a discharge in form to the bankrupt, it would be a mistaken kindness, for the validity of the discharge could be impeached before any court wherein it might be pleaded as a bar to a claim on the ground of want of jurisdiction in this court to entertain the petition for discharge; the record showing on its face that the petition was not filed within 18 months of the date of the adjudication."

25. In *re Johnson* (D. C., Ark.), 19 Am. B. R. 814, 158 Fed. 342; In *re Elby* (D. C.,

Iowa), 19 Am. B. R. 734, 157 Fed. 935; In *re Hockman* (D. C., Pa.), 30 Am. B. R. 921, 209 Fed. 330.

Referee has no jurisdiction.—Applications for discharge are in the nature of proceedings separate from the original cause which is closed upon the final distribution of the assets of the estate, and over them the reference to the referee of the original cause confers no jurisdiction. In *re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479.

An application for a discharge is in the nature of a separate proceeding from the original case which is closed with the final distribution of assets. The reference to the referee of the original case confers no jurisdiction whatever on him as to the discharge, as the bankruptcy act, in section 14 (a), requires the application to be "filed in the court of bankruptcy," and, in section 1(5), "Clerk" is defined to mean "clerk of the court of bankruptcy." *Matter of Kendrick & Co.* (D. C., Vt.), 35 Am. B. R. 630, 226 Fed. 980.

26. See discussion under Section Thirty-eight of this work, *post*. In *re Randall* (D. C., Pa.), 20 Am. B. R. 305, 159 Fed. 298.

Reference to special master.—Such application or any specified issue arising thereon may be sent to the referee to ascertain and report the facts and no one is prejudiced thereby. In *re McDuff* (C. C. A., 5th Cir.), 4 Am. B. R. 110, 101 Fed. 241. The judge may, in his discretion, appoint a person other than the referee. In *re Gillardon* (D. C., Pa.), 26 Am. B. R. 103, 187 Fed. 290.

27. *International Harvester Co. v. Carlson*, (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736; *Matter of Hughes* (C. C. A., 2d Cir.), 44 Am. B. R. 447, 262 Fed. 500.

28. *Matter of Peterson* (Ref., Minn.), 10 Am. B. R. 355; In *re Chamberlain* (D. C., N. Y.), 11 Am. B. R. 95, 125 Fed. 639; In *re Hammerstein* (C. C. A., 2d Cir.), 26 Am. B. R. 757, 189 Fed. 37; In *re Simon* (D. C., N. Y.), 29 Am. B. R. 808, 201 Fed. 1004.

Statutory provisions regulating the conditions on which bankrupts may be discharged are remedial in their nature with respect to the bankrupts or their creditors, and the strict rules of construction or interpretation appropriate to retroactive or retrospective laws are inapplicable to them.^{28a} The amendment of this section by the acts of 1903 and 1910 deals solely with a condition precedent to the discharge of a bankrupt in future cases.²⁹

III. APPLICATION FOR DISCHARGE.

a. Who may apply.—(1) IN GENERAL.—Subsection *a* provides that that any person who has been adjudged a bankrupt may file an application for a discharge; unless he is within the restrictions of § 14-b and § 29-b he will be entitled to it.³⁰ A bankrupt's right to a discharge is not affected by his insanity, which prevented his examination by creditors,³¹ and the same is probably true in case of death;³² in either event the personal representative should be permitted to institute the proceedings for a discharge.

(2) CORPORATION; INDIVIDUAL PARTNER.—Application may be filed by a corporation when it has been adjudicated a bankrupt.³³ If a member of a firm is adjudged a bankrupt, he is entitled to an individual discharge from partnership debts as well as individual debts.³⁴ But if the adjudication is that of the individual partner, and the administration has no concern with the partnership estate, he is not entitled to a discharge from partnership debts.³⁵

(3) DENIAL IN FORMER PROCEEDING.—The application may be filed even by one refused a discharge in a former proceeding,³⁶ but a second petition cannot be filed where a first petition in the same bankruptcy was denied on the merits.³⁷ Where the prior proceeding determined all the issues, and the subsequent proceeding was instituted for the purpose of obtaining a discharge denied in the prior proceeding,³⁸ or where the same debts were scheduled in

^{28a} Matter of Rosenfeld (C. C. A., 2d Cir.), 44 Am. B. R. 390, 262 Fed. 876.

²⁹ In re Scott (D. C., Del.), 11 Am. B. R. 327, 126 Fed. 981, citing many authorities under former acts; Matter of Petersen (Ref., Minn.), 10 Am. B. R. 355.

³⁰ In re Crist (D. C., Ala.), 9 Am. B. R. 1, 116 Fed. 1,007; Smith v. Keegan (C. C. A., 1st Cir.), 7 Am. B. R. 4, 111 Fed. 157; In re Eades (C. C. A., 7th Cir.), 16 Am. B. R. 30, 143 Fed. 293; In re Marshall Paper Co. (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872.

A voluntary bankrupt may be granted a discharge, although he has not filed a schedule of his assets with his petition and schedule of debts. A voluntary bankrupt need not satisfy the court that he has performed everything which the law requires of him to do and is guilty of none of the things which the law condemns; but he is entitled to his discharge as a legal right unless the objecting creditors establish his guilt. Matter of Johnson (D. C., Pa.), 32 Am. B. R. 448, 32 Fed. 448.

Must be affirmatively sought.—Armstrong v. Norris (C. C. A., 8th Cir.), 40 Am. B. R. 735, 247 Fed. 253.

³¹ In re Miller (D. C., Pa.), 13 Am. B. R. 345, 133 Fed. 1,017.

³² In re Miller (D. C., Pa.), 13 Am. B. R. 345, 133 Fed. 1,017; In re Hicks (D. C., Vt.), 6 Am. B. R. 181, 107 Fed. 910.

Application by administratrix of bankrupt.—The administratrix of a deceased bankrupt may file an application for discharge, and the judge may, on cause shown, extend the

time, but not exceeding 18 months from the adjudication. Matter of Agnew and Sherman (D. C., N. Y.), 35 Am. B. R. 709, 235 Fed. 650.

³³ In re Marshall Paper Co. (D. C., Mass.), 2 Am. B. R. 653, 95 Fed. 419; *affd.* on appeal, *s. c.*, 4 Am. B. R. 468, 102 Fed. 872; Matter of Hargadine-McKittrick, etc. Co. (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155.

³⁴ In re Myers (D. C., N. Y.), 3 Am. B. R. 260, 97 Fed. 753; In re Laughlin (D. C., Ia.), 3 Am. B. R. 1, 96 Fed. 589; Matter of Neyland v. McKeithen (D. C., Miss.), 24 Am. B. R. 879, 184 Fed. 144.

³⁵ Matter of Freund (D. C., Ia., Ref.), 1 Am. B. R. 25; In re Meyers (D. C., N. Y.), 3 Am. B. R. 707, 96 Fed. 408; In re Morrison (D. C., Tex.), 11 Am. B. R. 498, 127 Fed. 186; In re Hale (D. C., N. Car.), 6 Am. B. R. 35, 107 Fed. 432.

³⁶ In re Herman (D. C., N. Y.), 4 Am. B. R. 139, 102 Fed. 753; In re Clafl (D. C., Mass.), 7 Am. B. R. 128, 111 Fed. 508.

³⁷ In re Royal (D. C., No. Car.), 7 Am. B. R. 636, 113 Fed. 146; Matter of Feigenbaum (C. C. A., 2d Cir.), 9 Am. B. R. 595, 121 Fed. 60, *rev'd*, 7 Am. B. R. 339, 151 Fed. 508; In re Cohen (D. C., N. Y.), 29 Am. B. R. 698, 201 Fed. 188; Matter of Schwartz (D. C., Ohio), 41 Am. B. R. 246, 248 Fed. 841.

³⁸ Kunts v. Young (C. C. A., 8th Cir.), 12 Am. B. R. 505, 131 Fed. 719.

both proceedings,³⁹ the bankrupt may not be discharged. The denial of a discharge in the prior proceeding renders the issue of the bankrupt's discharge *res adjudicata* in a subsequent proceeding as to debts provable in the prior proceeding.⁴⁰

b. Time of making application.—(1) IN GENERAL.—The application should be filed after one month, and within the next twelve months. This means any time within a period of twelve months after the end of the first month succeeding the adjudication.⁴²

(2) EXTENSION OF TIME.—His time, on cause shown, may be and usually is extended six months, but such extension can be granted only by the judge.⁴³ In any event the bankrupt must apply for his discharge within eighteen months after adjudication; the one month after adjudication in which he cannot apply is not excluded.^{42a} An extension should not be granted unless it clearly appear that the bankrupt was unavoidably prevented from filing his application within the twelve months; laches will be fatal.⁴⁴ The words "unavoidably prevented" should

39. *Pollet v. Cosel* (C. C. A., 1st Cir.), 24 Am. B. R. 678, 179 Fed. 488; *Matter of Kuffler* (C. C. A., 2d Cir.), 23 Am. B. R. 280, 108 Fed. 1021, affg. 19 Am. B. R. 181, 155 Fed. 1018; *Matter of Schwartz* (D. C., Ohio), 41 Am. B. R. 246, 248 Fed. 841.

40. *In re Kuffler* (D. C., N. Y.), 19 Am. B. R. 181, 155 Fed. 1018, affd. 23 Am. B. R. 280, 108 Fed. 1021; *Matter of Spangler* (D. C., Mass.), 43 Am. B. R. 63, 256 Fed. 62.

Failure of objecting creditor.—Where, upon the objection of a creditor having a provable debt, the bankrupt is denied his discharge, but in a subsequent bankruptcy the same creditor intentionally remained away from court and the bankrupt was granted his discharge without objection, an action upon said debt, if it is a dischargeable one, is barred, where the ground upon which the first discharge was refused does not appear. *Bluthenthal v. Jones*, 208 U. S. 64, 19 Am. B. R. 288, 52 L. Ed. 390, affg. 51 Fla. 396, 41 So. 633.

42. *Matter of Jacobs* (C. C. A., 6th Cir.), 89 Am. B. R. 385, 241 Fed. 620. See also *Matter of Daly* (D. C., N. Y.), 35 Am. B. R. 219, 224 Fed. 263. *Contra*, *In re Knauer* (D. C., Ia.), 13 Am. B. R. 503, 133 Fed. 805; *In re Holmes* (D. C., Vt.), 21 Am. B. R. 339, 165 Fed. 225; *Matter of Snell* (D. C., N. Y.), 40 Am. B. R. 356, 244 Fed. 613.

Limitation as to time.—The section creates three limitations of time, all subsequent to adjudication, the first one month thereafter, the second the next twelve months after the first, and the third the next six months after the second. The bankrupt has twelve months within which to file his application for discharge as of right and course, commencing after the expiration of one month subsequent to adjudication. *Matter of Walters* (D. C., Mont.), 31 Am. B. R. 665, 209 Fed. 133.

43. For petition, certificate of the referee in charge, and order, see "Supplementary Forms," Hagar and Alexander's Bankruptcy Forms, 2d Ed., Forms No. 283-285.

Jurisdiction to grant order extending time.—Where a duly verified petition of the bankrupt, setting forth that sickness had prevented him from having sufficient means with which to pay an attorney for preparing his application for a discharge within twelve months after adjudication, was presented to the district judge before whom the bankruptcy proceedings were had, and who alone had jurisdiction of the discharge proceedings, he had jurisdiction to grant an order extending the time within which bankrupt might file his application for discharge, and the mere fact that the order was erroneous, because based on insufficient evidence, is no reason for vacating it on the ground of want of jurisdiction. *In re Casey* (D. C., N. Y.), 28 Am. B. R. 359, 195 Fed. 322. 43a. *Matter of Weldon* (D. C., Ia.), 45 Am. B. R. 196, 262 Fed. 823.

Computation of time.—Where a bankrupt was adjudicated on June 4, 1915, an application for discharge filed December 5, 1916, the preceding day not being Sunday or a legal holiday, is too late. *Matter of Lewandowski* (D. C., Mass.), 39 Am. B. R. 804.

44. *In re Fahy* (D. C., Iowa), 8 Am. B. R. 364, 116 Fed. 239. In this case the court said: "In express terms the discretion of the judge is limited to the six months following the expiration of the year beginning with the date of the adjudication, and, as I construe the statute, this is a limitation on the jurisdiction of the judge over the matter of discharge. The power and right to grant a discharge effectual to bar the enforcement of debts is conferred by the statute, and is governed by the limitations found in the statute; and, therefore, unless it is petitioned for within the time limit fixed by section 14 of the act, the court of bankruptcy is without the power and jurisdiction to grant a discharge." This language was quoted and approved in *In re Wagner* (D. C., Nev.), 15 Am. B. R. 100, 139 Fed. 87; *In re Daly* (D. C., Wash.), 30 Am. B. R. 475, 205 Fed. 1002.

Notice to bankrupt.—It is not the duty of the referee to notify the bankrupt when the year will expire. *In re Knauer* (D. C., Iowa), 13 Am. B. R. 503, 133 Fed. 805.

Objections by creditors, where an extension is granted, are confined to statutory objections. *In re Haynes & Son* (D. C., Pa.), 10 Am. B. R. 13, 122 Fed. 560.

Proof may be required showing why the application for a discharge was not made within the specified time. *In re Glickman* (D. C., Pa.), 21 Am. B. R. 171, 164 Fed. 209.

be construed with some liberality, so as to permit an extension in a case of excusable or ignorant neglect or mistake.⁴⁵ It must be shown that the petitioner was unavoidably prevented from filing his application during the entire period of one year.⁴⁶ An adjudication of bankruptcy will not be opened for the sole purpose of extending the time of making an application for a discharge.⁴⁷ The affidavit, upon which the extension is asked for, should contain a valid excuse; a statement that the counsel for the bankrupt was busy with other matters and had overlooked it is insufficient;⁴⁸ and mere illness in the family of the bankrupt will not suffice.⁴⁹ The granting of the extension is discretionary and no notice to creditors is required.⁵⁰ Creditors who had notice of an application to extend the time within which an application for a discharge may be made and who do not move promptly to vacate the order extending such time, but

A motion made more than eighteen months after adjudication for an order granting leave to file an application *nunc pro tunc* as of a date sixteen months after adjudication when an authorized application had been made, should be denied in the absence of sufficient reason therefor. In re Wolf (D. C., Cal.), 4 Am. B. R. 74, 100 Fed. 430.

Excuse of default.—Where more than thirteen months have expired from the adjudication in bankruptcy at the time a petition for a discharge is presented, it is impossible for the clerk to file same, or for the court to permit it to be filed, without a showing that the bankrupt was unavoidably prevented from filing it within the thirteen months succeeding the adjudication. If delay in filing an application for a discharge is occasioned by the fault of a postmaster or his employees, where the application is forwarded by mail, or is occasioned by the fault of some clerk or employee in the office of the attorney making the application, or by the absence of the court or judge from his office or place of holding court, or by any act of omission or commission on the part of an officer of the court, justice demands that a *nunc pro tunc* order be made. Matter of Daly (D. C., N. Y.), 36 Am. B. R. 219, 224 Fed. 263.

Waiting until latter part of year.—It is not obligatory upon a bankrupt or his attorney to make application for a discharge prior to the latter three months of the year succeeding the adjudication, in order to escape the charge of negligence. Matter of Waller (C. C. A., 7th Cir.), 41 Am. B. R. 314, 249 Fed. 187.

Delay by the court or referee in conducting the bankruptcy proceedings proper or in deciding questions relating to the due administration of the estate arising therein affords no excuse for not filing an application for a discharge within the time fixed by statute. Matter of Snell (D. C., N. Y.), 40 Am. B. R. 356, 244 Fed. 613.

45. The words "unavoidably prevented," should be liberally construed, so as to permit an application for discharge to be filed where bankrupt has been prevented from filing it during the first twelve months through excusable neglect, reasonable grounds for delay, mistake, inadvertence, etc. Where a bankrupt represents to the court his reliance upon counsel who it appears have misunderstood his instructions, his default in not filing an application for a discharge is explained, and the discretion of the court in granting an extension of time, upon such explanation, will not be disturbed. In re Churchill (D. C., Wis.), 28 Am. B. R. 607, 197 Fed. 114. See also Matter of Swain (D. C., Mass.), 39 Am. B. R. 841, 243 Fed. 781; Matter of Waller (C. C. A., 7th Cir.), 41 Am. B. R. 314, 249 Fed. 187.

46. In re Harris (D. C., Pa.), 15 Am. B. R. 705; In re Lewin (D. C., Tex.), 14 Am. B. R. 358, 135 Fed. 252.

47. In re Morse (D. C., N. Y.), 21 Am. B. R. 709, 168 Fed. 157.

48. Failure of application in time.—Where a bankrupt has failed to file a petition for discharge within one year from the time of his adjudication and within the next six months thereafter failed to obtain from the judge an extension of time, as provided by section 14-a of the bankruptcy act, his right to such discharge is lost to him forever, especially where bankrupt had been apprised of his error in time to make application to the judge for such extension of time. In re Levenstein (D. C., Conn.), 24 Am. B. R. 822, 180 Fed. 957, citing Kuntz v. Young (C. C. A., 8th Cir.), 12 Am. B. R. 505, 131 Fed. 719, 65 C. C. A. 477; In re Kuffler (C. C. A., 2d Cir.), 18 Am. B. R. 16, 151 Fed. 12, 80 C. C. A. 508; In re Bramlett (D. C., Ga.), 20 Am. B. R. 402, 161 Fed. 588; In re Anderson (D. C., Mont.), 14 Am. B. R. 221, 134 Fed. 319; Matter of Schwartz (D. C., Ohio), 41 Am. B. R. 246, 248 Fed. 841; In re Richter (D. C., Conn.), 27 Am. B. R. 215, 190 Fed. 905, holding that the failure to apply in time may not be excused because of the bankrupt's poverty.

49. In re Lewin (D. C., Tex.), 14 Am. B. R. 358, 135 Fed. 252.

Grounds for extension of time; sickness.—If a bankrupt or his family were sick and it was necessary for him to provide for their support, wherefore he did not have sufficient means to pay an attorney, it may be said that he was unavoidably prevented from filing his application for a discharge within one year after adjudication, so as to be permitted to file the application within six months thereafter. In re Casey (D. C., N. Y.), 28 Am. B. R. 359, 195 Fed. 322.

Delay caused by mistake as to law.—Where the bankrupt's counsel, through an honest mistake as to the law, supposed that a petition for discharge could not be filed until equity proceedings in the State court (in which charges were made against the bankrupt, which would be sufficient, if established, to defeat the discharge) had been terminated, and did not attempt to file a petition for discharge until the conclusion of those proceedings, "the bankrupt was unavoidably prevented from filing" the petition within the six months' grace period. Matter of Swain (D. C., Mass.), 39 Am. B. R. 841, 243 Fed. 781.

50. In re Frits (D. C., N. Y.), 23 Am. B. R. 84, 173 Fed. 560; In re Chase (D. C., Mass.), 36 Am. B. R. 456, 188 Fed. 408; Matter of Waller (C. C. A., 7th Cir.), 41 Am. B. R. 314, 249 Fed. 187.

Extension may be granted by the district judge, not only *ex parte*, but in such summary or informal manner as may be proper or convenient at the time; and a contention that an order extending the time in which a bankrupt may file his application is erroneous, because made without notice and upon an unverified petition, is without merit. In re Churchill (D. C., Wis.), 28 Am. B. R. 607, 197 Fed. 114.

appear for the purpose of filing objections will be deemed to have waived objections to the extension.⁵¹

(3) FILING AFTER TIME LIMITED.—It is doubtful whether the court may allow a *nunc pro tunc* order granting leave to file an application for a discharge after the period of eighteen months has expired;⁵² it has been held that the court has no jurisdiction after the expiration of the time limit.⁵³ If the court has permitted a petition to be filed more than a year after the adjudication, upon an insufficient showing, the remedy is by motion to vacate.⁵⁴ The application for a discharge will be dismissed if not diligently prosecuted.⁵⁵

c. Effect of failure to apply within time.—(1) IN GENERAL.—If the bankrupt fails to apply for his discharge within the limit prescribed by statute, *i. e.*, within twelve months after adjudication, or the succeeding six months if an extension of time has been granted, the court is without jurisdiction to grant such discharge.⁵⁶ His right to a discharge from the debts scheduled by him is lost, and may not be restored by any act or proceeding in the court.⁵⁷

(2) RIGHT NOT RESTORED BY SUBSEQUENT PROCEEDINGS.—The failure to apply for a discharge within the time limited has the same effect as a denial of a discharge from the debts involved in the proceedings, and the bankrupt may not thereafter institute voluntary proceedings for the purpose of securing a discharge from debts scheduled in the former proceedings.⁵⁸ The failure

51. In re Casey (D. C., N. Y.), 28 Am. B. R. 359, 195 Fed. 322.

Collateral attack.—An order granting an extension of time for the administratrix of a bankrupt to file an application for a discharge, and the validity and regularity of the latter, cannot be attacked upon a hearing of objections to the discharge. Matter of Agnew and Sherman (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

Laches of creditor.—Where a petition for an extension of time in which to file an application for a discharge, was filed five days before the expiration of eighteen months after adjudication, a motion by a creditor to vacate said order of extension filed twenty days thereafter should be denied upon the ground that it was not seasonably made. Matter of Maier (D. C., Me.), 43 Am. B. R. 609, 256 Fed. 60.

52. In re Wolff (D. C., Cal.), 4 Am. B. R. 74, 100 Fed. 430, holding that such a *nunc pro tunc* order may not be granted except where the delay was caused by some act of the court or its officers. But see Matter of Daly (D. C., N. Y.), 35 Am. B. R. 219, 224 Fed. 263.

53. In re Fahy (D. C., Ia.), 8 Am. B. R. 354, 116 Fed. 239; Matter of Taunton (D. C., N. Y.), 33 Am. B. R. 308, 216 Fed. 987; Matter of Loughran (C. C. A., 3d Cir.), 33 Am. B. R. 350, 215 Fed. 271.

Attorney in military service.—The time in which a bankrupt must apply for a discharge is not extended by virtue of the Soldiers' and Sailors' Civil Relief Act of March 8, 1918, by the fact that his attorney entered the service during the period in which a discharge should have been applied for. Matter of Weldon (D. C., Ia.), 45 Am. B. R. 196, 262 Fed. 828.

54. In re Haynes & Sons (D. C., Pa.), 10 Am. B. R. 13, 122 Fed. 560.

Application to vacate order dismissing petition.—The court will refuse, on the ground of laches, to vacate an order dismissing a petition for a discharge, where the application was made more than five years after the petition was dismissed, and nine years after the filing of the petition and specifications of objections to such discharge. Matter of Overstreet (D. C., Fla.), 45 Am. B. R. 129, 224 Fed. 828.

55. In re Lederer (D. C., N. Y.), 10 Am. B. R. 492, 125 Fed. 96.

Delay in prosecution.—The debtor was adjudged a bankrupt on January 4, 1906. In June, 1906, she signed an application for her discharge and left it with her attorney. He did not file it until April 28, 1907, when he procured a permissive order of the bankruptcy court on an affidavit which failed to show that he or the bankrupt had been unavoidably prevented from filing it within the year. Between April 28, 1907, and September 12, 1911, neither the bankrupt nor her attorney took any action to bring the application to a hearing. On the latter day they procured an order for a hearing on October 16, 1911, which was met by creditors by a motion to dismiss the application for the discharge for want of prosecution. Held, the motion should have been granted. The bankrupt failed to exercise that reasonable diligence requisite to call a court of equity into action on her behalf. Lindeka v. Converse (C. C. A., 8th Cir.), 28 Am. B. R. 596, 198 Fed. 618. But see In re Glasberg (C. C. A., 2d Cir.), 28 Am. B. R. 828, 197 Fed. 896, holding that delay in bringing on the hearing is not a ground for refusing a discharge.

56. Siebert v. Dahlberg (C. C. A., 8th Cir.), 33 Am. B. R. 272, 218 Fed. 793; In re Fahy (D. C., Ia.), 8 Am. B. R. 354, 116 Fed. 239; In re Knauer (D. C., Ia.), 13 Am. B. R. 503, 133 Fed. 805; In re Wagner (D. C., Nev.), 15 Am. B. R. 100, 139 Fed. 87; In re Levenstein (D. C., Conn.), 24 Am. B. R. 822, 180 Fed. 957; Horner v. Hamner (C. C. A., 4th Cir.), 40 Am. B. R. 817, 249 Fed. 134, citing Collier on Bankruptcy (11th ed.), 347; Matter of Schwartz (D. C., Ohio), 41 Am. B. R. 216, 248 Fed. 841.

57. In re Levenstein (D. C., Conn.), 24 Am. B. R. 822, 180 Fed. 957; Matter of Daly (D. C., N. Y.), 35 Am. B. R. 219, 224 Fed. 263, holding that section 14a of the Bankruptcy Act expressly forbids the court or judge to make an order after the expiration of 18 months from the date of the adjudication extending the time within which the application for a discharge may be filed.

58. In re Stone (D. C., Ore.), 23 Am. B. R. 24, 172 Fed. 947; In re Schnabel (D. C., N. Y.), 23 Am. B. R. 22, 166 Fed. 383; In re Pullian (D. C., Tenn.), 22 Am. B. R. 513, 171 Fed. 596; In re Kuffer (C. C. A., 2d Cir.), 18 Am. B. R. 16, 151 Fed. 12; In re Silverman (C. C. A.), 19 Am. B. R. 460, 157 Fed. 675; text cited

of an involuntary bankrupt to apply for a discharge within twelve months of his adjudication will prevent him from obtaining a discharge in a subsequent voluntary proceeding from debts which were scheduled in the prior proceeding.⁵⁰ The failure of the bankrupt to apply for a discharge in the first bankruptcy proceedings, and the approval of the record of such proceedings by the court without granting a discharge, are in effect a judgment by default in favor of his then existing creditors that the bankrupt was not entitled to a discharge from their claims, and that judgment is conclusive in favor of such creditors.⁵¹ This rule is also applicable to a case where a partner failed in the first proceedings against the partnership to apply for a discharge within the time required; he may not have a discharge in a subsequent proceeding from debts existing and provable against him in the first proceeding.⁶¹

d. Petition for discharge.—(1) **IN GENERAL.**—The application for a discharge is made by a petition, which should "state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt."⁶² If the application is by a member of a firm, the petition should indicate that the intention is to bar his partnership liability.⁶³

(2) **VERIFICATION OF PETITION.**—Neither the statute, the general orders nor the official form indicates that the petition must be verified. In conformity with the practice in other similar proceedings it would seem more suitable to verify the petition.⁶⁴ Being in the nature of a pleading, it should,

with approval in *In re Springer* (D. C., N.Y. Cir.), 29 Am. B. R. 96, 199 Fed. 294; *Matter of Warnock* (D. C., Tenn.), 59 Am. B. R. 539, 239 Fed. 779; *Armstrong v. Norris* (C. C. A., 8th Cir.), 40 Am. B. R. 735, 247 Fed. 253.

Withdrawal of application.—An application for a discharge made within due time, but voluntarily withdrawn, is in legal effect the same as a failure to apply for a discharge within the time limited by law. *Matter of Schwartz* (D. C., Ohio), 41 Am. B. R. 246, 248 Fed. 841.

An order of the bankruptcy court allowing the withdrawal without prejudice of an application for a discharge in the proceeding does not affirmatively confer upon the applicant the right to commence or maintain a second proceeding. *Armstrong v. Norris* (C. C. A., 8th Cir.), 40 Am. B. R. 735, 247 Fed. 253.

Where, in prior proceedings, a bankrupt's discharge was not in form refused, but on the ground that the bankrupt had failed to prosecute and to appear for examination, he is not entitled in a second proceeding to a discharge from debts in the first. *Pollet v. Cosel* (C. C. A., 1st Cir.), 24 Am. B. R. 678, 170 Fed. 468, 103 C. C. A. 68.

59. *In re Bramlett* (D. C., Ga.), 20 Am. B. R. 402, 161 Fed. 588; *In re Van Borries* (D. C., Wis.), 21 Am. B. R. 849, 168 Fed. 718, holding that in subsequent bankruptcy proceedings the bankrupt will only be granted a discharge as to such debts as were incurred since the institution of the first bankruptcy proceedings; *Matter of Loughran* (D. C., Penn.), 32 Am. B. R. 350, 215 Fed. 271; *Matter of Warnock* (D. C., Tenn.), 39 Am. B. R. 539, 239 Fed. 779. Compare *Matter of Kincaid* (D. C., Ore.), 41 Am. B. R. 338.

60. *Kunts v. Young* (C. C. A., 8th Cir.), 12 Am. B. R. 505, 131 Fed. 719, 65 C. C. A. 477; *In re Elby* (D. C., Iowa), 19 Am. B. R. 734, 157 Fed. 935; *Siebert v. Dahlberg* (C. C. A., 8th Cir.), 33 Am. B. R. 272, 218 Fed. 793; *Armstrong*

Norris (C. C. A., 8th Cir.), 40 Am. B. R. 735, 247 Fed. 253.

Failure of bankrupt to apply in former proceedings.—Where it appeared that the bankrupt had filed a prior petition, been adjudicated thereunder, but had failed within the statutory time to apply for a discharge, a creditor scheduled under the first petition may object to a discharge, as to him, on the second application, on the ground of failure to apply under the first petition within the time allowed, and, while a discharge on the second petition will be granted as to other creditors, the debt of the objecting creditor will be excluded from its operation. *In re Westbrook* (D. C., Ala.), 26 Am. B. R. 181, 186 Fed. 414. See also *Bacon v. Buffalo Cold Storage Co.* (C. C. A., 5th Cir.), 27 Am. B. R. 730, 193 Fed. 34; *Monk, Jr., v. Horn* (C. C. A., 5th Cir.), 44 Am. B. R. 472, 262 Fed. 121.

The failure of a voluntary bankrupt to apply for a discharge, within the time limited by section 14 of the Bankruptcy Act, bars him from making such an application, and a new petition subsequently filed, scheduling the same creditors and the same indebtedness, should be dismissed. *Matter of Loughran* (C. C. A., 3d Cir.), 33 Am. B. R. 350, 215 Fed. 271.

61. *In re Springer* (D. C., N. Car.), 29 Am. B. R. 96, 199 Fed. 294; *Armstrong v. Norris* (C. C. A., 8th Cir.), 40 Am. B. R. 735, 247 Fed. 253.

62. See General Order XXXI and Official Form No. 57; *Hagar & Alexander's Bankr. Forms* (2d ed.), Nos. 266-268.

63. *In re Laughlin* (D. C., Iowa), 3 Am. B. R. 1, 96 Fed. 589. See also *In re Hale* (D. C., No. Car.), 6 Am. B. R. 35, 107 Fed. 432; *In re Carmichael* (D. C., Iowa), 2 Am. B. R. 815, 96 Fed. 594; *In re Russell* (D. C., Iowa), 3 Am. B. R. 91, 97 Fed. 32; *In re McFaun* (D. C., Iowa), 3 Am. B. R. 66, 96 Fed. 592. See for individual petition after refusal of discharge to partnership, *In re Feigenbaum* (C. C. A., 2d Cir.), 6

in view of the requirements of § 182, be verified.⁶⁵ A failure to object that the application is unverified until after the evidence on the application has been heard amounts to a waiver.⁶⁶ The elaborate oath prescribed by the law of 1867 is no longer necessary.⁶⁷

(3) **WHERE FILED.**—All petitions should be filed with the clerk, and not with the judge or referee.⁶⁸ A filing with the clerk is deemed a filing with the court, within the meaning of subsection *a*, but a filing with the referee is not sufficient, unless specially authorized by court rule.⁶⁹

(4) **AMENDMENTS.**—The same liberality in respect to amendments to petitions for discharge should be permitted as in the case of other petitions in bankruptcy proceedings. If errors are contained in the petition, the court may direct their correction by amendment.⁷⁰ But such forbearance should not be extended in favor of a bankrupt whose business career is tainted, and whose conduct toward his creditors has not been fair.⁷¹ And where the time to file objections has expired an amendment to the petition in matter of substance is only allowable where there is already a record sufficient to justify it.⁷²

c. Notice to creditors and trustee.—Creditors are entitled to at least thirty days' notice by mail of all hearings upon applications for discharge.⁷³ When the petition for a discharge is duly filed the clerk may either himself send out the notices, or the referee may do it, upon the certificate of the clerk that the petition has been filed. It is usual for the clerk to issue an order to show cause to creditors, returnable before the judge. This order must be served by mail. In some districts, local rules result in the referee giving the required notice by mailing and publishing the order to show cause, or a notice of its pendency, and then returning the proofs, with a certificate of conformity, to the clerk in time for the return day.⁷⁴ Personal service of the notice is not required; the official form (Form No. 57) indicates that the notice be pub-

Am. B. R. 595, 121 Fed. 60. Compare for rule under law of 1867, *In re Pierson*, Fed. Cas. 11,153.

64. *In re Glass* (D. C., Tenn.), 9 Am. B. R. 394, 119 Fed. 509; *In re Brown* (C. C. A., 5th Cir.), 7 Am. B. R. 252, 112 Fed. 49.

The petition is a pleading of fact and should be verified. *In re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 147, 188 Fed. 479, where the court says: "Inasmuch as the official form of application for discharge contains the averment that the bankrupt has duly surrendered all his property and rights of property and has fully complied with all the requirements of the act and the orders of the court touching his bankruptcy, and inasmuch as this averment, without further proof, in the absence of objections filed, entitles the bankrupt to his discharge, it seems to me it should be considered a pleading of fact requiring verification."

65. *In re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479.

66. *In re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 147, 188 Fed. 479.

67. Act of 1867, § 20, R. S., § 5,108 (as amended by Act of July 26, 1876), *post*.

68. See Bankr. Act, § 38-a(4) and General Order XII(3); *In re Sykes* (D. C., Tenn.), 6 Am. B. R. 264, 106 Fed. 669.

69. *In re Hockman* (D. C., Pa.), 30 Am. B. R. 221, 209 Fed. 330.

In the Southern District of New York the office of the referee is, by force of District Court Rule II, the office of the court, and filing a petition for discharge with the referee confers jurisdiction. *In re Pincus* (D. C.,

N. Y.), 17 Am. B. R. 331, 147 Fed. 621. No such rule exists in the Northern District of Alabama and it has been held that a filing with the referee is not a filing with the court. *In re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479.

70. *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278; *In re Meyers* (D. C., N. Y.), 3 Am. B. R. 280, 97 Fed. 753.

71. *In re Gross* (Ref., N. Y.), 5 Am. B. R. 271, affirmed by Judge Brown of the Southern District of New York without opinion.

72. See *In re Gift* (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230.

73. Bankr. Act, § 58-a(9); *Matter of Langfeldt* (D. C., Fla.), 41 Am. B. R. 586, 253 Fed. 453.

Failure to give notice.—The mere fact that the receiver of a creditor, whose name and address appeared in the proofs, did not receive notice, because the creditor's name did not appear in the schedules, is not sufficient to set aside the order granting the discharge. *In re Frits* (D. C., N. Y.), 23 Am. B. R. 84, 173 Fed. 560.

74. This practice is recommended. For sample rules and forms, see Rules X and XI, No. Dist. of N. Y., 1 N. B. 109; and forms S. & T. Erie County (N. Y.) Dist., 1 N. B. N. 123; *In re Sykes* (D. C., Tenn.), 6 Am. B. R. 264, 106 Fed. 669.

Forms of order to show cause and certificate of conformity, see Supplementary Forms Nos. 108, 109; Hagar & Alexander's Bankr. Forms (2d ed.), Forms Nos. 267, 268.

lished in a designated newspaper, and "that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated;" this practice should be observed, and if it is the validity of the discharge is not affected by lack of personal notice to creditors.⁷⁵ The practice is not uniform throughout the country; local rules or customs should always be ascertained. Everywhere, however, all creditors and persons in interest must have at least ten days' notice of the hearing. Not only should creditors be notified of the application for discharge, but they are entitled to notice of the bankruptcy so that they may file their claims and be prepared to oppose the discharge; if no meeting of creditors is called, it is sometimes required by court rule that the bankrupt see that the creditors are notified of the bankruptcy.⁷⁶ The mailing of the notice in the manner prescribed by statute will be sufficient even if not received and read by creditors.⁷⁷

IV. HEARING ON APPLICATION FOR DISCHARGE.

a. Appearances.—Upon the filing of the application and the giving of notice a creditor opposing the application must enter his appearance in opposition thereto on the day when the creditors are required to show cause.⁷⁸ This requirement should be strictly followed.⁷⁹ The filing of objections by a creditor is equivalent to the appearance which the rule requires.⁸⁰ The appearance must be entered on the day of the return,⁸¹ and if objections are filed on such day it will be sufficient. The appearance may be entered at any time during such day, and it is error to deny the right to enter an appearance, because a creditor failed to appear at the hour appointed.⁸² The court may, in its discretion, extend the time within which the creditor may enter his appearance in opposition to a bankrupt's discharge even after the expiration of the time limit provided in the general order.⁸³ The appearance may be made by the

75. *Hanover National Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1, 46 L. ed. 1113, in which the court said: "Creditors are bound by the proceedings in distribution, on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to decree discharge, if sufficient opportunity to show cause to the contrary is afforded, or notice given in the same way. The determination of the status of the honest and unfortunate debtor by his liberation from encumbrance or future exertion is a matter of public concern, and Congress has power to accomplish it throughout the United States by proceedings at the debtor's domicile. If such notice to those who may be interested in opposing discharge, is provided to be given, that is sufficient. Service of process or personal notice is not essential to the binding force of the decree."

76. *In re Wollowitz* (C. C. A., 2d Cir.), 27 Am. B. R. 558, 192 Fed. 105, in which case it was held that Bankruptcy Rule 20 (So. Dist., N. Y.), providing that: "If the first meeting of creditors is not called and the examination of bankrupt at such meeting begun, carried on and completed before the discharge is filed, the referee is directed to certify such facts to the court, and thereupon, upon notice to the bankrupt, an application to dismiss the petition for discharge may

be made," is not obnoxious to the bankruptcy act and void, as adding a new ground for the refusal of a discharge, since it merely provides for the details of the form, manner and time of giving notice of the application for a discharge.

77. *In re Downing* (D. C., N. Y.), 28 Am. B. R. 778, 199 Fed. 329.

78. General Order XXXII, and cases cited thereunder. See Am. B. R. Dig., § 1,035.

79. Appearances must be entered as required in General Order XXXII; *In re Grant* (D. C., Pa.), 14 Am. B. R. 398, 135 Fed. 889; *In re Clothier* (D. C., Pa.), 6 Am. B. R. 203, 108 Fed. 199.

Failure to enter an appearance on the return day precludes the creditor from thereafter appearing and filing specifications. *In re Ginsberg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627.

80. *In re Magen Bros.* (C. C. A., 3d Cir.), 27 Am. B. R. 729, 192 Fed. 883.

81. *In re Young* (D. C., Pa.), 20 Am. B. R. 697, 162 Fed. 912; *In re Grant* (D. C., Pa.), 14 Am. B. R. 398, 135 Fed. 889; *In re Gingsburg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627.

82. *In re Barrager* (D. C., Iowa), 27 Am. B. R. 366, 191 Fed. 247.

83. *In re Levin* (C. C. A., 1st Cir.), 23 Am. B. R. 845, 176 Fed. 177.

creditor in person or by an attorney "who shall be an attorney or counsellor authorized to practice in the circuit or district court."⁸⁴ On the call of the case on the return day, if no appearance is entered or filed, and the statutory facts as to time, publication and mailing, etc., appear, a discharge follows.⁸⁵ The judge does not, as a rule, investigate further.⁸⁶ The bankrupt should be ordered to attend upon the hearing if the creditors so request.⁸⁷ The failure to appear on the return day will ordinarily preclude a creditor from subsequently filing specifications of objections.⁸⁸ An objection going to the jurisdiction cannot, it seems, be made for the first time on the application for a discharge.⁸⁹ Thus, the objection that a bankrupt is a non-resident will not be considered.⁹⁰

b. Specifications of objections.—(1) IN GENERAL.—If an appearance is made in opposition to the discharge by any party in interest, such party must file a specification in writing of the grounds of his opposition within ten days thereafter.⁹¹ The purpose of such specifications is to give the bankrupt notice of the particular conduct of his which is challenged as an objection to his discharge.⁹²

(2) TIME AND PLACE OF FILING.—The ten days' requirement should be followed, and may only be excused upon reasons satisfactory to the court.⁹³ Under the general order the time may be enlarged by the judge, or, in given circumstances, a late specification may be filed *nunc pro tunc*.⁹⁴ The hearing must then go on "at such time as will give parties in interest a reasonable opportunity to be fully heard." It must be before the judge or before a special master appointed for that purpose; a jury cannot be demanded.⁹⁵

(3) WHO MAY FILE SPECIFICATIONS.—Subsection *b* as amended by the amendatory act of 1910 limits the right to oppose to parties in interest, or

84. General Order IV, Bankr. Act, § 1(9). In re Gasser (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537, in which the court held that an attorney at law admitted to practice in the district court, who enters his appearance and files objections to the discharge of a bankrupt must be presumed to have authority so to do without any special written power of attorney to take such action. See Creditors v. Williams, Fed. Cas. 3,379; In re Palmer, Fed. Cas. 10,682; In re McVey, Fed. Cas. 8,932.

85. See In re Marshall Paper Co. (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872; Talcott v. Friend et al. (C. C. A., 7th Cir.), 24 Am. B. R. 708, 713, 179 Fed. 676.

86. In re Royal (D. C., No. Car.), 7 Am. B. R. 636, 113 Fed. 140.

Failure of trustee or creditor to file specifications.—Where on petition for discharge both the trustee and the referee who has administered the estate report that the bankrupt ought not to be discharged; but neither the trustee nor any creditor has filed specifications of objection, the referee may direct that a creditors' meeting be called to consider whether the trustee should be authorized to file objections. This is as far as the court of its own motion can go. Matter of Whitney (D. C., Mass.), 41 Am. B. R. 548, 250 Fed. 1006.

87. See discussion under Section Seven of this work, *ante*. In re Shanker (D. C., Pa.), 15 Am. B. R. 109, 138 Fed. 862.

88. In re Ginsberg (D. C., Pa.), 12 Am. B. R. 459, 180 Fed. 627; In re Chase (D. C., Mass.), 26 Am. B. R. 456, 186 Fed. 408; In re Eldom, Fed. Cas. 4,814.

The appearance of the parties before the referee and the acquiescence of the objecting creditor in the proceeding thereunder cure any infirmities that may exist in the application. In re Taylor (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479.

89. Allen & Co. v. Thompson, 10 Fed. 116. In

re Ives, Fed. Cas. 7,115; In re Polakoff (Ref., N. Y.), 1 Am. B. R. 358.

90. In re Goodale (D. C., N. Y.), 6 Am. B. R. 493, 109 Fed. 783.

91. General Order XXXII; In re Albrecht (D. C., Pa.), 5 Am. B. R. 223, 104 Fed. 974.

92. In re Hirsch (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468.

93. In re Clothier (D. C., Pa.), 6 Am. B. R. 203, 108 Fed. 199.

Time of filing.—Objections to a bankrupt's discharge must be filed with the clerk, within 10 days after the "show cause" hearing, and a motion to dismiss must be granted where they have not been so filed, unless the time is enlarged in accordance with General Order XXXII. Matter of Kendrick & Co. (D. C., Vt.), 35 Am. B. R. 630, 226 Fed. 980.

94. In re Grefe, Fed. Cas. 5,794; In re Frice (D. C., Iowa), 2 Am. B. R. 674, 96 Fed. 611.

Time of filing extended.—The district judge may, in his discretion, extend the time within which a creditor may enter his appearance and file specifications in opposition to a bankrupt's discharge. In re Levin (O. C. A., 1st Cir.), 23 Am. B. R. 845, 176 Fed. 177.

Failure to file specifications within the time limited by General Order 32 can only be excused upon reasons satisfactory to the court. In re Clothier (D. C., Pa.), 6 Am. B. R. 203, 108 Fed. 199.

95. Compare Bankr. Act, § 19. A jury trial was possible under the former law.

the trustee when duly authorized by a meeting of the creditors called for that purpose. The meeting which authorizes the trustee to oppose the discharge may be called by the referee; it is not necessary that the district judge should specially authorize the meeting.⁹⁶ A party in interest is meant to include only a party who has some pecuniary interest in the discharge.⁹⁷ Specifications may be filed by any person having a pecuniary interest in resisting the discharge of the bankrupt, as one owning an "unliquidated claim,"⁹⁸ or where the party holds an equitable claim only against the estate,⁹⁹ or is the assignee of a judgment, scheduled in the name of the original creditor,¹⁰⁰ or where his claim is being contested,¹⁰¹ even though such person has not proven a debt,¹⁰² or his debt is no longer provable.¹⁰³ If the bankrupt's schedule contains the name of a creditor, it is *prima facie* evidence that such creditor is entitled to oppose the bankrupt's discharge.¹⁰⁴ If the claim is barred by the statute of limitations between the filing of objections, and the hearing thereon, the objecting creditor does not lose his right to oppose the discharge because the right to plead the statute is a personal right which may be waived by the debtor.¹⁰⁵ If the limitation had not expired at the time of bankruptcy the debt

96. In re Reiff (D. C., Pa.), 29 Am. B. R. 753, 205 Fed. 399.

97. Pecuniary interest.—In re Frice (D. C., Iowa), 2 Am. B. R. 674, 96 Fed. 611. In the case of In re Levey (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572, the court said: "The court is of the opinion that it was the purpose of Congress to enable any person having a personal pecuniary interest or a representative pecuniary interest in preventing a discharge, to oppose the discharge of the bankrupt."

The term "parties in interest" includes all creditors who have had their claims allowed and who have participated in the distribution of the insufficient assets. Talcott v. Friend et al. (C. C. A., 7th Cir.), 24 Am. B. R. 708, 718, 179 Fed. 676.

The executor or administrator of a deceased creditor of the bankrupt, who had proved his claim, it seems, may file specifications of objection. In re Levey (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572.

The referee is not a party in interest. Matter of Walsh (C. C. A., 7th Cir.), 43 Am. B. R. 266, 256 Fed. 653.

98. Ex parte Traphagen, Fed. Cas. 14,140; In re Shepard, Fed. Cas. 12,753; In re Smith, Fed. Cas. 12,977; In re Boutelle, Fed. Cas. 1,705; Books Case, Fed. Cas. 1,637; In re Levey (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572, quoting Collier on Bankruptcy 5th Ed., p. 172. The plaintiff in an action on a promissory note, in which the bankrupt denies liability is a party interested to such an extent as to enable him to object to a discharge. In re Conroy (D. C., Pa.), 14 Am. B. R. 249, 134 Fed. 764.

An allegation that the objector, "being interested as a creditor in the estate of Jacob Nathanson, a bankrupt, does hereby oppose," etc., is sufficient to show that the objecting creditor is one of the parties in interest. Matter of Nathanson (D. C., N. Y.), 19 Am. B. R. 56, 155 Fed. 645.

99. In re Tebbetts, Fed. Cas. No. 13,817; In re Conroy (D. C., Pa.), 14 Am. B. R. 249, 252, 134 Fed. 764.

100. Haley v. Pope (C. C. A., 9th Cir.), 30 Am. B. R. 644, 206 Fed. 266.

101. In re Belden, Fed. Cas. No. 1,238; In re Conroy (D. C., Pa.), 14 Am. B. R. 249, 252, 134 Fed. 764.

102. In re Frice (D. C., Iowa), 2 Am. B. R. 674, 96 Fed. 611; Matter of Nathanson (D. C., N. Y.), 19 Am. B. R. 56, 155 Fed. 645; Haley v. Pope (C. C. A., 9th Cir.), 30 Am. B. R. 644, 206 Fed. 266; Matter of Armstrong (D. C., Cal.), 40 Am. B. R. 770, 248 Fed. 202. This was not so under the former law. Compare In re Murdock, Fed. Cas. 9,930. See also In re Beldon, Fed. Cas. 1,238, and In re Bush, Fed. Cas. 2,222.

103. Matter of Bimberg (D. C., N. Y.), 9 Am. B. R. 601, 121 Fed. 942; In re Conroy (D. C., Pa.), 14 Am. B. R. 249, 134 Fed. 764. A creditor who has been paid in full cannot oppose discharge. In re Harr (D. C., Mo.), 16 Am. B. R. 213, 143 Fed. 421. Nor can a creditor whose debt is barred by the statute of limitations. In re Burk, Fed. Cas. 2,156.

Creditor who refuses to submit claim.—A creditor may prove his claim for goods obtained by a false financial statement and oppose the discharge; but, if he will not liquidate his claim, and persists in proceeding in another jurisdiction on the theory that the debt is not provable and not dischargeable, he is not entitled to oppose the discharge. Matter of Menzin (D. C., N. Y.), 37 Am. B. R. 468, 233 Fed. 333.

104. In re Barrager (D. C., Ia.), 27 Am. B. R. 366, 191 Fed. 247.

105. Statute of limitations.—In the case of In re Westbrook (D. C., Ala.), 26 Am. B. R. 181, 182, 186 Fed. 414, the court said: "This matter comes on to be heard upon the objection of a creditor to the application of the bankrupt for his discharge. The bankrupt denies the right of the objecting creditor to appear and object as a party in interest, because his claim has become barred by the statute of limitations, after the filing of the specifications of objections, but before

is provable.¹⁰⁶ A creditor having a claim which is not dischargeable may not be heard in opposition.¹⁰⁷ Where petitioners simply allege that they are creditors of the bankrupt, it is insufficient to show that they are "parties in interest."¹⁰⁸ If a member of a firm files objections he must show that he is acting with the consent of the other members.¹⁰⁹ It was held under the law prior to the amendment of 1910 that a trustee is a "party in interest" and may file objections, when it appears that he is seeking to recover from the bankrupt property alleged to belong to the estate.¹¹⁰ Under the law as amended he is not a party to the proceedings until he has been authorized to appear by a creditors' meeting,¹¹¹ and proof of the trustee's authority is not waived by going to trial.^{111a} And when so authorized he is entitled to exercise the same rights as other parties in interest.¹¹² In Pennsylvania a creditor may prosecute his objections to the discharge of a bankrupt, in *forma pauperis*.¹¹³

(4) FORM AND CONTENTS OF SPECIFICATIONS.—(I) *In general*.—Official Form No. 58 should be followed in preparing the specifications. It will require modification to meet the circumstances of the particular case. They should be in writing, and should contain allegations sufficient to show that all essential facts exist bringing the opposition within the grounds specified by the statute.¹¹⁴ Specifications must be clear and unequivocal, and contain

the hearing of the application. The statute of limitations does not destroy the cause of action, but merely affects the remedy. If not specially pleaded by the debtor, when the claim is sued on, judgment would go against him. The defense is personal and waived by a failure to plead. In view of the nature of the defense there is left in the creditor a subsisting cause of action in spite of the running of the statute. He is therefore a party in interest, ever thereafter, in resisting the discharge. Again, when the specification of objection was filed by the creditor, the statute had not run. He was then a party in interest, and it seems to me the time as of which this interest is to be determined is the time of the beginning of the opposition to a discharge."

106. See discussion under Section Sixty-three, sub-heading "Debts outlawed by statute of limitations."

107. *In re Servis* (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222; *In re Maples* (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 919; *In re Main* (D. C., Iowa), 30 Am. B. R. 547, 205 Fed. 421. *Contra*, *Matter of Armstrong* (D. C., Cal.), 40 Am. B. R. 770, 248 Fed. 292.

Creditor who has proved claim.—Although a bankrupt is not entitled to be discharged from debts fraudulently contracted, a creditor who has proved a claim and from whom goods have been obtained by bankrupt under a false property statement in writing, may validly contest bankrupt's application for a discharge. *Matter of Reed* (D. C., Okl.), 26 Am. B. R. 286, 191 Fed. 920.

108. *In re Chandler* (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637, holding that the petition should show that the petitioners have at the time provable debts against the bankrupt which will be affected by his discharge; *In re Barrager* (D. C., Iowa), 27 Am. B. R. 366, 191 Fed. 247, holding creditors named in the bankrupt's sched-

ules are *prima facie* creditors entitled to oppose discharge.

109. *In re Hendrick* (D. C., Ky.), 16 Am. B. R. 218, 143 Fed. 647.

110. *In re Levey* (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572; *In re Hockman* (D. C., Pa.), 30 Am. B. R. 921, 209 Fed. 330.

111. *In re Hockman* (D. C., Pa.), 30 Am. B. R. 921, 209 Fed. 330; *Matter of White* (C. C. A., 9th Cir.), 41 Am. B. R. 458, 248 Fed. 115.

111a. *Matter of White* (C. C. A., 9th Cir.), 41 Am. B. R. 458, 248 Fed. 115.

112. **Effect of authorization of trustee to oppose discharge.**—Under section 14-b of the bankruptcy act, where a majority of the creditors both in number and amount have authorized the trustee to oppose a bankrupt's discharge, he is entitled to exercise the same rights which "parties in interest" may exercise as a matter of course, including "a reasonable opportunity to be fully heard;" and the right to exercise such authority having been granted or perfected as contemplated by the statute, the court or referee cannot withhold it or annex conditions which are repugnant to its free, or at least reasonable, exercise, such as denying him reimbursement for his costs and reasonable expenses and imposing the condition that the final settlement of the estate shall not be delayed for more than sixty days. *In re Churchill* (D. C., Wis.), 28 Am. B. R. 603, 197 Fed. 111.

113. *In re Guilbert* (D. C., Pa.), 18 Am. B. R. 830, 154 Fed. 676.

114. See also Supplementary Forms, No. 111; *Hagar & Alexander's Bankr. Forms* (2d Ed.), No. 274.

Form and contents of specifications.—*In re Peacock* (D. C., No. Car.), 4 Am. B. R. 136, 101 Fed. 560; *In re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 262; *In re Kaiser* (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689; *Matter of Brincat* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811; *Matter of Epstein* (D. C., Fla.), 40 Am. B. R. 406, 248 Fed. 191.

specific averments of facts; they should be pleaded with greater particularity than complaints in civil actions; indeed, they more nearly resemble indictments, especially if the commission of one of the offenses against the law is relied on,¹¹⁵ although the strict rules applicable to indictments may not apply.¹¹⁶ Allegations must be specific and of such a character that their sufficiency may be met by demurrer, or by exceptions analogous to those

A specification of objection to a bankrupt's discharge alleging that, within the four months' period, the bankrupts transferred, removed, destroyed or concealed their property, with intent to hinder, delay and defraud their creditors, in that, about a week prior to the filing of the petition, and at other times, they removed and concealed large quantities of merchandise in a certain house, with intent to hinder, delay, and defraud their creditors, is sufficient. *Milgraum v. Ost* (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

Where the written specifications are that the bankrupt has "concealed part of his effects from the court," and has, "in contemplation of becoming a bankrupt, made payments, transfers, and assignments of his property for the purpose of preferring a creditor having a claim against him, and to prevent the same from coming into the hands of the trustee, such specifications are not sufficiently definite and are too vague and general to prevent the discharge of the bankrupt. In *re Nixon* (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440.

An allegation that said bankrupts, with intent to conceal their financial condition, did destroy, through the agency of their regularly authorized bookkeeper, canceled checks drawn by them, and also the check stubs, from which such condition might be ascertained, is sufficiently specific. *Godschalk Co. v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580. But it has been held that a specification of objection to a bankrupt's discharge that said bankrupts, with intent to conceal their financial condition, have destroyed, concealed, or failed to keep books of account or record, from which such condition might be ascertained, is insufficient, because it follows the words of the statute. *Milgraum v. Ost* (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

Criminal concealment.—Specifications must aver scienter and all essential facts necessary to establish the commission of the offense. In *re Kaiser* (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689; *Matter of Wetmore* (Ref., N. Y.), 6 Am. B. R. 703.

115. Clear, positive and direct.—Specifications in opposition to a bankrupt's application for a discharge, and the proofs in support thereof, should be clear, positive, and direct. The opposing creditor or creditors must distinctly allege and prove one or more of the statutory grounds for refusing a dis-

charge. In *re McGurn* (D. C., Nev.), 4 Am. B. R. 459, 102 Fed. 743. See also In *re Thomas* (D. C., Iowa), 1 Am. B. R. 515, 92 Fed. 912; In *re Holman* (D. C., Iowa), 1 Am. B. R. 600, 92 Fed. 512; In *re Hixon* (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440; In *re Hirsch* (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468; In *re Kaiser* (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689; In *re Peacock* (D. C., No. Car.), 4 Am. B. R. 136, 101 Fed. 560; In *re McGurn* (D. C., Nev.), 4 Am. B. R. 459, 102 Fed. 743; In *re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; In *re Gross* (Ref., N. Y.), 5 Am. B. R. 271; In *re Wolfensohn* (Ref., N. Y.), 5 Am. B. R. 60; *Matter of Wetmore* (Ref., N. Y.), 6 Am. B. R. 703; In *re Idsall* (D. C., Iowa), 2 Am. B. R. 741, 96 Fed. 314; In *re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 164 Fed. 537; In *re Main* (D. C., Iowa), 30 Am. B. R. 547, 206 Fed. 421, citing text: *Matter of Groves* (D. C., Fla.), 39 Am. B. R. 833, 244 Fed. 197.
116. In *re Bialock* (D. C., So. Car.), 9 Am. B. R. 266, 118 Fed. 676.

Criminal indictment.—Where the offense is one prohibited by § 29 of the act the allegations should be set forth with substantially the exactness of a criminal indictment. *Matter of Wetmore* (Ref., N. Y.), 6 Am. B. R. 703; In *re Hirsch* (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468; In *re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282. So far as the specifications charge or attempt to charge the commission of a crime, they must state facts showing the commission of the crime with substantially the same particularity and exactness required in an indictment. In *re Levey* (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572. Even if not required to be as specific as indictments, they should, where based upon acts made criminal by the bankruptcy act, be so specific and of such a character that their sufficiency may be met by demurrer or by exceptions. *Matter of White* (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688.

Perjury; sufficiency of specifications.—Where perjury is relied upon as an objection to the confirmation of a composition, it should be charged with substantially the same particularity and exactness as would be required in an indictment. The specifications should set forth the testimony alleged to be false, together with the facts relied on to prove its falsity. *Matter of Reivkin* (D. C., Conn.), 33 Am. B. R. 170, 216 Fed. 218.

allowed in equity;¹¹⁷ mere general averments are not sufficient.¹¹⁸ If they fail to allege any fact which by any construction would be deemed ground for denying a discharge, they will be disregarded although not excepted to.¹¹⁹ The specifications should allege that the objecting creditor will be affected by the discharge, and is therefore interested in defeating it.¹²⁰ It is also necessary for the petitioners to aver in their application the facts showing their freedom from laches.¹²¹ The exact language of the statute should not be used except, possibly, in the case of failure to keep books of accounts.¹²² If vague or general, or merely asserting acts which would render certain debts not dischargeable, but not affect the right to a discharge proper, the specifications will be dismissed.¹²³ Two grounds of objection should not be included in one specification.¹²⁴ Mere conclusions of law and alternative general averments are not sufficient.¹²⁵ Nor are facts alleged upon mere information and belief.¹²⁶ The rule has been stated to be that facts relied on to prevent a discharge must be pleaded with sufficient certainty of detail to appraise the bankrupt of the charge he has to meet and to enable the court to understand the issue to be examined and determined.¹²⁷

117. *In re Troeder* (C. C. A., 1st Cir.), 17 Am. B. R. 723, 150 Fed. 710; *Matter of White* (D. C. Ore.), 34 Am. B. R. 803, 222 Fed. 688, citing text.

118. *In re Steed* (D. C., No. Car.), 6 Am. B. R. 73, 107 Fed. 682; *In re Peck* (D. C., Conn.), 9 Am. B. R. 747, 120 Fed. 972; *In re Parish* (D. C., Iowa), 10 Am. B. R. 548, 122 Fed. 553; *In re Chandler* (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637; *In re Servis* (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222; *Matter of Abramovitz* (D. C., Fla.), 41 Am. B. R. 588, 253 Fed. 299.

General averments.—Specifications of objections to a bankrupt's discharge, in general terms following the language of the statute, should be ordered amended or made more specific, provided an objection thereto is taken before trial; but where a motion to amend is not made until after witnesses have been called and it is apparent that the bankrupt will not be affected by surprise or prejudice by proceeding upon the specifications as they stand, it is not error to deny the motion until the testimony is heard which might supply the deficiency. *In re Mintzer* (D. C., N. Y.), 26 Am. B. R. 743, 197 Fed. 648.

119. *In re McCarthy* (D. C., N. Y.), 22 Am. B. R. 499, 170 Fed. 850; *Matter of Lockwood* (D. C., N. Y.), 39 Am. B. R. 478, 240 Fed. 161.

120. *In re Servis* (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222; *In re Brown* (C. C. A., 5th Cir.), 7 Am. B. R. 252, 112 Fed. 49; *Matter of Fackler* (D. C., Ohio), 39 Am. B. R. 742, 246 Fed. 864.

121. *In re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537.

122. *In re McNamara* (Ref., N. Y.), 2 Am. B. R. 506; *In re Hirsch* (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468; *In re Levey* (D. C., N. Y.), 13 Am. B. R. 317, 133 Fed. 572; *In re Wetmore* (D. C., N. Y.), 6 Am. B. R. 704, 95 Fed. 703. *In re Condict*, Fed. Cas. 3,094; *Matter of Remmers* (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484; *Milgraum v. Ost* (D. C., Pa.), 12 Am. B. R. 305, 129 Fed. 827.

123. *In re Hixon* (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440; *In re Holman* (D. C., Iowa), 1 Am. B. R. 600, 92 Fed. 512; *In re Shepherd*, 2 N. B. N. Rep. 1,020; *In re Hi*¹. Fed. Cas. 6,482; *In re Bellis*, Fed. Cas. 1,275. Compare *Braganza v. St. Louis Cycle* (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77; *In re Blalock* (D. C., So. Car.), 9 Am. B. R. 286, 118 Fed. 679; *In re Parish* (D. C., Iowa), 10 Am. B. R. 548, 122 Fed. 553; *In re Servis* (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222.

124. *Matter of Wetmore* (Ref., N. Y.), 6 Am. B. R. 703, holding a charge that the bankrupt made a false oath in the proceeding, and that he concealed assets from the trustee, objectionable.

125. *In re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 103 Fed. 232; *In re Main* (D. C., Ia.), 30 Am. B. R. 547, 205 Fed. 421.

126. *Matter of White* (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688; *Matter of Abramovitz* (D. C., Fla.), 41 Am. B. R. 588, 253 Fed. 299.

127. *Matter of Remmers* (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484, citing *In re McNamara* (Ref., N. Y.), 2 Am. B. R. 506; *In re Milgraum* (D. C.), 12 Am. B. R. 306, 129 Fed. 827; *In re Thomas* (D. C.), 1 Am. B. R. 515, 92 Fed. 912; *In re Holman* (D. C.), 1 Am. B. R. 600, 92 Fed. 512.

Information to bankrupt and court.—Specifications should distinctly allege the particular grounds relied upon to defeat the discharge, so as to advise (1) the bankrupt of the grounds relied upon, in order that he may prepare to meet the same, and (2) the court of the issue to be tried, and should also allege facts showing that the party filing the specifications will be affected by the discharge and is therefore interested in defeating the same. *In re Servis* (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222; *In re Wolfensohn* (Ref., N. Y.), 5 Am. B. R. 60.

(II) "*Knowingly and fraudulently committed act.*—Where it is charged that the bankrupt has committed an act punishable by imprisonment under the bankrupt act it must be alleged to have been done "knowingly and fraudulently,"¹²⁸ but specifications may be amended so as to allege that the acts complained of were knowingly and fraudulently committed.¹²⁹ This requirement applies where the act alleged consists of the concealment of property¹³⁰ or of making a false oath in the proceedings.¹³¹

(III) *Concealment or transfer of property.*—The allegations of the acts alleged as constituting should be specific as to the circumstances of the concealment or transfer.¹³² Where property has been fraudulently transferred or concealed the specifications should disclose a description of the property, together with the names of the persons holding the title, the time of the transfer and any other facts necessary to identify the transaction.¹³³

128. In re Blalock (D. C., So. Car.), 9 Am. B. R. 266, 116 Fed. 679; In re Peek (D. C., Ct.), 9 Am. B. R. 747, 120 Fed. 972; In re Patterson (D. C., N. Y.), 10 Am. B. R. 371, 121 Fed. 921; In re Levey (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572; In re Taplin (D. C., Ia.), 14 Am. B. R. 360, 135 Fed. 861.

Where concealment of true financial condition is alleged, and there is no allegation as to knowledge of fraudulent intent, the specification is insufficient. In re Wetmore (Ref., N. Y.), 6 Am. B. R. 703. Where the allegation is that the bankrupt has concealed assets, it must be alleged that such concealment was "knowingly and fraudulently" done. Property should be described in such a manner that it may be clearly identified; specifications should not be used as a dragnet or as a cover for a fishing excursion." In re Mudd (D. C., Mo.), 5 Am. B. R. 242, 105 Fed. 348. See also In re Peck (D. C., Conn.), 9 Am. B. R. 747, 120 Fed. 972; In re Hirsch (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468; In re Adams (D. C., N. Y.), 22 Am. B. R. 613, 171 Fed. 599.

129. In re Knaszak (D. C., N. Y.), 18 Am. B. R. 187, 151 Fed. 503.

130. In re Taplin (D. C., Ia.), 14 Am. B. R. 360, 135 Fed. 861; In re Pierce (D. C., N. Y.), 4 Am. B. R. 554, 103 Fed. 64; In re Adams (D. C., N. Y.), 22 Am. B. R. 613, 171 Fed. 599; In re Griffin Bros. (D. C., Ala.), 19 Am. B. R. 79, 154 Fed. 537.

131. In re Patterson (D. C., N. Y.), 10 Am. B. R. 371, 121 Fed. 921; Matter of Agnew & Sherman (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

False oath as to principal place of business.—Specifications insufficient. Matter of Greer (D. C., Ky.), 40 Am. B. R. 797, 248 Fed. 131.

132. Matter of Agnew & Sherman (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650; In re Griffin Bros. (D. C., Ala.), 19 Am. B. R. 79, 154 Fed. 537; In re Parish (D. C., Ia.), 10 Am. B. R. 548, 122 Fed. 553; In re Hixon (D. C., Ia.), 1 Am. B. R. 610, 93 Fed. 440, holding that where the written specifications are that the bankrupt has "concealed part of his effects from the court," and has, "in contemplation of becoming a bankrupt, made payments, transfers, and assignments of his property for the purpose of preferring a creditor having a claim against him, and

to prevent the same from coming into the hands of the trustee," they are too vague and general to prevent the discharge of the bankrupt.

Specifications as to time and place.—A specification of objection to bankrupt's discharge alleging that, within the four months' period, the bankrupts transferred, removed, destroyed, or concealed their property, with intent to hinder, delay, and defraud their creditors, in that, about a week prior to the filing of the petition, and at other times, they removed and concealed large quantities of merchandise in a certain house, with intent to hinder, delay and defraud their creditors, and thereafter, on a certain day, removed and concealed other large quantities of merchandise from their place of business with like intent, is sufficiently specific. In re Milgraum v. Ost (D. C., Pa.), 12 Am. B. R. 307, 129 Fed. 827.

133. In re Parish (D. C., Iowa), 10 Am. B. R. 548, 122 Fed. 553.

Description of property.—Specifications of objections to a bankrupt's discharge, alleging the concealment of assets, should specify what property was concealed, and when, with some reasonable degree of certainty. Matter of Agnew and Sherman (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

A specification in opposition to a bankrupt's discharge, which alleges that the bankrupt has concealed a large amount of merchandise and groceries, does not sufficiently describe the property. Matter of White (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688.

Placing property in hands of strangers.—If a person, before a petition in bankruptcy is filed by him or against him, in contemplation thereof, puts property out of his hands, intending to put it beyond the reach of his creditors and retain title, so that at some future time he may reclaim it, and he commences such concealment prior to the filing of a petition, and continues it thereafter and during the pendency of such bankruptcy proceedings, failing to disclose the truth to his trustee, and then aids in its concealment by transfer to or through others. specifications of objections to a discharge as

(IV) *False statement to secure credit.*—Where it is alleged as a ground of opposition that the bankrupt has made a materially false statement upon which he obtained credit, the substance or part of the statement alleged to be false must be set forth clearly and specifically.¹³⁴ Not only must the false representation be set out but the name of the person alleged to have been defrauded must be given,¹³⁵ and a statement made of the property which was obtained by such fraudulent representation.^{136a}

(V) *Failure to keep, or destruction or concealment of books.*—Ordinarily the bankrupt knows whether he has kept, destroyed or concealed books of accounts. The creditor may not be expected to know more than that proper books of accounts have not been delivered to the bankrupt's trustee, hence it is not required to allege this offense with the same particularity as the other offenses.¹³⁶ The language of the statute is sufficient to serve the purpose of giving notice to the offender of the particular conduct which is charged against him as an offense.¹³⁷

(5) AMENDMENT OF SPECIFICATIONS.—Amendments to correct error due to mistake or accident are usually allowed, if asked at any time prior to the

alleging, will be deemed sufficient. *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

134. *Godshalk Co. v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580; *In re Main* (D. C., Ia.), 30 Am. B. R. 547, 205 Fed. 421; *Matter of Epstein* (D. C., Fla.), 40 Am. B. R. 406, 248 Fed. 191. See also *Matter of Milboff* (D. C., Ohio), 40 Am. B. R. 72, 243 Fed. 242.

135. *Matter of Napier* (D. C., Ky., Ref.), 23 Am. B. R. 500; *In re Levey* (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572; *Matter of Epstein* (D. C., Fla.), 40 Am. B. R. 406, 248 Fed. 191.

136a. *Matter of Troutman & Jesse* (D. C., Ky.), 40 Am. B. R. 418, 251 Fed. 930.

136. General allegation as to failure to keep books or to conceal or destroy them, held sufficient. *Godshalk v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580; *In re Brod* (D. C., Ga.), 21 Am. B. R. 426, 166 Fed. 1011; *In re Ginsburg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627.

The intention of the bankrupt in failing to keep books of account should be alleged in the specification of objection to a discharge. *Matter of Epstein* (D. C., Fla.), 40 Am. B. R. 406, 248 Fed. 191.

Concealment of or failure to keep books; sufficient allegations.—Objections to a bankrupt's discharge upon the ground that he "concealed or failed to have kept books of account or the records from which his financial condition might be ascertained," and that "while under examination under oath before the referee he failed to show what he did or had done with money which he alleged to have borrowed from his sister-in-law," naming her, are sufficiently specific. *In re Randall* (D. C., Pa.), 20 Am. B. R. 306, 159 Fed. 258.

Where a bankrupt testifies that he kept no books of account, an objection to the granting of his discharge, following the words of the statute, that he failed to keep books of account or records from which his financial condition might be ascertained "with intent to conceal his true financial condition and in contemplation of bankruptcy" is sufficient. But this form of objection, following the language of the statute, may be criticised, in that it is impossible to tell whether an utter failure to keep books is intended to be charged, or whether the books that were kept are insufficient to show the true condition of the

bankrupt's property. *In re Lewis* (D. C., N. Y.), 20 Am. B. R. 711, 163 Fed. 137.

In the case of *In re Magen Bros. Co.* (C. C. A., 3d Cir.), 27 Am. B. R. 729, 192 Fed. 883, the court said: "Whether a bankrupt has kept such accounts, and, if so, whether he retains, conceals, or destroys them, is a matter peculiarly within his own knowledge and which, in the nature of things, a creditor ordinarily does not know. All he does know is that the bankrupt has not surrendered such books to the trustee. Now the purpose of a specification is to fairly apprise the bankrupt of such matters in bar of his discharge as will be insisted upon, in order that he may be able to meet them. Such matters are not to be specified with the exactness and formality required in indictments, but only in such substantial form as will fairly inform one of the charges made against him. But where, as in the case of books of account, the bankrupt in the very nature of things, and he alone already knows what books he did or did not keep, and the creditor does not know, except as he infers their non-existence, concealment, or destruction from the fact of their non-delivery to the trustee, it would seem that a specification following the language of the statute and covering non-keeping, concealment, or destruction sufficiently and fairly apprises the bankrupt of the matter insisted upon in that respect." Citing *Godshalk v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580, 64 C. C. A. 148.

137. *In re Hirsch* (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468; *In re Ginsburg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627; *In re Patterson* (D. C., N. Y.), 10 Am. B. R. 371, 121 Fed. 921; *Milgram v. Ost* (D. C., Pa.), 17 Am. B. R. 306, 129 Fed. 827; *In re Brod* (D. C., Ga.), 21 Am. B. R. 426, 166 Fed. 1,011; *Matter of Epstein* (D. C., Fla.), 40 Am. B. R. 406, 248 Fed. 191.

submission of the case.¹³⁸ It has even been held that under certain circumstances they may be denied to conform to the proofs.¹³⁹ Application should be made to the judge; a referee having no power to grant such amendments.¹⁴⁰ Leave to amend vague and indefinite specifications of objections may be granted.¹⁴¹ Where the original specifications allege fraudulent false representations as grounds of opposition, an amendment is permissible to set up another instance of such representations, where there is nothing to suggest laches or oversight.¹⁴² Specifications of objections to a bankrupt's discharge may be amended, in the discretion of the court, after the expiration of the ten days allowed by General Order XXXIII, for the filing thereof,¹⁴³ provided the proposed amendment does not present a new issue or set up new matter constituting an additional or separate objections to the discharge.¹⁴⁴ The specifications as amended must merely amount to an enlargement of the original, and if they exceed this they are not entitled to come in.¹⁴⁵ Amendments

138. In re Quackenbush (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; In re Carley (C. C. A., 3d Cir.), 8 Am. B. R. 720, 117 Fed. 130; In re Hixon (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440; In re Morgan (D. C., Ark.), 4 Am. B. R. 402, 101 Fed. 982; In re Osborne (C. C. A., 1st Cir.), 8 Am. B. R. 165, 115 Fed. 1; In re Glass (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509; Matter of Soloway & Katz (C. C. A., 2d Cir.), 32 Am. B. R. 234, 211 Fed. 333. See Am. Bankr. Dig., § 1044.

Knowingly and fraudulently committed.—An amendment to specifications may be allowed so as to allege that the acts complained of were knowingly and fraudulently committed. In re Knaskaz (D. C., N. Y.), 18 Am. B. R. 187, 151 Fed. 503. Such an amendment may be made *nunc pro tunc*. In re Pierce (D. C., N. Y.), 4 Am. B. R. 554, 103 Fed. 64; In re Bemis (D. C., N. Y.), 5 Am. B. R. 36, 104 Fed. 672.

In cases of mistake or accident the courts are extremely liberal in permitting amendments. In re Gross (Ref., N. Y.), 5 Am. B. R. 271.

Laches.—Where a creditor, nineteen months after filing its objections to the bankrupt's discharge and fifteen months after closing its case, presents a petition alleging more in detail but in substance the same transactions embodied in the objections of another creditor with whom it united in a single joint motion, whereby the specifications of both were referred to a special master, a refusal of the district judge to allow such additional specifications to be filed is a proper exercise of judicial discretion. Kentucky National Bank v. Carley (C. C. A., 3d Cir.), 10 Am. B. R. 375, 121 Fed. 822.

When creditors delay the hearing upon an application for a discharge by reason of their insufficient objections thereto, it rests largely in the sound discretion of the court as to whether or not amendments to such specifications shall be permitted. In re Mudd (D. C., Mo.), 5 Am. B. R. 242, 105 Fed. 348.

139. In re Lesser (D. C., N. Y.), 5 Am. B. R. 330, 108 Fed. 205; In re Knaskaz

(D. C., N. Y.), 18 Am. B. R. 187, 151 Fed. 503.

Amendments to conform to proof.—Where specifications of objections to bankrupt's discharge charged concealment of and failure to account for assets and the withholding of property from their schedules in certain amounts, the failure of the trustee to prove the whole amount alleged is immaterial in passing upon the bankrupt's right to be discharged, but the specifications may be amended to conform to the proof. Matter of Magen (D. C., Pa.), 33 Am. B. R. 346, 218 Fed. 692.

140. In re Wolfensohn (Ref., N. Y.), 5 Am. B. R. 60; In Kaiser (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689; In re Peck (D. C., Conn.), 9 Am. B. R. 747, 120 Fed. 972. For form of petition for amendment of specifications, see Hagar & Alexander's Bankr. Forms, (2d ed.), Form No. 276.

141. In re Wittenberg (D. C., Pa.), 20 Am. B. R. 308, 160 Fed. 991; Matter of Singer (C. C. A., 2d Cir.), 41 Am. B. R. 508, 261 Fed. 51.

142. Matter of Pechin (D. C., Pa.), 34 Am. B. R. 721, 225 Fed. 798.

143. In re Osborne (C. C. A., 1st Cir.), 8 Am. B. R. 165, 115 Fed. 1; In re Nathanson (D. C., N. Y.), 18 Am. B. R. 252, 152 Fed. 585.

144. In re Johnson (D. C., S. Dak.), 27 Am. B. R. 644, 192 Fed. 356; In re Weston (C. C. A., 2d Cir.), 30 Am. B. R. 647, 206 Fed. 281.

145. Defects in the form of specifications, filed with a referee, may be cured by amendments, if the nature of the objections remains unchanged. In re Hendrick (D. C., Conn.), 14 Am. B. R. 795, 138 Fed. 473.

Lack of verification, being matter of form only, may be supplied by amendment. In re Gift (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230; In re Hanna (C. C. A., 2d Cir.), 21 Am. B. R. 843, 108 Fed. 238.

Amendments in matter of substance, after the time within which objections are required to be filed, are only allowable where there is already a record sufficient to justify it. In re Gift (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230.

are discretionary with the district courts, and are reviewable in the circuit court of appeals, under section 24-b of the Bankruptcy Act.¹⁴⁸ Leave to amend should not be granted where only the words of the statute are used.¹⁴⁷

(6) **WAIVER OF DEFECTS.**—All objections to the sufficiency of specifications are waived unless made before trial;¹⁴⁸ unless the specifications are fatally defective because failing to show some jurisdictional requirement, as, for instance, that the party filing them is a party in interest.¹⁴⁹ Lack of verification may be waived,¹⁵⁰ and so may a defect consisting of a failure to allege that the offense was committed knowingly and fraudulently.¹⁵¹

(7) **EXCEPTIONS TO SPECIFICATIONS.**—Objections to the form of specifications not taken in the lower court cannot be raised on review.¹⁵² The bankrupt need not answer;¹⁵³ the issue is made by the petition and the specifications. He may file exceptions to the latter, on the ground of insufficiency, or he may answer or demur if he chooses.¹⁵⁴ The creditors may not object to the referee's report because he failed to consider the bankrupt's exceptions.¹⁵⁵

148. Amendments discretionary.—An amendment of specifications in opposition to a discharge is a matter of sound discretion and should only be exercised to meet the ends of justice. In re Morgan (D. C., Ark.), 4 Am. B. R. 402, 101 Fed. 982.

Where no laches or unfairness on the part of a creditor appears, and no injustice to the bankrupt or unreasonable delay will result, amendments to specifications in opposition to the bankrupt's discharge should be allowed as of course. In re Carley (C. C. A., 3d Cir.), 8 Am. B. R. 720, 117 Fed. 130.

While the court may permit the objecting creditor to amend his specifications so as to specifically state his objections, it should not do so unless it is apparent that the party can specify facts, and that his failure to be specific is excusable. In re Hixon (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440.

147. In re Bromley (D. C., Pa.), 18 Am. B. R. 227, 153 Fed. 493. In re Pack (D. C., Conn.), 9 Am. B. R. 747, 120 Fed. 972.

148. In re Baldwin (D. C., N. Y.), 9 Am. B. R. 591, 119 Fed. 796.

Where specifications of objection are insufficiently drawn, objections to the form of the specifications are waived where the bankrupt goes into the hearing without making a motion to dismiss until the taking of the testimony is completed. Matter of Huber (D. C., N. D., Ref.), 34 Am. B. R. 100.

149. In re Servis (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222.

150. Lack of verification.—An objection that specifications lack verification comes too late if made after the submission of the case. In re Baerncof (D. C., Pa.), 9 Am. B. R. 133, 117 Fed. 975; In re Robinson (D. C., R. I.), 10 Am. B. R. 477, 123 Fed. 844.

Objection to the jurat to specifications of objections to a discharge may not be raised for the first time on petition for review. Godschalk Co. v. Sterling (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580.

151. In re Osborne (C. C. A., 1st Cir.), 8 Am. B. R. 165, 115 Fed. 1.

Failure to demur or object.—Where a rule of the court provides that when specifications of objections are filed, and no demurrer or motion as to their sufficiency is interposed, prior to the hearing, they shall be deemed sufficient to present every question fairly suggested thereby, it was held that a specification alleging a fraudulent transfer and that the bankrupt retained possession of the property and made no reference thereto in his schedules, is sufficient to raise the question of a secret ownership or concealment. In re Wakefield (D. C., N. Y.), 31 Am. B. R. 42, 207 Fed. 180.

152. In re Headley, 2 N. B. N. Rep. 684; In re Servis (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222; Matter of Singer (C. C. A., 2d Cir.), 41 Am. B. R. 505, 251 Fed. 51. Form of exceptions to specifications, see Hagar & Alexander's Bankr. Forms (2d ed.), Form No. 275.

153. In re Logan (D. C., Ky.), 4 Am. B. R. 525, 102 Fed. 876, holding that a failure to answer does not justify a denial of the bankrupt's discharge, but that the specifications in opposition must be established by proof. In re Crist (D. C., Ala.), 9 Am. B. R. 1, 116 Fed. 1007, holding that the bankrupt need not demur.

154. In re Rosenfield, Fed. Cas. 12,059.

In the Western District of Kentucky where specifications of objections to a bankrupt's discharge have been filed, the practice is to refer the application for discharge to a referee to ascertain and report the facts under the third clause of General Order in Bankruptcy No. 12; the filing of objections does not start a new case; no system of pleading is in existence in such case, and a demurrer taken to the specifications of objections pending the reference and eleven days thereafter is not in harmony with the practice in such district, although valid grounds of objection, even though taken by demurrer, will not be disregarded by the court. Matter of Daugherty (D. C., Ky.), 26 Am. B. R. 550, 189 Fed. 239.

Weight given report of special master.—When to prevail over unverified allegations of fact by bankrupt. Matter of Frosteg (D. C., Ga.), 42 Am. B. R. 275, 252 Fed. 199.

155. Matter of Brockman (D. C., Ky.), 21 Am. B. R. 261, 168 Fed. 1015.

c. **Creditor proceeding under specifications of another creditor.**—Creditors may be allowed, in the discretion of the court, to enforce objections filed and abandoned by other creditors.¹⁵⁶ And a claim by a creditor, whose objections to a discharge are held to be insufficient, of the right to proceed under objections filed on behalf of another creditor who did not appear on the hearing should be passed upon by the district judge, and not by the referee.¹⁵⁷

d. **Verification of specifications.**—Specifications of objection to a bankrupt's discharge are in the nature of pleadings within the meaning of section 18-c of the bankruptcy act and should be verified¹⁵⁸ in order to prevent frivolous objections and waste of time;¹⁵⁹ although it has been held that lack of verification is not fatal,¹⁶⁰ and the omission may be supplied by amendment,¹⁶¹ at any time before the testimony is all in and the argument commenced.¹⁶² An objection that there was a failure or omission of verification cannot be raised for the first time on petition for review.¹⁶³ Several creditors may verify the same specifications.¹⁶⁴ A verification, made by the attorney or agent for the objecting creditor, should explain why the oath was not made by the creditor himself.¹⁶⁵ The verification should be in the form prescribed for the creditor's petition. If there be two or more objecting creditors all should verify the specifications.¹⁶⁶

156. In re Houghton, Fed. Cas. 6,730, 10 N. B. R. 337.

157. Matter of Wetmore (Ref., N. Y.), 6 Am. B. R. 703.

158. **Verification of specifications.**—In re Brown (C. C. A., 5th Cir.), 7 Am. B. R. 252, 112 Fed. 49; In re Baerncoff (D. C., Pa.), 9 Am. B. R. 133, 117 Fed. 975; In re Gift (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230; Matter of Milhoff (D. C., Ohio), 40 Am. B. R. 72, 243 Fed. 242; Matter of Abramovitz (D. C., Fla.), 41 Am. B. R. 588, 253 Fed. 299.

159. In re Brown (C. C. A., 5th Cir.), 7 Am. B. R. 252, 112 Fed. 49.

160. In re Jamieson (D. C., Ill.), 9 Am. B. R. 681, 120 Fed. 697; In re Brown (C. C. A., 5th Cir.), 7 Am. B. R. 252, 112 Fed. 49, holding that a ruling of the district judge requiring a positive verification to the specifications of objections is not reviewable.

161. In re Meurer (D. C., Pa.), 15 Am. B. R. 823, 144 Fed. 445; In re Miller (D. C., Iowa), 27 Am. B. R. 606, 192 Fed. 730, holding that the verification may be supplied after the specifications were filed; In re Gift (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230; In re Hanna (C. C. A., 2d Cir.), 21 Am. B. R. 843, 168 Fed. 238, holding that specifications filed for a number of creditors but signed and verified only by an agent of one of them, may be amended so as to permit another creditor to sign and verify them; Matter of Abramovitz (D. C., Fla.), 41 Am. B. R. 588, 253 Fed. 299.

162. In re Baerncoff (D. C., Pa.), 9 Am. B. R. 133, 117 Fed. 975; In re Miller (D. C., Iowa), 27 Am. B. R. 606, 192 Fed. 730.

After submission of the case to the court upon evidence which fully supports and verifies certain of the specifications, the objection to the specifications for lack of verification is too late, and cannot be considered as a sufficient ground for dismissing the specifications and granting the discharge. In re Robinson (D. C., R. I.), 10 Am. B. R. 477, 123 Fed. 844.

163. Godechalk v. Sterling (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580.

164. Milgraum v. Ost (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

165. **Verification by attorney or agent.**—In re Randall (D. C., Pa.), 20 Am. B. R. 305, 159 Fed. 298. If counsel sign and swear to specifications the reason for this unusual practice should be stated so that the court may be enabled to decide whether the reason is sufficient. In re Baerncoff (D. C., Pa.), 9 Am. B. R. 133, 117 Fed. 975. The practice which forbids attorneys in fact or at law from signing and swearing to specifications of objections to a bankrupt's discharge will be departed from only in exceptional circumstances. Milgraum v. Ost (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

Order of court required.—The attorneys or solicitors or other agents of creditors opposing the bankrupt's discharge will not be allowed to make the verification to the specifications in opposition unless by order of the court allowing the oath to be so taken, the reasons therefor appearing in the order and on the face of the oath itself. In re Glass (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509. See also Matter of Abramovitz (D. C., Fla.), 41 Am. B. R. 588, 253 Fed. 299.

166. **Form of verification.**—See form No. 3, post. In re Glass (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509.

On information and belief.—An affidavit to specifications of objection that the facts therein stated are true to the best of affiant's knowledge, information and belief is sufficient. Milgraum v. Ost (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

Verification by partnership.—When the opposing creditor is a partnership, the signature of the firm by one of the partners authorized to sign the firm name will be sufficient, and may be verified by him alone or another partner, if the facts be known to him and not the partner signing the plead-

e. Reference to special master.—The referee being denied jurisdiction to determine discharges,¹⁶⁷ references to him, not as referee, but as special master in chancery to hear and report on the facts, are quite universal.¹⁶⁸ The report of the referee is advisory only and the court is not bound thereby.¹⁶⁹ A reference may be made to a person other than the referee, as in other cases in equity.¹⁷⁰ If such a reference is ordered, the special master sets a time and place for the hearing, which goes on before him as if before the judge. Special masters may pass on the relevancy or materiality of evidence,¹⁷¹ and determine the sufficiency of specifications so far, at least, as to decide whether to permit testimony thereon. But a referee, acting as special master,

ing, the oath stating the fact as it may be. *In re Glass* (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509.

Verification by corporation should be by the same oath as other creditors. *In re Glass* (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509.

167. Bankr. Act, § 38-a (4); General Order XII (3).

A referee has no power to decide any question relating to the bankrupt's discharge until that subject has been referred to him by the judge. *In re Randall* (D. C., Pa.), 20 Am. B. R. 305, 159 Fed. 298; *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736.

A referee in bankruptcy having no jurisdiction to act upon an application for discharge, it is within the power of the court, under General Order XII, to specially refer it to a referee. *Matter of Amer* (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576.

168. *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736.

Jurisdiction or referee.—*Fellows v. Freudenthal* (C. C. A., 7th Cir.), 4 Am. B. R. 490, 102 Fed. 731; *In re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479. The referee has no jurisdiction to determine the question as to discharge, but the court may refer the case to him generally for a report. He aids the court like a master in chancery. He cannot finally determine the question of discharge or non-discharge, but he may be ordered to report the facts and his recommendations or conclusions as to the matter. *In re Rauchenplat* (D. C., Porto Rico), 9 Am. B. R. 763. Where an application for a discharge must be heard and decided by the judge, such application or any specified issue arising thereon may be sent to the referee to ascertain and report the facts, and no one is prejudiced thereby. *In re McDuff* (C. C. A., 5th Cir.), 4 Am. B. R. 110, 101 Fed. 241.

A referee in bankruptcy, upon a reference as to the sufficiency of specifications of objection to a discharge, has no jurisdiction to determine whether a particular debt is a liability "for obtaining property by false pretenses or false representations." *Matter of Lockwood* (D. C., N. Y.), 39 Am. B. R. 478, 240 Fed. 161.

As to rules governing a special master upon a hearing, see *In re Walder* (D. C., Ct.), 18 Am. B. R. 419, 152 Fed. 489.

169. The practice on reference of discharge cases and the effect of a referee's report thereon is commented upon in *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736, in which the court says: "The duty of the court to pass

upon the issue cannot be shifted by such a reference, nor can the duty of the court be dependent upon the filing of exceptions. Orderly practice would require that such exceptions be filed, but the omission to do so is not jurisdictional. When the question of the discharge is brought before the District Court the issue is made up of the specifications of objection to the discharge, and the bankrupt's answer thereto, and not by the report of the referee and exceptions thereto. We are of the opinion, therefore, that it was the duty of the district judge to hear the cause and exercise an independent judgment thereon. When the referee's report was brought to his notice, he was then, for the first time, called upon to perform his duty of deciding whether the petition for discharge should be granted or denied. If the filing of exceptions to the master's report would aid him in the performance of this duty, he had ample authority to require such exceptions to be filed, or to consider such exceptions though they were filed late. Counsel for the objecting creditor insists that General Order 37 makes the general equity rules prescribed by the Supreme Court applicable to proceedings in bankruptcy, and that by Equity Rule 68, the time for filing exceptions to the report of masters is fixed at twenty days. We do not think that the general equity rules can be applied as rules of court in the performance of the administrative work of courts of bankruptcy. They may be looked to for analogies but not as rules. The Supreme Court itself has fixed the rules to govern courts of bankruptcy. To hold that the District Court was bound by the report of the referee because exceptions were not filed within twenty days, would deprive that court of its duty both under the bankruptcy law and the rules of the Supreme Court to pass upon the question of the bankrupt's right to his discharge.

170. *In re Gillardon* (D. C., Pa.), 26 Am. B. R. 103, 1887 Fed. 289.

171. *In re Kaiser* (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689. Compare *Matter of Neuman* (D. C., Mont.), 40 Am. B. R. 427, 251 Fed. 667.

In the Southern District of New York the matters are referred as of course to the referee who has acted in the proceeding, as special master, and it is then the duty of the bankrupt to bring the matter on before the referee. *In re Eldred* (D. C., N. Y.), 18 Am. B. R. 243, 152 Fed. 491.

should not base a finding upon the original examination of the bankrupt before him as referee.¹⁷² A special master should not report upon questions presented by the specifications of objections to a discharge without having examined the witnesses and heard their testimony for the presence of witnesses in a contested controversy is vital to its proper determination.¹⁷³ All testimony objected to, with the objections noted therein and the decisions thereon, should be preserved and reported to the court.¹⁷⁴

f. Proceedings on hearing.—(1) **IN GENERAL.**—The hearing is, in effect, a trial in equity. Objections to a bankrupt's discharge are the beginning of a distinct and separate dispute and easily fall within any accepted definition of a suit or an action.¹⁷⁵ The opposition to the discharge is always in the nature of a new suit. It requires proofs of the grounds set out in the specifications in opposition to the discharge.¹⁷⁶ All the grounds of objection urged against granting a discharge should be passed upon, so as to prevent the necessity of sending the case back, if the referee's conclusions on particular charges are not concurred in by the court.¹⁷⁷ The bankrupt may file such papers as he may desire, but he is not required to file any.¹⁷⁸

(2) **DEATH OF CREDITOR AFTER OBJECTIONS.**—The death of a creditor who has filed objections prior to the termination of the discharge proceedings, the hearing upon the application should be continued on notice to the decedent's attorney and also to the widow and children or next of kin; but it is not necessary for the bankrupt to proceed in the proper jurisdiction to obtain the appointment of a legal representative of the decedent's estate.¹⁷⁹ The testimony already given by the deceased creditor in the proceedings under oath, although not signed or read to him, as required by General Order 22, may be written out and included in the report.¹⁸⁰

(3) **RULES OF EVIDENCE; PROOF REQUIRED.**^{180a}—The ordinary rules of evidence control. Proof must be strict and convincing, but not necessarily to the limit required in proving a crime.¹⁸¹ Evidence will be confined to the

172. *In re Murray* (D. C., Conn.), 20 Am. B. R. 700, 162 Fed. 983.

May not pass upon objections.—A special master appointed to hear the "specifications in opposition to the discharge" of a bankrupt member of a copartnership has no jurisdiction to pass upon an objection raised before him that the bankrupt cannot be discharged from his own debts when he has filed no individual schedules and has taken no steps to bring in the absent partner. *In re Cantor* (Ref., N. Y.), 26 Am. B. R. 859 (report of special master confirmed by Judge Holt).

173. *Matter of Rubin & Lipman* (D. C., N. Y.), 32 Am. B. R. 295, 215 Fed. 669.

174. *In re Isaacson* (D. C., N. Y.), 23 Am. B. R. 665, 174 Fed. 406; *First National Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 31 Am. B. R. 436, 165 Fed. 852.

175. *In re Guilbert* (D. C., Pa.), 18 Am. B. R. 830, 154 Fed. 676, quoting *Collier on Bankruptcy* (6th ed.), p. 182; objections to a bankrupt's discharge are the beginning of a distinct and separate dispute, and the hearing thereon is in effect a trial in equity. *Matter of Amer* (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576.

176. *In re Prager & Son* (D. C., W. Va.),

13 Am. B. R. 527, 134 Fed. 1,006.

177. *Matter of Haskell* (D. C., N. Y.), 20 Am. B. R. 914, 164 Fed. 301.

178. *In re Logan* (D. C., Ky.), 4 Am. B. R. 525, 102 Fed. 876; *In re Hendrick* (D. C., Conn.), 14 Am. B. R. 795, 138 Fed. 473.

Demurrer.—The bankrupt need not file a demurrer to specifications in opposition to his discharge. *In re Crist* (D. C., Ala.), 9 Am. B. R. 1, 116 Fed. 1,007.

179. *Matter of Blaesser* (D. C., N. Y.), 36 Am. B. R. 795, 230 Fed. 528.

180. *Matter of Blaesser* (D. C., N. Y.), 36 Am. B. R. 795, 230 Fed. 528.

180a. See also *Evidence of concealment of assets*, *post*, p. 373.

181. *Proof.*—In the case of *Garry v. Jefferson Bank* (C. C. A., 5th Cir.), 26 Am. B. R. 511, 514, 186 Fed. 461, the court said: "We are of the opinion that as stated in *Collier* (8th Ed.), p. 268, while the ordinary rules of evidence control: the proof must be strict and convincing, but not necessarily to the limit required in proving a crime." *In re Polakoff* (Ref., N. Y.), 1 Am. B. R. 358; *In re Gross* (Ref., N. Y.), 5 Am. B. R. 271; *In re Berner* (Ref. Ohio), 4 Am. B. R. 393; *In re Greenberg* (D. C., Conn.), 8 Am. B. R. 94, 114 Fed. 773; *In re Dauchy* (D. C., N. Y.), 10 Am. B. R. 527, 122 Fed. 688; *In re Troeder* (C. C. A., 1st Cir.), 17

specifications.¹⁸³ The burden of proof is upon the opposing creditor,¹⁸³ unless the question presented is the construction of a statute.¹⁸⁴ But when a set of facts is shown which unexplained would lead a reasonable man to believe the allegations of the objector, the burden is on the bankrupt to relieve himself from the inference to be drawn from the facts.^{184a} It is not necessary that the alleged ground for refusing a discharge be proved beyond a reasonable doubt, as in the case of the trial of a criminal offense,¹⁸⁵ although the conscience of the court should be satisfied by clear and convincing testimony that the bankrupt is not entitled to his discharge.¹⁸⁶ If the ground depended

Am. B. R. 723, 150 Fed. 710, quoting Collier on Bankruptcy (5th ed.), p. 174; Matter of Rivkin (D. C., Conn.), 88 Am. B. R. 170, 210 Fed. 218; Matter of White (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688; Matter of Braus (C. C. A., 2d Cir.), 40 Am. B. R. 668, 248 Fed. 55. As to evidence in proceedings to obtain discharge, see Am. Bankr. Dig., §§ 1064-1068.

183. In re Rosenfeld, Fed. Cas. 12,059; In re Hendrick (D. C., Ct.), 14 Am. B. R. 795, 138 Fed. 473; Matter of Newmark (C. C. A., 2d Cir.), 41 Am. B. R. 54, 249 Fed. 341.

The bankrupt has the opportunity, upon the hearing of an application for discharge, to argue before the judge that the question put to him was not material. In re Weinreb (C. C. A., 2d Cir.), 18 Am. B. R. 387, 153 Fed. 363.

183. Burden of proof.—In re Idsall (D. C., Iowa), 2 Am. B. R. 741, 96 Fed. 314; In re Brice (D. C., Iowa), 4 Am. B. R. 355, 102 Fed. 114; In re Phillips (D. C., N. Y.), 3 Am. B. R. 542, 98 Fed. 844; In re Fitchard (D. C., N. Y.), 4 Am. B. R. 606, 103 Fed. 742; In re Wetmore (D. C., Mo.), 2 Am. B. R. 755; In re Finkelstein (D. C., N. Y.), 3 Am. B. R. 800, 101 Fed. 418; In re Cashman (D. C., N. Y.), 4 Am. B. R. 326, 103 Fed. 67; In re Ferris (D. C., Iowa), 5 Am. B. R. 246, 106 Fed. 356; In re Wolfensohn (Ref., N. Y.), 5 Am. B. R. 60; In re Howden (D. C., N. Y.), 7 Am. B. R. 191, 111 Fed. 723; In re Gaylord (C. C. A., 2d Cir.), 7 Am. B. R. 1, 112 Fed. 668; In re Chamberlain (D. C., N. Y.), 11 Am. B. R. 95, 125 Fed. 629; In re Hamilton (D. C., N. Y.), 13 Am. B. R. 333, 133 Fed. 823; In re Jacobs (D. C., N. Y.), 16 Am. B. R. 482, 144 Fed. 868; In re Keefer (D. C., N. Y.), 14 Am. B. R. 290, 135 Fed. 585; In re Bades (C. C. A., 7th Cir.), 16 Am. B. R. 30, 143 Fed. 293; In re Brockman (D. C., Ky.), 21 Am. B. R. 251, 161 Fed. 301; Hardie v. Swafford Bros. Dry Goods Co. (C. C. A., 5th Cir.), 21 Am. B. R. 457, 165 Fed. 588; Shaffer v. Koblegard Co. (C. C. A., 4th Cir.), 24 Am. B. R. 398, 183 Fed. 71; In re Main (D. C., Iowa), 30 Am. B. R. 547, 205 Fed. 421; Matter of Haimowich (D. C., Pa.), 36 Am. B. R. 648, 232 Fed. 878; Matter of Groves (D. C., Fla.), 39 Am. B. R. 853, 244 Fed. 197; Matter of Troutman & Jesse (D. C., Ky.), 40 Am. B. R. 418, 251 Fed. 930; Matter of Newmark (C. C. A., 2d Cir.), 41 Am. B. R. 54, 249 Fed. 341; Matter of Gottlieb (C. C. A., 2d Cir.), 45 Am. B. R. 180, 262 Fed. 730. See also Am. B. R. Dig., § 1068.

When objecting creditors show that a financial statement made by a partner was untrue in the material respects; that the firm had obtained money on the credit of it; and that its untruthfulness related to a subject within the knowledge of said partner, they established a prima facie case, disentitling said partner to a discharge. Matter of Perlmutter (D. C., N. Y.), 43 Am. B. R. 362, 256 Fed. 802.

The reason for this rule rests upon the basis that it is an independent proceeding, and that when the bankrupt comes into court with a proper certificate of conformity, showing he has performed all the acts he is required by the Bankruptcy Act to perform, as preliminary to

his discharge, the independent objections of creditors raise a new issue which they must sustain by proof. Matter of Lally (D. C., N. Y.), 43 Am. B. R. 252, 255 Fed. 358.

Failure to keep books.—Where the specification is based upon the ground that the bankrupt has, with intent to conceal his financial condition, failed to keep books of account, the burden of proof is upon the opposing creditor to show by convincing proof both that he failed to keep books of account and that his omission to do so was with intent to conceal his financial condition. In re Garrison (C. C. A., 2d Cir.), 17 Am. B. R. 832, 140 Fed. 178.

184. In re Gilpin (D. C., Pa.), 20 Am. B. R. 374, 160 Fed. 171.

184a. Matter of Gottlieb (C. C. A., 2d Cir.), 45 Am. B. R. 180, 262 Fed. 730.

185. In re Greenberg (D. C., Conn.), 8 Am. B. R. 94, 114 Fed. 773; In re Gross (Ref., N. Y.), 5 Am. B. R. 271; In re Berner (Ref., Ohio), 4 Am. B. R. 383; In re Polakoff (Ref., N. Y.), 1 Am. B. R. 380; In re Salisbury (D. C., N. Y.), 7 Am. B. R. 771, 113 Fed. 833; In re Howden (D. C., N. Y.), 7 Am. B. R. 101, 111 Fed. 723; In re Leslie (D. C., N. Y.), 9 Am. B. R. 561, 119 Fed. 406; In re Dauchy (D. C., N. Y.), 10 Am. B. R. 527, 122 Fed. 688; Matter of Lally (D. C., N. Y.), 43 Am. B. R. 252, 255 Fed. 358; Matter of Perlmutter (D. C., N. Y.), 43 Am. B. R. 362, 256 Fed. 802; Matter of Gottlieb (C. C. A., 2d Cir.), 45 Am. B. R. 180, 262 Fed. 730. Except possibly where the ground of opposition consists of the concealment of property or the making of a false oath within the meaning of section 29-b of the bankruptcy act. In re Hennebury (D. C., Ia.), 31 Am. B. R. 231, 207 Fed. 882.

Evidence of false oath.—An objection to a bankrupt being granted a discharge, on the ground that he had knowingly and with fraudulent intent made a false oath to his schedules, need only be sustained by proof such as will overcome the presumption as to his honesty of purpose. Matter of Remmers (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484; see In re Marcus & Sherr (D. C., N. Y.), 27 Am. B. R. 164, 192 Fed. 743.

Concealment of assets.—The fact, that a bankrupt has been indicted and put upon trial for the criminal offense of concealing assets on the eve of bankruptcy, may be sufficient ground for a denial of his discharge. The facts need not be proved beyond a reasonable doubt. A preponderance is enough, although not sufficient to convict. Matter of Atlas (D. C., Ill.), 34 Am. B. R. 44, 219 Fed. 783; In re Delmour (D. C., N. Y.), 20 Am. B. R. 405, 161 Fed. 589; In re Doyle (D. C., N. Y.), 29 Am. B. R. 302, 199 Fed. 247; In re Bacon (D. C., N. Y.), 39 Am. B. R. 584, 205 Fed. 545; Matter of Perlmutter (D. C., N. Y.), 43 Am. B. R. 362, 256 Fed. 802. The bankrupt is entitled to the benefit of the doubt, In re Cotton & Preston (D. C., Ga.), 25 Am. B. R. 532, 183 Fed. 190; In re Wakefield (D. C., N. Y.), 31 Am. B. R. 43, 207 Fed. 180.

upon is an offense for which the bankrupt may be punished it is probable that a greater degree of proof should be required.¹⁸⁷ Mere suspicious circumstances tending toward the establishment of a ground of objection, shown by the bankrupt's testimony, alone, would be insufficient.¹⁸⁸ How far testimony brought out on the bankruptcy proceeding *per se* may be used as evidence on the discharge is a question; some authorities holding that it is material only for impeaching purposes.¹⁸⁹ The accepted rule seems to be that the bankrupt's evidence, but not that of other witnesses, so far as it is material to the issues, may be so used.¹⁹⁰ The whole record of the bankruptcy case proper is fre-

186. In re Howden (D. C., N. Y.), 7 Am. B. R. 194, 111 Fed. 723, 725; In re Troeder (C. C. A., 1st Cir.), 17 Am. B. R. 723, 732, 150 Fed. 710, 80 C. C. A. 376; In re Taylor (D. C., Ala.), 26 Am. B. R. 144, 188 Fed. 479; In re Chamberlain (D. C., N. Y.), 25 Am. B. R. 37, 40, 180 Fed. 304; In re Cotton & Preston (D. C., Ga.), 25 Am. B. R. 517, 528, 183 Fed. 181; In re Berner (Ref., Ohio), 4 Am. B. R. 383, holding that proof should be "clear" or satisfying, where the commission of an offense punishable by imprisonment is charged; In re Gross (Ref., N. Y.), 5 Am. B. R. 271, holding that it is sufficient ground for refusing a discharge if the conscience of the court is satisfied by proper and sufficient evidence that the bankrupt is not entitled to receive it.

187. In re Gaylord (C. C. A., 2d Cir.), 7 Am. B. R. 1, 112 Fed. 668, holding that where a false oath is charged it is incumbent upon the opposing creditor to establish satisfactorily that the particular statements of which perjury is predicated were false.

Presumption of innocence.—In the case of In re Troeder (C. C. A., 1st Cir.), 17 Am. B. R. 723, 150 Fed. 710, the court says that where a crime is charged, although only on a civil issue, "it shocks the judicial mind to refuse to give him the benefit of the usual presumption of innocence, unless the adverse proofs are so far satisfactory as to be convincing." This case was sustained in Garry v. Jefferson Bank (C. C. A., 5th Cir.), 26 Am. B. R. 511, 514, 186 Fed. 461.

188. In re Kolster (D. C., Nev.), 17 Am. B. R. 52, 146 Fed. 138; In re Howard (C. C. A., 2d Cir.), 24 Am. B. R. 84, 180 Fed. 309.

Suspicious circumstances.—Under the rule that mere suspicion, conjecture, or surmise is not a basis for a conclusion that a bankrupt has concealed assets, evidence which merely shows that on the night prior to bankruptcy, bankrupt was seen to leave his business clandestinely and late at night, bearing away with him what seemed to the witness to be books and records, is insufficient to support a charge that bankrupt concealed or destroyed inventory books especially where his bookkeeper testifies that no inventory books were kept and that all the books were delivered to bankrupt's trustees when they entered into possession. In re Simon (D. C., N. Y.), 29 Am. B. R. 808, 201 Fed. 1004.

189. In re Penny, 2 N. B. N. Rep. 1001. See "Use of Former Examination under § 7(9)" in this section, *post*.

190. In re Bard (D. C., N. Y.), 5 Am. B. R. 810, 108 Fed. 208; In re Wilcox (C. C. A., 2d Cir.), 6 Am. B. R. 362, 109 Fed. 628 (superseding In re Cooke (D. C., N. Y.), 5 Am. B. R. 434, 109 Fed. 631); In re Leslie (D. C., N. Y.), 9 Am. B. R. 561, 119 Fed. 406; In re Goodhile (D. C., Iowa), 12 Am. B. R. 380, 130 Fed. 732; In re Gaylord (D. C., N. Y.), 5 Am. B. R. 410, 106 Fed. 833 *affd.*, s. c., 7 Am. B. R. 1, 112 Fed. 668; In re Eaton (D. C., N. Y.), 6 Am. B. R. 531, 110 Fed. 731; Goerner v. Eastman (C. C. A., 5th Cir.), 44 Am. B. R. 303, 261 Fed. 177.

Use of bankrupt's former testimony.—In the

case of Shaffer v. Koblegard Co. (C. C. A., 4th Cir.), 24 Am. B. R. 898, 900, 183 Fed. 71, the court said: "It has generally been held that statements made by the bankrupt, under oath in his examination before the referee, may and should be considered in a proceeding touching his right to a discharge so far as the same may be material to the issues involved." (Citing cases in this note and the text.)

An application for a discharge is not a criminal proceeding, and section 7, providing that no testimony given by a bankrupt at any meeting of creditors "shall be offered in evidence against him in any criminal proceeding" has no apparent application to such a proceeding. In re Gaylord (C. C. A., 2d Cir.), 7 Am. B. R. 1, 112 Fed. 668.

Evidence by partners on former examination.—Evidence given by the members of a bankrupt partnership on a general examination before the referee as to the property of the firm is admissible, on an application for a discharge, against each of the members respectively; but the evidence of each member is not admissible against each of the other members. Matter of Malschick & Levin (D. C., Pa.), 33 Am. B. R. 214, 217 Fed. 492.

Waiver of objection.—Upon a hearing before the referee upon objections to the discharge of members of a bankrupt firm, objection was made to the admission in evidence, in support of the specifications, of the bankrupt's testimony taken upon the general examination, upon the grounds that such examination was never adjourned *sine die*, that the testimony had not been signed; that bankrupts had no opportunity to amend or correct it and that no opportunity had been given to cross-examine them for the purpose of elucidating points in their favor, but not upon the ground that the testimony of one bankrupt, so taken was inadmissible against the other, and after opportunity was afforded to examine bankrupts and after their examination in the discharge proceedings, no further objection was taken. *Held*, that the objection had been waived. Matter of Magen (D. C., Pa.), 33 Am. B. R. 246, 218 Fed. 692.

191. See General Order XXII.

The referee in taking testimony must have it taken down preferably in narrative form, but upon objection raised, it is his duty to require the matter to be presented by question, to which the objection and reason thereof is to clearly but briefly noted, then to enter his ruling thereon as to whether proper or not, and although he may rule it to be improper, yet allow it to be answered. In re Romine (D. C., W. Va.), 14 Am. B. R. 785, 788, 138 Fed. 837.

192. In re Isaacson (D. C., N. Y.), 23 Am. B. R. 665, 174 Fed. 406; In re Knasak (D. C., N. Y.), 18 Am. B. R. 188, 151 Fed. 503.

Power to sustain objections.—Referees have no authority to sustain objections and to exclude evidence on proceedings for a discharge. Matter of Neuman (D. C., Mont.), 40 Am. B. R. 427, 251 Fed. 667.

quently stipulated in. This practice is loose and should not be followed. The better method, where a stipulation is possible, is to cull out those portions that are pertinent, and read them in.

(4) **MINUTES AND REPORT.**—The testimony may be taken down in narrative form, or by question and answer, and, if the latter, a stenographer may be employed, this perhaps by analogy to the procedure on the examination of the bankrupt.¹⁹¹ The referee should preserve all testimony objected to, noting the objections and taking answers subject thereto, and report the same to the court, or if necessary, certify to the court on proper application any particular ruling.¹⁹² Equity Rules LXXII to LXXXII should be consulted for details of procedure on such hearings. At the conclusion of the reference, the special master makes up a report, and files it, with his record, and all papers and pleadings with the clerk.¹⁹³ Such report should embody a summary of his findings and state his opinion thereon. He should pass his own judgment on the facts,¹⁹⁴ and not that of a jury which in another proceeding had rendered a verdict as to the bankrupt's guilt.¹⁹⁴ He should pass upon all the grounds of objections urged on the hearing before him.¹⁹⁵ This report is brought upon notice either on motion for confirmation or by exception, and the case then proceeds before the judge.¹⁹⁶ Exceptions to the report of the referee must be filed within twenty days after the filing of the report.¹⁹⁷ A referee's findings upon conflicting evidence are entitled to the same consideration as those of a district judge,¹⁹⁸ and cannot be disregarded where there is sufficient testimony to support them.¹⁹⁹ This is true whether the findings are in favor of the bankrupt or the trustee.^{199a}

193. Report of special master.—See "Supplementary Form No. 115;" Hagar & Alexander's *Bankr. Forms* (2d Ed.), Form No. 280, *post*. Compare *In re Steed* (D. C., N. Car.), 6 Am. B. R. 73, 107 Fed. 682; *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278.

It is the duty of the special master to take and report evidence, and to return the same together with the ruling as to its admissibility. It is not error for the special master to reserve decision as to the admissibility of testimony under insufficient specifications. *In re Knaszak* (D. C., N. Y.), 18 Am. B. R. 187, 151 Fed. 503.

Where a special commissioner has stated his general findings in the form of an opinion on specifications of objection to a discharge, an objection that he has not made separate findings of fact and of law will not be sustained, because an opinion is generally of more value than enumerated statements of fact and conclusions of law. *Matter of Rowe* (D. C., N. Y.), 39 Am. B. R. 461, 240 Fed. 165.

Synopsis of specifications.—Where the specifications of objections to bankrupt's discharge filed by creditors were before the referee, but in referring to them in his report he set out a synopsis of them instead of setting them out in full, an exception that he erred in setting forth specifications of objections not actually filed, is frivolous. *Matter of Magen* (D. C., Pa.), 33 Am. B. R. 348, 218 Fed. 692.

193a. Practice where referee only reports testimony and fails to state conclusions.—Where a referee on objection to a bankrupt's discharge only reported the testimony, and failed to reach any definite conclusion thereon, the District Court, on review, may either refer the matter back to the referee with instructions to find and report the ultimate facts upon the testimony and the applicable rules of law, or may find them itself; but it is the better practice to refer the matter back to the referee.

Matter of Troutman & Jesse (D. C., Ky.), 40 Am. B. R. 413, 251 Fed. 930.

194. *In re Cohan* (D. C., N. J.), 26 Am. B. R. 544, 192 Fed. 751.

195. *Matter of Haskell* (D. C., N. Y.), 20 Am. B. R. 914, 164 Fed. 301; *In re Hendrick* (D. C., Conn.), 14 Am. B. R. 795, 138 Fed. 473.

196. Compare Equity Rules and the various district rules for the practice. See, for effect of findings of referee, *In re Covington* (D. C., N. Car.), 6 Am. B. R. 373, 110 Fed. 143; also, that findings of fact are conclusive on a petition for rehearing, *In re Royal* (D. C., N. Car.), 7 Am. B. R. 636, 113 Fed. 140.

Exceptions to report of referee.—The District Court is not bound by a report of a referee denying a bankrupt's discharge, because exceptions were not filed within twenty days as required by Equity Rule 66. *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 173, 217 Fed. 736.

197. *Matter of Pierce, Jr.* (D. C., Wash.), 32 Am. B. R. 96, 210 Fed. 339.

198. *In re Simon v. Sternberg* (D. C., Ga.), 13 Am. B. R. 204, 151 Fed. 507; *In re Wheeler* (C. C. A., 7th Cir.), 21 Am. B. R. 262, 164 Fed. 301; *Matter of Robinson* (D. C., Mass.), 43 Am. B. R. 64, 256 Fed. 55.

199. *Matter of Amster* (D. C., Ohio), 41 Am. B. R. 249, 249 Fed. 257; *Matter of Goldberg* (D. C., Mass.), 43 Am. B. R. 127, 256 Fed. 541; *Matter of Lally* (D. C., N. Y.), 43 Am. B. R. 252, 255 Fed. 558; *In re Forth* (D. C., N. Y.), 18 Am. B. R. 186, 151 Fed. 951. Thus a finding that the bankrupt made a false oath and concealed his assets will not be disturbed. *In re Knaszak* (D. C., N. Y.), 18 Am. B. R. 187, 151 Fed. 503.

Conflicting evidence.—In the case of *Baker v. Bishop-Babcock-Becker Co.* (C. C. A., 4th Cir.), 34 Am. B. R. 396, 220 Fed. 657, the court said: "Just what weight should be

(5) **COMPENSATION AND DISBURSEMENTS.**—The right of referees sitting as special masters to compensation in addition to their fees as referees has already been well settled,²⁰⁰ and rests on the ground that the duties required of them are outside their functions as defined and paid for under the law. Section 72, added by the amendatory act of 1903, has not, it is thought, affected this rule. This compensation is often fixed by district rules.²⁰¹ If not, it is adjusted under Equity Rule LXXXII. The disbursements of the special master, as for a stenographer, are, of course, allowed.²⁰²

V. GROUNDS OF OPPOSITION TO DISCHARGE.

a. **In general.**—Subsection *b* of this section specifies the cases in which a bankrupt may be refused a discharge. As previously suggested, the specifications of objection must exhibit, and the evidence in support of them must prove, one of the objections specified in the law,²⁰³ and the only grounds of

given to the finding of a referee or special master upon an application for a discharge, has been the subject of some difference of opinion among the courts; but we think it may fairly be stated that the consensus is that where a referee and special master's action is based upon conflicting testimony, and he heard and saw the witnesses, that his findings ought to be accepted, and not disturbed, unless it appears that he has made a plain mistake; and this is particularly true in cases involving the concealment of assets, where the motive and intent of the bankrupt becomes material. In this class of cases much weight is necessarily due to the conclusions of the tribunal which had the opportunity of seeing and observing the matter and deportment of the witnesses whose acts were called in question, or of those who may have been cognizant of the transaction. In *re Lafache* (D. C., Vt.), 6 Am. B. R. 483, 109 Fed. 307; *Ohio Valley Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155, and cases cited, 89 C. C. A. 606, 24 L. R. A. (N. S.) 184; in *re Wheeler* (C. C. A., 7th Cir.), 21 Am. B. R. 262, 105 Fed. 183, 91 C. C. A. 222; *Epstein v. Steinfeld* (C. C. A., 3d Cir.), 32 Am. B. R. 6, 210 Fed. 236, 127 C. C. A. 24. In this case we have the findings of fact by the referee and special master, and have carefully and critically examined the testimony; and our conclusion is that he was correct in his finding, and that the evidence is entirely insufficient to justify a refusal of the discharge."

Review.—The District Court will not overrule the findings of a special commissioner on objections to a discharge, if there is any evidence upon which the findings are based, unless the conclusions are contrary to law, or unless consideration of the entire issue leads to a different construction of some of the acts involved. *Matter of Rowe* (D. C., N. Y.), 39 Am. B. R. 461, 240 Fed. 166.

199a. *Matter of Amster* (D. C., Ohio), 41 Am. B. R. 240, 249 Fed. 257.

200. **Compensation.**—*Fellows v. Freudenthal* (C. C. A., 7th Cir.), 4 Am. B. R. 490, 102 Fed. 781; in *re Grossman* (D. C., Mich.), 6 Am. B. R. 510, 111 Fed. 507. In *Bragassa v. St. Louis Cycle* (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77, the referee seems to have been allowed extra compensation as referee and not as special master.

201. See, for rule in force in the Northern and Western Districts of New York, in *re Gaylord* (D. C., N. Y.), 5 Am. B. R. 805, 106 Fed. 833.

202. In *re Grossman* (D. C., Mich.), 6 Am. B. R. 510, 111 Fed. 507.

Findings where jury has found as to same facts.—Where a referee, who has been appointed to take proofs respecting specifications of objection to a bankrupt's discharge and to report such proofs to the court together with his findings thereon, is convinced after duly considering all the evidence, that bankrupt had wilfully sworn falsely to material facts, and so certifies, he should report a finding to that effect, and it is error for him to subordinate his own judgment in the matter to that of a jury which, by their verdict in another proceeding, had found bankrupt not guilty of the offense with which he is charged. In *re Cohan* (D. C., N. J.), 26 Am. B. R. 544, 192 Fed. 751.

Supreme Court Equity Rule 67, as to costs, applies to a hearing of objections to a bankrupt's discharge, and the fact that the same objecting creditor filed similar exceptions in five separate cases does not relieve it from payment of costs to each of the bankrupts. *Matter of Amer* (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576.

203. In *re Frank* (Ref., N. Y.), 6 Am. B. R. 156; *Smith v. Keegan* (C. C. A., 1st Cir.), 7 Am. B. R. 4, 111 Fed. 157; in *re Wetmore* (Ref., N. Y.), 6 Am. B. R. 703; in *re Steed* (D. C., N. Car.), 6 Am. B. R. 73, 107 Fed. 682; *Bauman v. Feist* (C. C. A., 8th Cir.), 5 Am. B. R. 703, 107 Fed. 83; in *re Pierce* (D. C., N. Y.), 4 Am. B. R. 554, 103 Fed. 64; in *re Black* (D. C., Pa.), 4 Am. B. R. 776, 104 Fed. 289; in *re Peacock* (D. C., N. Car.), 4 Am. B. R. 136, 101 Fed. 560; in *re Marshall Paper Co.* (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872; in *re Logan* (D. C., Ky.), 4 Am. B. R. 525, 102 Fed. 874; in *re Crist* (D. C., Ala.), 9 Am. B. R. 1, 116 Fed. 1007; in *re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 73, 154 Fed. 537; in *re Bialock* (D. C., S. Car.), 9 Am. B. R. 266, 118 Fed. 679; in *re Howden* (D. C., N. Y.), 7 Am. B. R. 191, 111 Fed. 723; in *re Schenck* (D. C., Wash.), 8 Am. B. R. 727, 116 Fed. 554; *Matter of Epstein* (D. C., Fla.), 40 Am. B. R. 406; 248 Fed. 191; *Matter of Armstrong* (D. C., Cal.), 40 Am. B. R. 770, 248 Fed. 292; *Matter of Newmark* (C. C. A., 2d Cir.), 41 Am. B. R. 54, 249 Fed. 341; *Feder v. Goets* (C. C. A., 2d Cir.), 45 Am. B. R. 57, 264 Fed. 610. The fact that one claim against a bankrupt is not dischargeable does not prevent his discharge from other debts. *Matter of Lockwood* (D. C., N. Y.), 39 Am. B. R. 478, 240 Fed. 161.

objection specified are those enumerated in sections fourteen and twenty-nine.²⁰⁴ Matters of jurisdiction and the validity of prior proceedings are not included.²⁰⁵ Even if the proof shows that the only debt is one which is not dischargeable, if the specifications are not sustained, a discharge should be granted.²⁰⁶ But it has been held that if the court knows of facts rendering the discharge revokable if they had first become known after it was granted, the statute does not compel the court to grant the discharge.²⁰⁷ And if one of several objections is well pleaded and sustained by the evidence, a discharge may be denied.²⁰⁸

b. Offense of larceny.—The offense of larceny, or larceny as bailee, committed by a bankrupt against an objecting creditor more than a year before the petition was filed, is not within the statutory grounds.²⁰⁹

c. Under the original law, and under the law as amended.—The additional objections provided for by the act of 1903, and as amended by the act of 1910, are important and far-reaching, but they are not available as grounds for denying a discharge in proceedings instituted prior to the taking effect of said amendments.²¹⁰ Neither the original act nor its amendments are retrospective; if the act complained of was not prohibited when it was committed a discharge may not be refused because under a subsequent enactment such act was prohibited.²¹¹

VI. COMMISSION OF OFFENSE PUNISHABLE BY IMPRISONMENT.

a. In general.—Subdivision 1 of subsection *b* provides as the first ground of refusing a discharge the commission of "an offense punishable by imprisonment as herein provided." This, in effect, means the commission of either of the offenses specified in the first and second subdivisions of § 29-b.²¹² Those defined in the third, fourth or fifth subdivision cannot well be committed by a bankrupt.²¹³ It has been thought also to include the commission of a contempt,

²⁰⁴ *In re Walrath* (D. C., N. Y.), 24 Am. B. R. 541, 175 Fed. 243; *In re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; *Matter of Wetmore* (Ref., N. Y.), 6 Am. B. R. 703; *In re Thomas* (D. C., Iowa), 1 Am. B. R. 515, 92 Fed. 912; *Matter of Epstein* (D. C., Fla.), 40 Am. B. R. 406, 248 Fed. 191.

General dishonesty, or unfair and sharp dealing with creditors or oral misrepresentations made in obtaining property on credit are not grounds for refusing a discharge. *In re Chamberlain* (D. C., N. Y.), 25 Am. B. R. 37, 180 Fed. 304.

Charging the creation of a debt by reason of bankrupt's misconduct while acting in a fiduciary capacity is not sufficient ground for a discharge. *In re Gara* (D. C., Pa.), 26 Am. B. R. 573, 190 Fed. 112.

The violation by a bankrupt of a criminal law of a State is no ground for denying his discharge in bankruptcy. *In re McLellan* (D. C., N. Y.), 30 Am. B. R. 325, 204 Fed. 482.

The mere giving of a preference is no reason for denying a discharge. *Devorkin v. The Security Bank, etc., Co.* (C. C. A., 6th Cir.), 39 Am. B. R. 738, 243 Fed. 171.

²⁰⁵ *In re Walrath* (D. C., N. Y.), 24 Am. B. R. 541, 175 Fed. 243, holding that the question of the infancy of the bankrupt cannot be interposed collaterally as an objection to his discharge.

Domicile or residence of bankrupt cannot be interposed as an objection on an application for a discharge. *In re Mason* (D. C.,

N. Car.), 3 Am. B. R. 599, 99 Fed. 256; *In re Olsdell* (D. C., N. Y.), 4 Am. B. R. 95, 101 Fed. 246.

²⁰⁶ *In re Rhtassel* (D. C., Iowa), 2 Am. B. R. 697, 96 Fed. 597; *In re Tinker* (D. C., N. Y.), 3 Am. B. R. 580, 99 Fed. 79; *In re McCarthy* (D. C., Ill.), 7 Am. B. R. 40, 111 Fed. 151. But in *In re Maples* (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 919, it was held that where the only debt scheduled is a judgment for seduction, the court will not grant a discharge.

²⁰⁷ *Matter of Luftig* (D. C., Mass.), 15 Am. B. R. 773, 162 Fed. 323.

²⁰⁸ *Hudson v. Mercantile Nat. Bank* (C. C. A., 8th Cir.), 9 Am. B. R. 432, 56 C. C. A. 250, 119 Fed. 346.

²⁰⁹ *In re Wolf* (D. C., Pa.), 20 Am. B. R. 304, 159 Fed. 299.

²¹⁰ *In re Dauchy* (D. C., N. Y.), 10 Am. B. R. 527, 122 Fed. 688.

²¹¹ *In re Webb* (D. C., N. Y.), 3 Am. B. R. 386, 96 Fed. 404; *In re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; *In re Hammerstein* (C. C. A., 2d Cir.), 26 Am. B. R. 757, 199 Fed. 37.

²¹² See § 29 of Bankr. Act, *post*, and discussion thereunder.

²¹³ See Bankr. Act, § 29-b(3) (4) (5).

though the use of the word "offense" necessarily negatives such a view.²¹⁴ If any of the offenses enumerated by § 29 of the act are committed by the bankrupt, either in his own or some other bankruptcy proceedings, his discharge must be denied.²¹⁵

b. Concealment of property.—(1) **WHAT CONSTITUTES.**—(I) *In general.*—To entitle the bankrupt to the privilege of a discharge there must be entire good faith on his part; he must surrender his property fully; he may not retain or conceal any part thereof which should go to his creditors.²¹⁶ The bankrupt cannot decide for himself whether a specific piece of property may be retained by him, and conceal the existence thereof by omitting it from his

§14. A contempt, even though punished by imprisonment, is not a crime. The offense must be one under the bankruptcy law. Section 29 indicates what constitutes such "offenses."

§15. **Commission of offenses in bankrupts bankruptcy.**—In the case of *Matter of Lesser* (C. C. A., 2d Cir.), 36 Am. B. R. 833, 234 Fed. 65, the court said: "As herein provided means as provided under the head of 'Offenses' in the bankruptcy act (section 29a). If a bankrupt applying for a discharge has committed an offense covered by section 29a his discharge must be refused. It would be an absolute impossibility for him to commit some of these offenses in his own bankruptcy. One of the offenses punished by section 29a is the embezzlement by a trustee in bankruptcy of property belonging to the estate of the bankrupt. If the trustee is convicted of such embezzlement and subsequently becomes a bankrupt himself he can, if the ruling of the district judge is correct, obtain his discharge, notwithstanding his conviction under section 29a of an offense which section 14 declares is an absolute bar to a discharge. As before stated, there is nothing in the act which confines the perjury which bars a discharge to that committed in the bankrupt's own proceeding. On the contrary, many of the offenses, conviction of which bars a discharge, cannot, as before stated, be committed in the bankruptcy proceedings of the applicant for a discharge. We cannot think that the lawmakers intended a result so illogical as to permit a trustee who has embezzled the estate of the bankrupt placed in his care by the court to file a petition of his own and procure a discharge, notwithstanding his crime, because it was committed in a bankruptcy proceeding other than his own. There is nothing compelling such a construction of the law. * * * It seems clear that the intention of the lawmakers was to refuse a discharge to a bankrupt who has taken a false oath in any bankruptcy proceeding. If he can commit perjury once and succeed he will be quite likely to attempt it again. The contention that the perjury must be committed in his own bankruptcy is contrary to the letter of the law, and if sustained may lead to deplorable results."

Violation of State law.—Although the failure of bankrupts, engaged as private bankers, to transmit to a foreign country moneys received for such purpose, constitutes a misdemeanor under the General Business Law of the State of New York, it is not an offense punishable by imprisonment under any provision of the Bankruptcy Act, and hence does not prevent a discharge. *Matter of Oliner* (C. C. A., 2d Cir.), 44 Am. B. R. 450, 262 Fed. 734.

§16. *In re Breitling* (C. C. A., 7th Cir.), 13 Am. B. R. 126, 133 Fed. 146; *Matter of Brincat* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

Complete appropriation of assets.—In the case of *In re Baudouine* (D. C., N. Y.), 3 Am. B. R. 55, 61, 96 Fed. 536, 539, Judge Brown said: "A discharge in bankruptcy upon any other condition than the complete appropriation of every known asset legally available to creditors would not only be a glaring wrong to creditors, but contrary to every conception of a just system of bankruptcy."

In the case of *Barton Bros. v. Produce Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 502, 505, 136 Fed. 355, the court said: "The bankrupt must make a full and complete surrender of all his unexempt property for the benefit of his creditors. He must be honest in this respect. He must neither conceal nor withhold knowingly anything from his creditors which they are entitled, under the law, to know or receive. Whenever the court is impressed with the belief, after due inquiry and examination, that in the main the bankrupt has intended and tried to comply with the law, he should be dealt with liberally on his petition for manumission from his debts. On the other hand, in order to obstruct gross abuses of the spirit of the bankrupt act, that it may not aid the dishonest debtor in being acquitted of his honest debts, while withholding aught that he should surrender for the benefit of his creditors, it is the duty of the court to look into the heart of his transactions."

Bad faith of bankrupt.—Where creditors objecting to a bankrupt's discharge sustain their accusation that he has so conducted his business as not to indicate good faith, and has caused his assets to disappear, the burden is upon the bankrupt to show that he is entitled to a discharge; and where bankrupt conducted a business which he got rid of when trouble was in sight because of a promissory note, and thereafter conducted business for the benefit and in the name of his sister, who apparently had no capital, without accounting for the proceeds derived from the sale of his business, a discharge will be denied. *In re Miller* (D. C., N. Y.), 30 Am. B. R. 113, 203 Fed. 170.

schedules; it is his duty to disclose the property and permit the court to determine whether it could go to his creditors.²¹⁷

(II) *Essential elements*.—To constitute concealment an objection to a discharge, it must be (1) by the bankrupt,²¹⁸ while a bankrupt or after his discharge—in other words, after the filing of the petition²¹⁹—and (2) from his trustee, (3) of property belonging to the estate in bankruptcy, and (4) such concealment must be “knowingly and fraudulently” done.²²⁰

(III) *Knowingly and fraudulently*.—The most important of the essentials of a concealment is that it be done “knowingly and fraudulently,” and without clear proof sustaining it, the specifications must be dismissed.²²¹ The question of intent becomes, therefore, of first importance in determining whether the offense has been committed. Without a purpose to profit by the concealment, or to deprive the creditors of their legal right to an apportionment of all the property of the bankrupt the act complained of will not constitute a bar to a discharge.²²² Thus, an omission to include property in the schedules under

²¹⁷ In re Gailey (C. C. A., 7th Cir.), 11 Am. B. R. 539, 127 Fed. 538; Barton v. Texas Produce Co. (C. C. A., 8th Cir.), 14 Am. B. R. 502, 136 Fed. 355; Vehon v. Ullman (C. C. A., 7th Cir.), 17 Am. B. R. 435, 147 Fed. 694, holding that the failure of the president of a mail order corporation to schedule a duplicate mailing list was not a bar to his discharge.

Intent.—While intent is a pertinent inquiry, it is not the sole inquiry. The substance of the offense is the withholding of assets, so that the true inquiry is whether with fraudulent intent, the bankrupt withheld from his schedule property belonging to his creditors. Apart from the withholding of assets, the intent constitutes no cause for denying a discharge. Vehon v. Ullman (C. C. A., 7th Cir.), 17 Am. B. R. 435, 147 Fed. 694.

Where it appears that a bankrupt intentionally took his property and kept it from his creditors, with intent to hinder, delay or defraud them, he will be denied a discharge, even though he thought his action justified. Matter of Nelson (D. C., N. Y.), 23 Am. B. R. 37, 179 Fed. 320.

²¹⁸ In re Myers (D. C., N. Y.), 5 Am. B. R. 4, 105 Fed. 353, holding that a discharge may be granted to a wife, notwithstanding a concealment of assets by her husband in managing her business. So, the fraud of a husband in failing to keep true books of account will not prevent the wife from securing her discharge. In re Hyman (D. C., N. Y.), 3 Am. B. R. 169, 97 Fed. 195.

²¹⁹ In re Webb (D. C., N. Y.), 3 Am. B. R. 386, 98 Fed. 404.

²²⁰ *Concealment; essential elements*.—To constitute a concealment of property having discharge, it must have been by the bankrupt after the filing of a petition against him, while a bankrupt, or after his discharge, and the property must have been concealed from the trustee, and such property must have belonged to the estate in bankruptcy. The concealment must be knowingly and

fraudulently made. Matter of Agnew and Sherman (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

²²¹ In re Conn (D. C., Or.), 6 Am. B. R. 217, 108 Fed. 525; In re Pierce (D. C., N. Y.), 4 Am. B. R. 554, 103 Fed. 64; In re Freund (D. C., N. Y.), 3 Am. B. R. 418, 98 Fed. 81; In re Bryant (D. C., Tenn.), 5 Am. B. R. 114, 104 Fed. 789; In re Todd (D. C., Vt.), 7 Am. B. R. 770, 112 Fed. 315; In re Patterson (D. C., N. Y.), 10 Am. B. R. 371, 121 Fed. 921; In re Blalock (D. C., S. Car.), 9 Am. B. R. 266, 118 Fed. 679; In re Beebe (D. C., Pa.), 8 Am. B. R. 597, 116 Fed. 46; Woods v. Little (C. C. A., 3d Cir.), 13 Am. B. R. 742, 134 Fed. 229; In re Talpin (D. C., Iowa), 14 Am. B. R. 360, 135 Fed. 861; In re Griffin Bros. (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; In re Bacon (D. C., N. Y.), 30 Am. B. R. 584, 205 Fed. 545.

The words “knowingly” and “fraudulently,” in section 29b, relating to concealment of assets by a bankrupt, must be given their natural significance in the consideration of a charge of concealment of assets made in opposition to granting him a discharge, and it must be shown by a clear preponderance of evidence that such concealment was practiced knowingly and fraudulently. Klein v. Powell (C. C. A., 3d Cir.), 23 Am. B. R. 494, 174 Fed. 640.

²²² Matter of Nelson (D. C., N. Y.), 23 Am. B. R. 37, 179 Fed. 320; Klein v. Powell (C. C. A., 3d Cir.), 23 Am. B. R. 494, 174 Fed. 640; In re Julius Bros. (D. C., N. Y.), 31 Am. B. R. 132, 209 Fed. 371, holding that creditors, claiming that a bankrupt transferred property in fraud of their rights, must show that the bankrupt knew the result of his act would deprive them of their rights—that is the element of intent—but it is quite irrelevant whether the bankrupt in his own mind had an honest justification; In re Kyte (D. C., Pa.), 23 Am. B. R. 414, 174 Fed. 867.

an honest mistake of law or fact will not bar a discharge.²²³ But, if such omission is not satisfactorily explained, it will usually amount to a concealment.²²⁴

(IV) *Property belonging to estate.*—The concealment must pertain to property belonging to the bankrupt, which would pass upon his bankruptcy to his trustee. It must be shown by competent and sufficient evidence that the property concealed belonged to the bankrupt, and in the absence of a finding to this effect the offense is not established.²²⁵ The amount or value of the property concealed does not bear particularly upon the existence of the offense, if the knowledge, intent or wilfulness of the concealment is established.²²⁶

(V) *Failure to schedule property.*—Failure to schedule or surrender property to the trustee is not *per se* or *ipso facto* knowingly and fraudulently concealing it.²²⁷ If the bankrupt has money in his possession when he files his petition, which he did not schedule or turn over to his trustee, he is, in the absence of a satisfactory explanation, guilty of a concealment of assets which bars his discharge.²²⁸ An omission to schedule property fraudulently conveyed usually amounts to a concealment, where the bankrupt retains an interest therein.²²⁹ But where the transfer was made more than four months prior

²²³. In re Morrow (D. C., Cal.), 3 Am. B. R. 263, 97 Fed. 574; In re Wetmore (D. C., Pa.), 3 Am. B. R. 700, 99 Fed. 703; In re Bialock (D. C., N. Car.), 9 Am. B. R. 266, 118 Fed. 679; In re Eaton (D. C., N. Y.), 6 Am. B. R. 531, 110 Fed. 731.

²²⁴. In re Royal (D. C., N. Car.), 7 Am. B. R. 106, 112 Fed. 135; In re Finkelstein (D. C., N. Y.), 3 Am. B. R. 800, 101 Fed. 418; In re O'Gara (D. C., Or.), 3 Am. B. R. 849, 97 Fed. 932. For such an explanation, see In re Miner (D. C., Or.), 8 Am. B. R. 248, 114 Fed. 988.

Presumption of concealment arises from failure to account for property in possession of bankrupt shortly before adjudication, and and not included in schedules. The sufficiency of the explanation is in the discretion of the district judge. Siegel v. Cartel (C. C. A., 8th Cir.), 21 Am. B. R. 140, 164 Fed. 691.

²²⁵. Property belonging to estate.—Under section 29b of the bankruptcy act, to justify the refusal of a discharge, it must appear that the bankrupt knowingly and fraudulently "concealed while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy." Hence, a report by a special master that certain moneys have been retained by the bankrupt and not paid over, which does not state whether or not such moneys were concealed from the trustee, is insufficient. Matter of Lenweaver (D. C., N. Y.), 36 Am. B. R. 73, 226 Fed. 987.

Desire to conceal although no property existing.—The mental operation of thinking property is owned, and desiring to conceal it, when in fact no such property exists, does not fall within any of the prohibitions of section 14. Matter of Hughes (C. C. A., 2d Cir.), 44 Am. B. R. 447, 262 Fed. 500.

²²⁶. Value of property concealed.—The bankruptcy act is not aimed particularly at large concealments of property, but at all concealments of property. If the amount is small, and inadvertently retained or forgotten, the failure to disclose will not prevent a discharge; but when knowingly and willfully concealed from the trustee, and drawn out and used by the bankrupt for his own personal use, whether the sum be large or small, there is a concealment of property

with intent to defraud creditors. Matter of Smith (D. C., N. Y.), 37 Am. B. R. 230, 232 Fed. 248. See Matter of Levy (D. C., N. Y.), 36 Am. B. R. 181, 227 Fed. 1011.

The mere fact that a bankrupt omitted bedroom furniture of small value from his schedules is not in itself sufficient to justify the denial of a discharge, especially where it was partly owned by his clerk and the key to the room had been given to the trustee. Baker v. Bishop-Babcock-Becker Co. (C. C. A., 4th Cir.), 34 Am. B. R. 396, 220 Fed. 657.

²²⁷. In re Hirsch (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 406; In re Freund (D. C., N. Y.), 3 Am. B. R. 418, 98 Fed. 81; In re Bialock (D. C., S. Car.), 9 Am. B. R. 266, 118 Fed. 679; Gretsch v. United States (C. C. A., 3d Cir.), 36 Am. B. R. 571, 231 Fed. 57.

Failure to schedule property transferred.—The failure to schedule or surrender property to the trustee is not *per se*, or *ipso facto*, knowingly and fraudulently concealing it, though an omission to schedule property fraudulently conveyed usually amounts to a concealment where the bankrupt retains any interest therein. Where, however, the evidence shows an entire absence of fraudulent intent, no such offense has been committed as will warrant the denial of a discharge on the ground of concealment. Matter of Stafford (D. C., Conn.), 35 Am. B. R. 747, 221 Fed. 127.

²²⁸. In re Friedrich (D. C., Minn.), 28 Am. B. R. 656, 199 Fed. 193, holding that proceeds derived from the sale of crops raised upon homestead property are not exempt under the law of Minnesota, so as to excuse a bankrupt for failure to schedule such proceeds or turn them over to his trustee.

²²⁹. Bragassa v. St. Louis Cycle (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77; In re Berner (D. C., Ohio, Ref.), 4 Am. B. R. 383; In re Skinner (D. C., Iowa), 3 Am. B. R. 163, 97 Fed. 190; In re Welch (D. C.,

to filing the petition in bankruptcy, it will not constitute a bar to discharge.²²⁹ This question often arises where property has been given or transferred by a bankrupt to his wife and omitted from the schedules or otherwise concealed.²³¹ Where a bankrupt has property in his wife's name, for the purpose of keeping such property from his creditors, a discharge will not be granted.²³² It seems, however, that an omission of assets from the schedule, on the advice of counsel, honestly given, is at least a presumptive excuse;²³³ as where the bankrupt was advised that his interest in his grandfather's estate was contingent and not vested.²³⁴ If there be no fraudulent or criminal intent in failing to schedule the property, and it was omitted upon a fair and reasonable cause to believe that it should not be included, based upon the advice of counsel, the omission is not an offense barring discharge.²³⁵ The advice of counsel is no excuse unless it was based upon a full and truthful disclosure of all the facts pertaining to the

Ohio), 3 Am. B. R. 93, 100 Fed. 65; In re McNamara (Ref., N. Y.), 2 Am. B. R. 566, 95 Fed. 429; In re Quackenbush (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; Matter of Stafford (D. C., Conn.), 35 Am. B. R. 747, 221 Fed. 127.

Failure to schedule property transferred by a bankrupt to his wife prior to the enactment of the bankruptcy law is not a ground for opposing a discharge. In re Goodale (D. C., N. Y.), 6 Am. B. R. 493, 100 Fed. 783; In re House (D. C., N. Y.), 4 Am. B. R. 603, 103 Fed. 616. So also a transfer made more than two years prior to bankruptcy, Matter of Kaufman (C. C. A., 2d Cir.), 38 Am. B. R. 648, 239 Fed. 805.

Transfer of claim for salary.—Where a claim for salary due, transferred by a bankrupt to his lawyer, was fictitious and made as a basis for a pretext for not scheduling said salary as an asset, so that his principal creditor might be kept from receiving any part of it, he is guilty of concealment which is a ground for denying him a discharge. Graton v. Melkham (C. C. A., 5th Cir.), 40 Am. B. R. 433, 246 Fed. 757.

232. In re Henneby (D. C., Iowa), 31 Am. B. R. 231, 207 Fed. 862; In re Kolater (D. C., Nev.), 17 Am. B. R. 52, 146 Fed. 138; In re Countryman (D. C., Ia.), 9 Am. B. R. 572, 110 Fed. 637; Fields v. Karier (C. C. A., 5th Cir.), 8 Am. B. R. 351, 115 Fed. 950. Otherwise if within the four months' period. Pirvits v. Pithian (C. C. A., 8th Cir.), 27 Am. B. R. 621, 194 Fed. 403, 114 C. C. A. 365.

233. In re McCrea (C. C. A., 2d Cir.), 20 Am. B. R. 412, 161 Fed. 246; In re Brown (D. C., Vt.), 15 Am. B. R. 350, 140 Fed. 383, in which case it was held that since a Vermont statute prohibits a contract between husband and wife, an attempted transfer to her did not constitute a concealment; In re Hirschowitz (D. C., Pa.), 27 Am. B. R. 701, 194 Fed. 562; Matter of Newmark (C. C. A., 2d Cir.), 41 Am. B. R. 54, 249 Fed. 341; Matter of Bishop (D. C., N. Y.), 42 Am. B. R. 495, 253 Fed. 454.

234. In re Steindler & Hahn (Ref., N. Y.), 5 Am. B. R. 63; In re Gilbert (D. C., Pa.), 22 Am. B. R. 221, 100 Fed. 149. Failure to schedule assets held in trust for a bankrupt by his wife is ground for refusal of his discharge. Matter of Borg (D. C., Minn.), 25 Am. B. R. 189, 194 Fed. 649; In re De Mauriac (D. C., N. Y.), 30 Am. B. R. 677, 206 Fed. 358.

Failure to schedule property held by wife.—In the case of In re Graves (D. C., Pa.), 26 Am. B. R. 633, 189 Fed. 847, the court said: "To entitle the bankrupt to a discharge, there must be entire good faith on his part. He must surrender his property fully. He cannot retain or conceal any part

thereof which should go to his creditors. If the property, or a portion of it, belonging to the bankrupt has been vested directly or indirectly in his wife, no matter when that was done, if the court believes from the evidence that it was done and continued fraudulently, and the property really was held for the bankrupt's benefit and subject to his control, the failure to mention such property, of whatever it may consist, in the schedule and to inform the trustee in regard thereto, is concealment of property and will prevent a discharge. This is a well settled principle, requiring no reference to cases decided." See also In re Diamond (D. C., Wis.), 30 Am. B. R. 363, 204 Fed. 137. But this rule would not apply where the property so transferred was purchased by the bankrupt with his wife's money. Matter of Kean (D. C., N. Y.), 38 Am. B. R. 628, 237 Fed. 682.

235. Omission under advice of counsel.—In re Schreck (Ref., N. Y.), 1 Am. B. R. 366; In re Berner (Ref., Ohio), 4 Am. B. R. 383; In re Headley, 2 N. B. N. Rep. 684; U. S. v. Connor, 3 McLean, 573; In re Kyte (D. C., Pa.), 23 Am. B. R. 417, 174 Fed. 867; Matter of Meikelham (D. C., Ga.), 38 Am. B. R. 324, 236 Fed. 401. But in re Stoddard (D. C., Wash.), 7 Am. B. R. 762, 114 Fed. 486, it was held that where certain real estate conveyed by the bankrupt shortly before filing his petition in bankruptcy, in trust to pay another the profits thereof for life and then to hold for his benefit, is intentionally omitted from his schedules, he is not entitled to his discharge, although he acted under advice of counsel, that all his interest in the property was divested by the deed. See also Matter of Bishop (D. C., N. Y.), 42 Am. B. R. 495, 253 Fed. 454.

Doubtful ownership.—In the case of In re Alleman (D. C., Pa.), 20 Am. B. R. 745, 162 Fed. 693, it was held that a bankrupt will not be denied a discharge upon the ground of a fraudulent concealment of property, where his ownership is doubtful and, under the advice of counsel, the property in question is omitted from the schedules.

234. Woods v. Little (C. C. A., 3d Cir.), 13 Am. B. R. 742, 134 Fed. 229.

235. In re Jacobson & Son Co. (C. C. A., 2d Cir.), 28 Am. B. R. 492, 196 Fed. 949.

omitted assets.²³⁶ Where a person prior to filing a petition in bankruptcy conveys property to a third person, to be held, in whole or in part, in secret trust for himself, and fails to schedule such interest, such failure constitutes a knowing and fraudulent concealment from his trustee, while a bankrupt, of property belonging to his estate in bankruptcy, and will preclude his discharge.²³⁷ The listing of property after an attempt to conceal the same and after the false oath has been discovered will not relieve the bankrupt from the consequences of such acts.²³⁸ Real property set apart to a divorced wife as alimony is not within the jurisdiction of a court in bankruptcy,²³⁹ and a failure to schedule such property does not constitute a concealment so as to defeat the wife's right to a discharge.²⁴⁰ Salary of a public officer does not pass to a trustee, and a failure to schedule the amount earned when the petition was filed is not a concealment of assets barring discharge.²⁴¹ A bankrupt should not be refused a discharge because he failed to set forth in his schedules the income derived from certain trust funds, and did not turn over to the trustee on demand his interest in said income, especially where it has not been decided whether or not such income passes to the trustee.²⁴²

(VI) *Undervaluation*.—The value of the property concealed is not material if it be shown that it was knowingly and fraudulently done.²⁴³ If property is undervalued the fact may be considered in determining whether a concealment has been committed although it is not itself a concealment.²⁴⁴

(VII) *Other instances of fraudulent concealment*.—It is not fraud for a bankrupt to collect insurance commissions and apply them to his own use, where a referee has decided that such commissions do not pass to the trustee, although the referee is subsequently reversed.²⁴⁵ The participation of bankrupt partners in the foreclosure of a chattel mortgage, given anterior to the four

²³⁶ Matter of Remmers (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484.

²³⁷ Matter of Borg (D. C., Minn.), 25 Am. B. R. 189, 184 Fed. 640; In re Breiner (D. C., Iowa), 11 Am. B. R. 684, 129 Fed. 155; In re Dauchy (D. C., N. Y.), 10 Am. B. R. 527, 122 Fed. 688; Hudson v. Mercantile Nat. Bank (C. C. A., 8th Cir.), 9 Am. B. R. 432, 56 C. C. A. 250, 119 Fed. 346; In re Bemis (D. C., N. Y.), 5 Am. B. R. 36, 104 Fed. 672; In re Welch (D. C., Ohio), 3 Am. B. R. 93, 100 Fed. 65.

Omission of a vested remainder of doubtful value which the bankrupt held in his father's estate, coupled with the bankrupt's testimony that he took nothing under his father's will, constitutes a fraudulent concealment. In re Becker (D. C., N. Y.), 5 Am. B. R. 438, 106 Fed. 54.

Failure to surrender life income in a trust fund, although scheduled, will prevent the granting of a discharge. In re Fleischman (D. C., Ill.), 9 Am. B. R. 557, 120 Fed. 960.

Surrender of an option to purchase real estate and a failure to mention the same in his schedules will not constitute a concealment of assets in the absence of evidence of a secret trust or agreement that the one to whom the option was surrendered was to hold the property for the benefit of the bankrupt. In re Kloster (D. C., Nev.), 17 Am. B. R. 52, 146 Fed. 138.

Assignment of securities to attorney.—

Where bankrupt on the day before filing his petition made an assignment to his attorney of certain pledged securities which he omitted to schedule, and delivered such assignment to the bank holding the securities in pledge after his adjudication, an intention to conceal said securities is made out; and a conditional assignment of said securities subsequently tendered to bankrupt's trustee by the attorney, which would necessitate the bringing of an action against bankrupt to recover his equities therein, will not relieve the bankrupt from the consequences of his act. In re Doyle (D. C., N. Y.), 29 Am. B. R. 102, 199 Fed. 247.

²³⁸ In re Breiner (D. C., Iowa), 11 Am. B. R. 684, 129 Fed. 155; In re Sussman (D. C., Pa.), 26 Am. B. R. 18, 190 Fed. 111; Grafton v. Meckleham (C. C. A., 5th Cir.), 40 Am. B. R. 433, 246 Fed. 737.

²³⁹ Audubon v. Shufeldt, 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1009.

²⁴⁰ In re LeClaire (D. C., Iowa), 10 Am. B. R. 733, 124 Fed. 654.

²⁴¹ In re Doherty (D. C., Ct.), 13 Am. B. R. 549, 135 Fed. 432.

²⁴² Matter of Buchanan (C. C. A., 2d Cir.), 33 Am. B. R. 638, 219 Fed. 492.

²⁴³ In re Lowenstein (D. C., N. Y.), 2 Am. B. R. 193, 106 Fed. 51; In re Becker (D. C., N. Y.), 5 Am. B. R. 438, 106 Fed. 54.

²⁴⁴ In re Semmel (D. C., Pa.), 9 Am. B. R. 351, 118 Fed. 487.

²⁴⁵ In re Wright (D. C., N. Y.), 24 Am. B. R. 437, 177 Fed. 578.

months' period, being charged as a fraudulent concealment of assets from the trustee, will prevent the granting of a discharge until the validity of the mortgage and the sufficiency of the foreclosure has been passed upon by a court of competent jurisdiction.²⁴⁶ If a voluntary transfer be made in contemplation of future indebtedness it may amount to a concealment,²⁴⁷ and so also where it appears that property was conveyed in fraud of creditors and is held in secret trust;²⁴⁸ and where a deed executed and recorded more than four months prior to bankruptcy, was in fact a mortgage which was not disclosed until immediately prior to the filing of the petition, there was a concealment of property within the meaning of the act.²⁴⁹ Where the bankrupt remains in possession of the transferred property, and the transfer is merely a device to obtain credit from the use of the transferee's note, the property is fraudulently concealed, and discharge may be denied.²⁵⁰

(2) EVIDENCE OF CONCEALMENT OF ASSETS.^{250a}—A wilful and fraudulent concealment of assets by a bankrupt need only be shown by a fair preponderance of credible evidence.²⁵¹ The burden of proof rests upon the opposing creditors; they must show by satisfactory evidence the essential elements of a concealment.²⁵² If the testimony is that of the bankrupt alone, and the most that can be said is that the circumstances are suspicious, the objection to a discharge should be overruled.²⁵³ Where objecting creditors have made a *prima facie*

²⁴⁶. In re Olanaky (D. C., N. Y.), 20 Am. B. R. 790, 163 Fed. 428.

²⁴⁷. In re McNamara (Ref., N. Y.), 2 Am. B. R. 579.

²⁴⁸. In re Berner (Ref., Ohio), 4 Am. B. R. 363.

Secret trust.—It has been held on several occasions that where a person, prior to filing a petition in bankruptcy, conveys the whole or a part of his property to a third party to be held in secret trust for himself, and fails to schedule it as a part of his assets, such an act amounts to a fraudulent concealment of assets which will defeat his right to a discharge. *Hudson v. Mercantile Nat'l Bank* (C. C. A., 8th Cir.), 9 Am. B. R. 432, 436, 119 Fed. 346; *In re Bemis* (D. C., N. Y.), 5 Am. B. R. 36, 104 Fed. 672; *In re Welch* (D. C., Ohio), 3 Am. B. R. 93, 100 Fed. 65; *In re Becker* (D. C., N. Y.), 5 Am. B. R. 438, 106 Fed. 54; *Matter of Borg* (D. C., Minn.), 25 Am. B. R. 189, 184 Fed. 640.

²⁴⁹. *Matter of White* (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688.

²⁵⁰. *Matter of Hagy* (C. C. A., 6th Cir.), 34 Am. B. R. 319, 220 Fed. 665.

^{250a}. See also Rules of Evidence; Proof Required, *ante*, p. 362.

²⁵¹. Evidence of concealment.—*In re Greenberg* (D. C., Ct.), 8 Am. B. R. 94, 114 Fed. 773; *In re Howden* (D. C., N. Y.), 7 Am. B. R. 101, 111 Fed. 723; *In re Gaylord* (C. C. A., 2d Cir.), 7 Am. B. R. 1, 112 Fed. 608; *In re Tillyer* (D. C., Pa.), 17 Am. B. R. 125, 147 Fed. 800; *Matter of Garrity* (C. C. A., 2d Cir.), 40 Am. B. R. 664, 247 Fed. 310. It is not necessary to establish the concealment of assets beyond a reasonable doubt. A fair preponderance of testimony is sufficient. *In re Delmour* (D. C., N. Y.), 20 Am. B. R. 405, 161 Fed. 589; *Klein v. Powell* (C. C. A., 3d Cir.), 23 Am. B. R. 494, 174 Fed. 640; *In re Mar-*

golis (D. C., Mass.), 24 Am. B. R. 934, 181 Fed. 591; *In re Cohen* (C. C. A., 2d Cir.), 30 Am. B. R. 653, 206 Fed. 457, *revg.* 29 Am. B. R. 698, 201 Fed. 188; *In re Doyle* (D. C., N. Y.), 29 Am. B. R. 102, 199 Fed. 247; evidence that a bankrupt knowingly and fraudulently concealed property from his trustee must be clear. *Matter of Agnew and Sherman* (D. C., N. Y.), 36 Am. B. R. 709, 225 Fed. 650; a willful and fraudulent concealment of assets by a bankrupt need only be shown by a clear preponderance of credible evidence. *Matter of Brincat* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

Sufficiency of evidence.—Although the facts of concealment if proved would render the bankrupt liable to criminal prosecution, yet in an application for a discharge, merely a civil case, the facts proved need not be sufficient to convict of the crime. *Matter of Atlas* (D. C., Ill.), 34 Am. B. R. 44, 219 Fed. 783.

²⁵². *Poff v. Adames*, (C. C. A. 4th Cir.), 35 Am. B. R. 307, 226 Fed. 187; *Matter of Garrity* (C. C. A., 2d Cir.), 40 Am. B. R. 664, 247 Fed. 310; *Matter of Lally* (D. C., N. Y.), 43 Am. B. R. 252, 255 Fed. 358.

²⁵³. *In re Kolster* (D. C., Nev.), 17 Am. B. R. 52, 146 Fed. 138; *Matter of Nadel* (D. C., N. Y.), 34 Am. B. R. 727, 211 Fed. 767; *Matter of Miller* (C. C. A., 2d Cir.), 32 Am. B. R. 397, 212 Fed. 920.

Mere suspicion insufficient.—In the case of *In re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 149, 188 Fed. 479, 484, the court said: "The denial of the discharge because of fraudulent concealment of assets or of a false oath by the bankrupt must be made out by clear and convincing proof, and is not the subject of mere suspicion or inference."

That fraud may not be presumed does not imply that it may not be proved by circumstances. *Matter of Brincat* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

case the burden is on the bankrupt to so weaken it by credible evidence as to present a question of fact.²⁵⁴ If it appear that the bankrupt did not act in good faith in withholding a part of his property from his creditors, the court will not countenance it by permitting his discharge.²⁵⁵ While fraudulent intent is essential it does not of itself justify a refusal of a discharge where it is not shown that the assets alleged to have been concealed belonged to the bankrupt's estate.²⁵⁶ If it be decided in a prior controversy in the proceedings that the bankrupt was guilty of a concealment of assets, the question of concealment is *res adjudicata* in the proceedings for a discharge, and raises a presumption against the bankrupt.²⁵⁷ The failure of the trustee to prove the whole amount alleged to have been concealed is immaterial in passing on the bankrupt's right to be discharged, as the specifications may be amended to conform to the proof.²⁵⁸

(3) CONTINUING CONCEALMENT.—Concealment being possible only if the person is "a bankrupt," strictly, a concealment accomplished before the bankruptcy is not within the penalty of the statute. This limitation has, however, led to the doctrine of "continuing concealment," which is now generally recognized.²⁵⁹ Although the concealment must have been done while a bank-

254. In re Leslie (D. C., N. Y.), 9 Am. B. R. 561, 119 Fed. 403. In this case it was held that an unexplained shrinkage in the bankrupt's assets of about \$12,000 within a year of his bankruptcy is insufficient proof that he had that amount of money at the time of filing his petition and concealed it from his creditors and the trustee. See also In re Blinlock (D. C., S. Car.), 9 Am. B. R. 263, 118 Fed. 679; In re Baernkopf (D. C., Pa.), 9 Am. B. R. 133, 117 Fed. 975; In re Copleman (D. C., Mich.), 30 Am. B. R. 414, 207 Fed. 815.

Undervaluation.—In the case of In re Sammel (D. C., Pa.), 9 Am. B. R. 353, 118 Fed. 457, it was held that the bankrupt could not be charged with concealing shares of stock because he had undervalued them, but that fact, as well as the fact that he did not name the stock, was a circumstance of more or less weight on the question of concealment, if there was further evidence to bear it out; In re Jacobs (D. C., N. J.), 16 Am. B. R. 483, 144 Fed. 863.

Presumption of concealment arises from failure to account for property in possession of the bankrupt shortly before adjudication, and not included in his schedules. The reasonableness of a bankrupt's explanation of the omission of property from his schedules is in the judicial discretion of the judge. Matter of Brincat (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

255. In re Brethling (C. C. A., 7th Cir.), 13 Am. B. R. 123, 133 Fed. 146; In re Graves (D. C., Pa.), 26 Am. B. R. 633, 139 Fed. 847.

256. Vohon v. Ullman (C. C. A., 7th Cir.), 17 Am. B. R. 435, 147 Fed. 694.

257. In re Krall (D. C., Conn.), 28 Am. B. R. 452, 196 Fed. 402.

When not *res judicata*.—Rulings of the referee upon objections to an allowance of a homestead exemption because of concealment of property in violation of the State statutes are not *res judicata* upon an application for a discharge. Matter of Frosteg (D. C., Ga.), 42 Am. B. R. 275, 232 Fed. 199.

A judgment in an action by a trustee in a State court refusing to set aside as fraudulent, a transfer made by the bankrupt, does not bind the bankruptcy court in an application for discharge to hold that the transfer was not fraudulent. Matter of Jutkovits (D. C., N. Y.), 44 Am. B. R. 231, 259 Fed. 915.

258. Matter of Magen (D. C., Pa.), 33 Am. B. R. 346, 218 Fed. 692.

259. In re Quackenbush (D. C., N. Y.), 4

Am. B. R. 274, 102 Fed. 283; In re Bemis (D. C., N. Y.), 5 Am. B. R. 36, 104 Fed. 673.

Placing title in wife's name as continuing concealment.—Where a bankrupt, several years previously, had transferred certain real estate, subject to a mortgage to his wife, without consideration, but without any attempt at concealment, and there was no proof that there was any agreement between them that the bankrupt should retain any interest in such property, the fact that after such transfer the bankrupt continued to live with his wife on this property and other real estate which she purchased, and that he worked for her thereon, without proof, however, that he did more for his wife than his board was worth, was not sufficient to disclose such a secret interest in the property as to sustain the burden imposed upon a creditor objecting to the bankrupt's discharge on the ground of concealment of property. In re Wermuth (D. C., N. Y.), 24 Am. B. R. 785, 175 Fed. 1009.

Where the record shows that the bankrupt, having an interest in certain properties, placed the title thereto in his wife's name for the purpose of keeping them out of the reach of the creditors, and she held the title when he filed his schedules, in which he did not include his interest in the properties, he will be refused a discharge, both upon the ground of a fraudulent concealment of assets and of making a false oath. In re Guilbert (D. C., Pa.), 22 Am. B. R. 221, 169 Fed. 149.

Concealment of assets of a bankrupt before the appointment of a trustee, and continuing after such appointment, is a concealment from the trustee in violation of the bankruptcy act. Matter of Brincat (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

Conveyances prior to four months' period.—In New York a conveyance of real estate made by a bankrupt long anterior to the

rupt or after discharge, yet where a bankrupt has disposed of property prior to bankruptcy but has possession or control of the proceeds subsequent to adjudication which he fails to disclose, there is a continuing concealment for which he is amenable to the law.²⁶⁰ The word "concealed" is sufficiently elastic to include "continuing concealments."²⁶¹ Such a concealment once begun necessarily continues after the bankruptcy and is, therefore, "from his trustee." Whether it is also of "property belonging to his estate in bankruptcy" is sometimes a difficult question, and usually turns on the *bona fides* of the transaction through which possession and title passed from the bankrupt. No hard and fast rule can be phrased; the cases rest each on its own facts.²⁶²

four months' period, with intent to hinder, delay and defraud creditors, may be alleged as a ground of objection to his discharge, where the conveyance is not recorded until within the four months' period. Matter of McKane (D. C., N. Y.), 19 Am. B. R. 103, 155 Fed. 674. But it is no ground for denying a bankrupt's discharge that more than four months prior to the filing of his petition he conveyed to his wife, for full value, certain shares of corporate stock for the purpose of raising money to pay the expenses of an impending suit for breach of promise to marry. In re Brambaugh (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971.

Proof that the bankrupt, three years prior to bankruptcy, having no other property, conveyed certain real estate, heavily mortgaged, but in which he had an equity of redemption worth from \$10,000 to \$12,000, to his sons for a cash consideration of \$500, and upon the understanding that they would pay his creditors, including themselves, is insufficient, in the absence of evidence that the property was held by the grantees in trust for the bankrupt or his benefit or that he thereafter in any way dealt with the property as his own or directly or indirectly derived any benefit therefrom, to sustain an objection to his discharge upon the ground of a concealment of assets from his trustee. In re Jacobs (D. C., N. J.), 16 Am. B. R. 482, 144 Fed. 868.

Where a bankrupt, while insolvent, conveys property to a near relative without consideration and afterward fails to disclose the existence of such property in his schedules, he is *prima facie* guilty of concealing assets from his trustee, although the conveyance may have been made more than four months before the petition was filed; but if, upon the bankrupt's application for discharge, the innocence of the transaction be made to appear, the conveyance and the subsequent omission of the property from the schedules will interpose no obstacle to the discharge. In re McCann (D. C., Pa.), 24 Am. B. R. 789, 179 Fed. 575.

Continued after filing petition.—A concealment of property, in order to bar a discharge, must be by the bankrupt, or by his procurement, after the filing of his petition, and from his trustee, or before such filing, and continued after such filing and the ap-

pointment of the trustee, and such concealment must be knowingly and fraudulently done. Matter of Brincat (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

260. U. S. v. Cohen (D. C., N. Y.), 15 Am. B. R. 359, 142 Fed. 983, holding that if a bankrupt before the bankruptcy has concealed his property, and after his trustee is appointed continues to conceal it, he is criminally liable under § 29-b; In re Jacobs & Verstandig (D. C., Or.), 17 Am. B. R. 470, 147 Fed. 797; In re James (D. C., N. Car.), 23 Am. B. R. 703, 175 Fed. 894, *affd. sub nom.* James v. Stone, 24 Am. B. R. 288, 181 Fed. 476.

Evidence of concealment before bankruptcy.—Upon the prosecution of a defendant for "the offence of having knowingly and fraudulently concealed while a bankrupt * * * from his trustees * * * property belonging to his estate in bankruptcy," in violation of section 29b of the Bankruptcy Act, testimony of facts indicating concealment of property before bankruptcy is admissible in proof of its concealment continued and completed after bankruptcy. As evidence of acts committed before bankruptcy is admissible in proof of concealment then begun and thereafter completed, no evidence of acts before bankruptcy is admissible in proof of fraudulent intent with which concealment is completed after bankruptcy. Glass v. United States (C. C. A., 3d Cir.), 36 Am. B. R. 550, 231 Fed. 65.

261. In re Jacobs & Verstandig (D. C., Or.), 17 Am. B. R. 470, 147 Fed. 797; James v. Stone (C. C. A., 4th Cir.), 24 Am. B. R. 288, 181 Fed. 476.

262. In re March (D. C., Vt.), 6 Am. B. R. 537, 109 Fed. 602; In re Adams (D. C., N. Y.), 4 Am. B. R. 696, 104 Fed. 72; In re Fitchard (D. C., N. Y.), 4 Am. B. R. 609, 103 Fed. 742; In re Jacobs (D. C., Or.), 17 Am. B. R. 470, 147 Fed. 797. If upon a bankrupt's application for a discharge, the innocence of the transaction be made to appear, the conveyance of property to a near relative and the subsequent omission of such property from the schedules will interpose no obstacle to the discharge. In re McCann (D. C., Pa.), 24 Am. B. R. 789, 179 Fed. 575; In re Doyle (D. C., N. Y.), 29 Am. B. R. 102, 199 Fed. 247.

(4) MISCELLANEOUS CASES.—In the foot-notes will be found a number of cases, not previously cited, in all of which the commission of the offense of concealment has been alleged.²⁶³

c. A false oath in the proceeding.—(1) IN GENERAL.—Much that has been said in the previous paragraphs applies with equal force here. The oath, if available as an objection to a discharge, must be (1) “in or in relation to any proceeding in bankruptcy.”²⁶⁴ The analogy of this objection to a crime usually compels strict pleading and even stricter proof.²⁶⁵

(2) KNOWINGLY AND FRAUDULENTLY.—The false oath must have been knowingly and fraudulently made.²⁶⁶ That is the statement must contain matter which the bankrupt knew to be false and he must have included them wilfully with intent to defraud.²⁶⁷

(3) WHAT CONSTITUTES FALSE OATH.—The verification of an answer of a bankrupt, containing a false statement and filed after the time allowed by the Bankruptcy Act, does not constitute a false oath.²⁶⁸ The oath may have been

263. Discharge granted.—In re Locks (D. C., N. Y.), 5 Am. B. R. 136, 104 Fed. 783; In re Hirsch (D. C., N. Y.), 3 Am. B. R. 344, 97 Fed. 571; In re Cornell (D. C., N. Y.), 3 Am. B. R. 172, 97 Fed. 29; In re Polakoff (Ref., N. Y.), 1 Am. B. R. 358; In re Lesser (C. C. A., 2d Cir.), 8 Am. B. R. 15, 114 Fed. 83, revg. s. c., 5 Am. B. R. 330, 108 Fed. 205; In re Countryman (D. C., Iowa), 9 Am. B. R. 572, 119 Fed. 637; In re Semmel (D. C., Pa.), 9 Am. B. R. 351, 118 Fed. 487; Matter of Lally (D. C., N. Y.), 43 Am. B. R. 252, 255 Fed. 338.

Discharge refused.—In re Scheneck (D. C., Wash.), 8 Am. B. R. 727, 116 Fed. 554; In re Bullwinkle (D. C., N. Y.), 6 Am. B. R. 756, 111 Fed. 364; In re Cabus (D. C., N. Y., Ref.), 6 Am. B. R. 156; Ablowich v. Sturaburg (C. C. A., 2d Cir.), 5 Am. B. R. 403, 99 Fed. 81, affg. In re Ablowich (D. C., N. Y.), 3 Am. B. R. 586, 99 Fed. 81; Fields v. Karter (C. C. A., 5th Cir.), 8 Am. B. R. 351, 115 Fed. 950; In re Gross (Ref., N. Y.), 5 Am. B. R. 271; In re Heyman (D. C., N. Y.), 4 Am. B. R. 735, 104 Fed. 677; In re Hoffman (D. C., N. Y.), 4 Am. B. R. 331, 102 Fed. 970; In re Dews (D. C., R. I.), 3 Am. B. R. 691, 96 Fed. 181; In re Holstein (D. C., Ct.), 8 Am. B. R. 147, 114 Fed. 794; In re Greenberg (D. C., Ct.), 8 Am. B. R. 94, 114 Fed. 773; In re Young (D. C., N. Car.), 15 Am. B. R. 477, 140 Fed. 728; Matter of Wibeck (D. C., Mass.), 40 Am. B. R. 172, 245 Fed. 135; Matter of Baldwin (D. C., N. Y.), 41 Am. B. R. 664, 253 Fed. 836.

On appeal.—In re Otto (D. C., N. J.), 8 Am. B. R. 305, 115 Fed. 860; Osborne v. Perkins (C. C. A., 1st Cir.), 7 Am. B. R. 260, 112 Fed. 127; In re Covington (D. C., N. Car.), 6 Am. B. R. 373, 110 Fed. 143.

264. Compare, for practice, In re Goodale (D. C., N. Y.), 6 Am. B. R. 493, 109 Fed. 783. The statement in the above case that “the facts relied upon to prove falsity” should be stated does not mean that evidence must be set forth. Matter of Jacob Nathanson (D. C., N. Y.), 19 Am. B. R. 56, 155 Fed. 645 (false oath as to keeping of books). See In re Kretsch (D. C., N. Y.), 22 Am. B. R. 284, 172 Fed. 523, holding that false oath in the proceedings for discharge is not available to prevent a discharge.

265. In re Howden (D. C., N. Y.), 7 Am. B. R. 191, 111 Fed. 723; In re Gaylord (D. C., N. Y.), 5 Am. B. R. 410, 106 Fed. 833. See also this case on appeal, 7 Am. B. R. 195, 111 Fed. 717. Compare Matter of Remmers (C. C. A., 8th Cir.), 23 Am. B. R. 76, 173 Fed. 484, holding that the objection need only be sustained by such proof as will overcome the presumption of the honest of purpose of the bankrupt; Matter of Agnew and Sherman (D. C., N. Y.), 35 Am. B. R. 709, 715, 225 Fed. 650.

266. In re Bryant (D. C., Tenn.), 5 Am. B. R. 114, 104 Fed. 789; In re Salisbury (D. C., N. Y.), 7 Am. B. R. 771, 113 Fed. 833; In re Beebe (D. C., Pa.), 8 Am. B. R. 597, 116 Fed. 48; In re Cohen (D. C., N. Y.), 18 Am. B. R. 84, 149 Fed. 908; Matter of Luftig (D. C., Mass.), 15 Am. B. R. 773, 162 Fed. 322; Kentucky Nat. Bank v. Carley (C. C. A., 3d Cir.), 12 Am. B. R. 119, 127 Fed. 686. Compare also cases in foot-note, ante.

Knowingly and fraudulently.—A specification of objection to a bankrupt's discharge which fails to state, either in the words of the statute or in equivalent phraseology, that bankrupt knowingly “and fraudulently” made a false oath in or in relation to any proceeding in bankruptcy does not set forth the offense defined in section 29 of the Bankruptcy Act, and is insufficient to bar a discharge. In re Mayer (D. C., N. Y.), 28 Am. B. R. 342, 195 Fed. 571.

267. In re Hale (D. C., N. Mex.), 31 Am. B. R. 88, 206 Fed. 856.

Purpose of deceiving trustee.—A specification in opposition to a bankrupt's discharge, that he knowingly and fraudulently made a false oath, is shown to be material, where it appears that the oath was made for the purpose of deceiving the trustee, concealing the assets of the bankrupt, and preventing a discovery thereof. Matter of White (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688.

268. In re Young (D. C., N. Car.), 15 Am. B. R. 477, 140 Fed. 728.

made by the bankrupt in a bankruptcy proceeding other than his own.²⁶⁹ A discharge in bankruptcy cannot be denied on the ground that the testimony of the bankrupt was evasive, and may have been false.²⁷⁰

(4) OATH TO SCHEDULES OMITTING PROPERTY.—A common instance is where a bankrupt swears that his schedule of property is a statement of "all his estate, both real and personal," and he has knowingly or fraudulently omitted assets therefrom.²⁷¹ If the items were omitted because of mistake or the honest advice of counsel, to whom the bankrupt had disclosed all the facts relative to such items, the oath will not be deemed wilfully false, and the discharge should not be denied because of it.²⁷² The evidence must be definite and certain to the effect that the property omitted should have been scheduled as part of the bankrupt's assets.²⁷³ A bankrupt, who omits from his sworn schedule

269. *Matter of Lesser* (C. C. A., 2d Cir.), 36 Am. B. R. 833, 234 Fed. 65.

270. *In re Cohen* (D. C., N. Y.), 18 Am. B. R. 84, 149 Fed. 908.

Where a bankrupt, at the first meeting of creditors, made evasive answers to inquiries concerning his insolvency at a certain time, and even made some statements which were not true, but admitted as soon as the question was squarely put to him, that he was insolvent at that time, sufficient cause does not exist for the denial of his discharge on the ground of making false oath. *In re Marcus & Scherr* (D. C., N. Y.), 27 Am. B. R. 164, 192 Fed. 743, *affd.* 30 Am. B. R. 176, 203 Fed. 29.

Former determination as to false oath; effect.—A prior adjudication that the bankrupt had made a false oath, and his summary punishment for contempt, are to be considered as *prima facie* establishing a specification of objection to his discharge, interposed on the ground that he had made such false oath, but opportunity should not be denied him of showing in the discharge proceedings that the offense of making a false oath was not knowingly and fraudulently committed, nor should he be prevented from making further explanation of his testimony, or from showing that he did not make a willful misstatement. *In re Shear* (D. C., N. Y.), 29 Am. B. R. 688; 201 Fed. 460.

271. *In re Breiner* (D. C., Iowa), 11 Am. B. R. 684, 129 Fed. 155; *In re Gailey* (C. C. A., 7th Cir.), 11 Am. B. R. 539, 127 Fed. 538; *In re Rauchenplat* (D. C., Porto Rico), 9 Am. B. R. 763; *In re Semmel* (D. C., Pa.), 9 Am. B. R. 351, 118 Fed. 487; *Barton v. Texas Produce Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 502, 136 Fed. 355; *In re Herman* (C. C. A., 2d Cir.), 13 Am. B. R. 778, 69 C. C. A. 413, 134 Fed. 566; *In re Schofield* (D. C., Pa.), 17 Am. B. R. 916, 147 Fed. 862; *In re Gilbert* (D. C., Pa.), 22 Am. B. R. 221, 169 Fed. 149; *Matter of Cooper* (C. C. A., 2d Cir.), 38 Am. B. R. 589, 230 Fed. 991; *Matter of Garrity* (C. C. A., 2d Cir.), 40 Am. B. R. 664, 247 Fed. 310.

False oath to schedules.—Where a bankrupt, in his schedules, states that he had no money or property except \$10 in cash, when in fact he was the owner of nine head of cattle and had in his possession \$861 in

cash, which he failed to schedule, but afterward surrendered to his trustee by order of the referee, he will be denied a discharge upon the ground of having made a false oath to his schedules. *Matter of Napier* (Ref., Ky.), 23 Am. B. R. 560.

Where it appears that a bankrupt has concealed assets, which have not been listed in his schedules, he will be deemed to have taken a false oath when he swore to the truth of the schedules. *In re Cantor* (Ref., D. C., N. Y.), 26 Am. B. R. 859.

False oath as to interest in real property.—Where it appears that by statute a bankrupt has a life estate in one-third of his wife's real estate, that such property was purchased by his wife with his own savings; that, although he claims to hold the property merely as trustee for his children, he has in many instances held it out as his own, his oath to the effect that he has no such interest will be held to have been made knowingly and will prevent his discharge. *In re Hale* (D. C., New Mex.), 31 Am. B. R. 88, 206 Fed. 856.

Property fraudulently transferred.—Bankrupts by omitting to list property fraudulently transferred in their schedules are guilty of making a false oath for which their discharge should be denied. *Matter of Aymo and Barathia* (Ref., D. C., N. Y.), 35 Am. B. R. 13; *Matter of Schroeder* (D. C., N. Y.), 45 Am. B. R. 202, 264 Fed. 862.

272. *Matter of Stafford* (D. C., Conn.), 35 Am. B. R. 747, 221 Fed. 127.

273. Evidence.—*In re Hamilton* (D. C., N. Y.), 13 Am. B. R. 333, 133 Fed. 823; *In re Ferris* (D. C., Iowa), 5 Am. B. R. 246, 105 Fed. 356; *In re Fitchard* (D. C., N. Y.), 4 Am. B. R. 609, 103 Fed. 742; *In re Boyden* (D. C., Pa.), 13 Am. B. R. 269, 132 Fed. 991, holding that discrepancy between statement of his financial condition made prior to bankruptcy and his schedules is not necessarily evidence of a false oath. *Matter of Rosenberg* (D. C., N. Y.), 45 Am. B. R. 319, — Fed. —.

An objection to a bankrupt being granted a discharge, on the ground that he had knowingly and with fraudulent intent made false oath to his schedules, need only be sustained by proof such as will overcome the presumption as to his honesty of purpose. *Matter of Remmers* (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484.

securities which are absolutely worthless, is not guilty of making a false oath.²⁷⁴ If the securities omitted are deemed valuable by the bankrupt, evidenced by an effort made to recover them by suit against a pledgee, brought subsequent to the bankrupt's adjudication, his discharge should be denied.²⁷⁵ It thus appears that the omission of property from verified schedules may be both a false oath and a concealment.²⁷⁶ What has already been said in respect to wilful and fraudulent omission of items from schedules constituting concealment, applies here with equal force.

(5) FALSE OATH ON FORMER EXAMINATION UNDER § 7 (9).—This same analogy has led to much confusion concerning the right to predicate such an objection on a false oath during the bankrupt's examination. It seems not to be doubted that this objection may rest on any oath voluntarily taken,²⁷⁷ but it has been vigorously denied that a false oath under compulsion can be made the basis of an objection to a discharge. The earlier cases were quite uniform that it could not; this on the ground that, by § 7 (9), the evidence then adduced could not be used against a bankrupt in a criminal proceeding.²⁷⁸ This view has, however, now been exploded.²⁷⁹ It is a torturing of words to call a proceeding on discharge a criminal proceeding, merely because the same facts if proven in support of an indictment might result in conviction for crime. The contention that to permit the use of such testimony "would set a trap for the debtor" has been well answered by a distinguished judge to the effect that the opposite rule "would set a trap for the creditors, or else so set the trap that the debtor could get all the bait (the discharge) and yet not spring the trap."²⁸⁰

(6) OTHER INSTANCES OF FALSE OATH.—The false oath must be on a matter material to the inquiry,²⁸¹ and it has been held that it must have been made in the proceedings in which the bankruptcy of the petitioner was to be adjudicated and his estate administered.²⁸² But, if a false oath was due to a mistake in fact or the result of honest advice of counsel, a discharge will not usually

²⁷⁴ *In re McCrea* (C. C. A., 2d Cir.), 20 Am. B. R. 412, 161 Fed. 246.

Value of property not scheduled.—Where a bankrupt, after turning over to his wife a plumbing business, had its full management and control, and had drawn but from \$2 to \$4 a week for his services, which were reasonably worth \$10 to \$20 a week, it cannot be charged that he made a false oath in omitting from his schedules a claim against his wife for services where the specifications of objection to his discharge, alleging the above facts, fail to set forth the existence of a valid claim against the wife. *In re Adams* (D. C., N. Y.), 22 Am. B. R. 613, 171 Fed. 599.

²⁷⁵ *Matter of Remmers* (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484; *In re Sussman* (D. C., Pa.), 26 Am. B. R. 18, 190 Fed. 111.

²⁷⁶ *In re Becker* (D. C., N. Y.), 5 Am. B. R. 438, 106 Fed. 54; *Matter of Garrity* (C. C. A., 2d Cir.), 40 Am. B. R. 664, 247 Fed. 310.

²⁷⁷ See reasoning in cases immediately post.
²⁷⁸ *In re Goldsmith* (D. C., Pa.), 4 Am. B. R. 234, 101 Fed. 570; *In re Marx* (D. C., Ky.), 4 Am. B. R. 521, 102 Fed. 676; *In re Logan* (D. C., Ky.), 4 Am. B. R. 525, 102 Fed. 876.

²⁷⁹ *In re Dow* (D. C., Iowa), 5 Am. B. R. 400, 105 Fed. 880 *In re Gaylord* (D. C., Mo.), 7 Am. B. R. 195, 111 Fed. 117, affg. s. c., 5 Am. B. R. 410, 106 Fed. 833; *Matter of Kaplan* (D. C., Mass.), 40 Am. B. R. 181, 245 Fed. 222.

²⁸⁰ *In re Dow* (D. C., Iowa), 5 Am. B. R. 400, 105 Fed. 880.

²⁸¹ Compare, for testimony in State court, *In re Eaton* (D. C., N. Y.), 6 Am. B. R. 531, 110 Fed. 731; and, to effect that testimony other than by the bankrupt is inadmissible, *In re Wilcox* (C. C. A., 2d Cir.), 6 Am. B. R. 362, 109 Fed. 628; *In re Strouse*, 2 N. B. N. Rep. 64; *In re Huber*, 1 N. B. N. 431; *In re Chamberlain* (D. C., N. Y.), 25 Am. B. R. 37, 180 Fed. 304. See cases cited Am. Bankr. Dig., § 1011.

²⁸² False oaths should relate to matters material to the bankruptcy proceedings in order to be interposed as objections to a discharge. *In re Chamberlain* (D. C., N. Y.), 25 Am. B. R. 37, 180 Fed. 301; *In re Marcus & Scherr* (D. C., N. Y.), 27 Am. B. R. 164, 192 Fed. 743, affd. 30 Am. B. R. 176, 203 Fed. 29. Thus, a false oath made by the bankrupt, prior to his adjudication in a bankruptcy proceeding, against a corporation of which he was an officer and stockholder, is not ground for refusing his discharge. *In re Blalock* (D. C., S. Car.), 9 Am. B. R. 266, 118 Fed. 679; *In re Marcus* (C. C. A., 2d Cir.), 30 Am. B. R. 176, 203 Fed. 29.

Perjury of a bankrupt in a proceeding for his discharge is not ground for depriving him of the discharge itself, but he is guilty of a contempt of court and may be punished therefor. *In re Kretsch* (D. C., N. Y.), 22 Am. B. R. 284, 172 Fed. 523.

Materiality of false oath.—A false oath is not a bar to a discharge unless it constitutes an offense punishable by imprisonment. Testimony as to property, which can have no in-

be refused.²⁸³ Statements by bankrupt on examination before the referee that he had no property not scheduled, when it appeared that he had transferred valuable property within the four months' period with intent to defraud his creditors, constitute a false oath, barring his discharge.²⁸⁴ A bankrupt's discharge may be denied where he failed to include certain creditors in his schedules, though he presents releases from such creditors on the hearing of the application for a discharge.^{284a} A bankrupt, who at the first meeting of creditors swears positively that he had never made a statement of financial condition to any one, when in fact he had made such a statement a very short time before, is guilty of knowingly and fraudulently making a false oath, which constitutes a bar to his discharge.²⁸⁵ The attempt of a bankrupt, in making his schedules, to falsely decrease the claim of a creditor who has some security is a sufficient ground for denial of a discharge, unless the creditor could have been estopped and his claim held down to the lower amount.^{285a} Cases where the bankrupt swears falsely to an account in the proceeding are rare. Usually such an oath would also amount to a false oath proper, and might often be a concealment. There are as yet no authorities in point. Additional cases where this ground of objection has been considered will be found in the foot-note.²⁸⁶

VII. FAILURE TO KEEP, DESTRUCTION OR CONCEALMENT OF BOOKS.

a. In general.—A bankrupt who, "with intent to conceal his financial condition, destroyed, concealed or failed to keep books of accounts or records from which such condition might be ascertained" is not entitled to a discharge.²⁸⁷ The amendatory act of 1903 materially modified the original law, and greatly altered the essential elements of pleading and proof. We have indicated these changes in the notes to the text of section 14.²⁸⁸ The subdivision in its original form was highly objectionable, in particular, in that it required proof that the act complained of was "in contemplation of bankruptcy,"²⁸⁹ which was held to mean in contemplation of a bankruptcy proceeding. This requirement has been dropped out.²⁹⁰ So have the adjectives "fraudulent," as perhaps nar-

terest to the estate and no bearing on the estate's condition, is not material in a bankruptcy case. *Matter of Huber* (Ref., D. C., N. D.), 34 Am. B. R. 160.

283. In re Estou (D. C., N. Y.), 6 Am. B. R. 351, 110 Fed. 731; or if it appears that an erroneous statement was subsequently corrected by the bankrupt. In re Doyle (D. C., N. Y.), 29 Am. B. R. 102, 199 Fed. 247; *Matter of Stafford* (D. C., Conn.), 35 Am. B. R. 747, 231 Fed. 127; *Matter of Levy* (D. C., N. Y.), 36 Am. B. R. 151, 227 Fed. 1011.

284. *Poff v. Adams* (C. C. A., 4th Cir.), 35 Am. B. R. 307, 226 Fed. 197. See also *United States v. Gray* (D. C., N. Y.), 48 Am. B. R. 158, 265 Fed. 98.

284a. *Matter of Juthovits* (D. C., N. Y.), 44 Am. B. R. 221, 299 Fed. 915.

285. *Matter of Zoffer* (C. C. A., 2d Cir.), 33 Am. B. R. 932, 211 Fed. 936.

False statement to mercantile agency; false oath.—False testimony, given by a bankrupt as to a false statement made by him to a mercantile agency, is "in relation to" a "proceeding in bankruptcy" within the meaning of section 29b(2) of the Bankruptcy Act, and is a bar to a discharge, although it does not appear that any creditor relied upon the false statement to the mercantile agency. *Matter of Shelnberg* (D. C., N. Y.), 35 Am. B. R. 122, 223 Fed. 218.

285a. *Matter of Rowa* (D. C., N. Y.), 39 Am. B. R. 461, 240 Fed. 165.

286. Discharges granted.—*Bauman v. Feist* (C. C. A., 8th Cir.), 5 Am. B. R. 703, 107 Fed. 83; In re Crenshaw (D. C., Ala.), 2 Am. B. R. 628, 95 Fed. 632; In re Babes (D. C., Conn.), 5

Am. B. R. 848, 125 Fed. 1097; In re Troeder (C. C. A., 1st Cir.), 17 Am. B. R. 723, 180 Fed. 719. But compare In re Roy (D. C., Vt.), 3 Am. B. R. 37, 96 Fed. 400; and *Hellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 94 Fed. 391; *Matter of Kappes* (D. C., N. Y.), 44 Am. B. R. 150, 258 Fed. 363.

Discharges refused.—In re Grossman (D. C., Mich.), 6 Am. B. R. 510, 111 Fed. 507; In re Gamman (D. C., Iowa), 6 Am. B. R. 482, 109 Fed. 312; In re Lesser Bros. (D. C., N. Y.), 5 Am. B. R. 330, 108 Fed. 203 (reversed on appeal, 8 Am. B. R. 15, 114 Fed. 83). In re Lewin (D. C., Vt.), 4 Am. B. R. 636, 103 Fed. 852; In re Lowenstein (D. C., N. Y.), 2 Am. B. R. 103, 106 Fed. 61; In re Williams, 2 N. B. N. Rep. 206; In re Goodman (D. C., Pa.), 22 Am. B. R. 570, 171 Fed. 287; *Broomfield v. Lehman* (C. C. A., 1st Cir.), 32 Am. B. R. 456, 215 Fed. 97; *Matter of Kaplan* (D. C., Mass.), 40 Am. B. R. 181, 243 Fed. 222; *Matter of Baldwin* (D. C., N. Y.), 41 Am. B. R. 664, 238 Fed. 836; *Matter of Gottlieb* (C. C. A., 2d Cir.), 45 Am. B. R. 180, 262 Fed. 730.

287. Bankr. Act, § 14-b(2), ante.

288. See ante, p. 335.

289. In re Spear (D. C., Vt.), 4 Am. B. R. 617, 103 Fed. 779; In re Marx (D. C., Ky.), 4 Am. B. R. 521, 102 Fed. 676; In re Morgan (D. C., Ark.), 4 Am. B. R. 402, 101 Fed. 982; In re Berkowitz (Ref., N. Y.), 4 Am. B. R. 37; *Van Ingen v. Schopphofen* (C. C. A., 8th Cir.), 19 Am. B. R. 24, 129 Fed. 352. But see In re Feldstein (C. C. A., 2d Cir.), 8 Am. B. R. 100, 115 Fed. 259.

290. The reasons for these changes are indicated in a Report of the Executive Com-

rowing the meaning of "intent," and "true," as redundant when limiting the words "financial condition." These changes, however, by no means bring the law in this regard up to the level of its predecessor. It is still necessary to show that the failure to keep books was "with the intent to conceal his true financial condition."²⁹¹ The former law, like the English law, made mere failure by a merchant or tradesman to keep proper books of account an objection to his discharge; proof of intent was essential only when falsifying books was charged.²⁹² To sustain this objection, the proof must now show that (1) the act complained of was done after the passage of the bankruptcy law, (2) by the bankrupt or by some one acting under his direction, (3) with intent to conceal his financial condition; and (4) the act must consist of either destruction, concealment — which, as has been seen, includes secreting, falsifying, and mutilating²⁹³ — or failure to keep books of account or records from which the bankrupt's condition might be ascertained.²⁹⁴

b. Act committed after passage of law.— The first of these elements flows by implication from the words of the law.²⁹⁵ For instance a loss or disappearance of books prior to the enactment of the bankruptcy act will not justify a finding that there has been a failure to keep books with the intent to conceal the financial condition of the bankrupt.²⁹⁶ The bankrupt's failure to enter loans in the books or records of his business is not excused by the fact that the loans were made before the bankruptcy act was passed.²⁹⁷

c. Act by bankrupt.— It is also clear that the act complained of must have been committed by the bankrupt or by some one acting under his direction.²⁹⁸ If the bankrupt leaves the keeping of books of account to his wife or an agent he is responsible for a failure to keep proper books, if such failure was the natural result of the bankrupt's own acts.²⁹⁹ Where it appears that the bank-

mittee of the National Association of Referees in Bankruptcy published in March, 1900, as follows: "The necessity of proving intent to conceal condition, coupled with the still more difficult element of 'contemplation of bankruptcy,' which means bankruptcy *per se*, and not mere insolvency, has rendered this objection all but useless." See *In re Alvord* (D. C., Conn.), 14 Am. B. R. 264, 135 Fed. 236; *Matter of Amster* (D. C., Ohio), 41 Am. B. R. 249, 249 Fed. 257.

^{291.} *In re Burstein* (D. C., Conn.), 20 Am. B. R. 399, 160 Fed. 765; *In re Griffin Bros.* (D. C. Ala.), 19 Am. B. R. 78, 154 Fed. 537; *Matter of Acomb* (Ref., D. C., Ohio), 33 Am. B. R. 854.

"It would seem as if the purpose of the amendment was merely to relieve those objecting to the granting of a discharge from being required to prove that the intent with which a bankrupt was concealing his true financial condition was a fraudulent one that is, accompanied by, or in pursuance of, a design actually to defraud; now, it is sufficient if he has the intent to conceal his financial condition from his creditors, because it would be presumed that the existence of such intent was with the design of perpetuating a fraud." *Matter of Hindin* (D. C., Cal.), 34 Am. B. R. 114, 219 Fed. 605.

^{292.} Law of 1867, § 29, R. S., § 5,110.

^{293.} See Bankr. Act. § 1 (22),

^{294.} *Baylor v. Rawlings* (C. C. A., 8th Cir.), 28 Am. B. R. 773, 200 Fed. 731; *Matter of Amster* (D. C., Ohio), 41 Am. B. R. 249, 249 Fed. 257.

^{295.} *In re Shertzer* (D. C., Pa.), 3 Am. B. R. 699, 99 Fed. 706; *In re Lieber* (Ref., Pa.), 3 Am. B. R. 217; *In re Carmichael* (D. C., Iowa), 2 Am. B. R. 815, 96 Fed. 594; *In re Shorer* (D. C., Conn.), 2 Am. B. R. 165, 96 Fed. 90; *In re Stark* (Ref., N. Y.), 1 Am. B. R. 180; *In re Polakoff* (Ref., N. Y.), 1 Am. B. R. 358.

^{296.} *In re Prager* (D. C., W. Va.), 13 Am. B. R. 527, 134 Fed. 1006.

^{297.} *In re Feldstein* (C. C. A., 2d Cir.), 8 Am. B. R. 160, 115 Fed. 259.

^{298.} *In re Hyman* (D. C., N. Y.), 3 Am. B. R. 169, 97 Fed. 193, in which case it appeared that the business of a bankrupt was conducted entirely by her husband; he intentionally and fraudulently failed to keep true books of account from which her financial condition could be ascertained, and it was held that his fraud could not under these circumstances be imputed to her and her discharge should be granted.

The acts of one of two partners in failing to keep books of account will not deprive the other partner of his right to a discharge, where it appears that during the period when the books were not kept he was sick and had no knowledge of the failure to keep the books. *Matter of Harrell* (D. C., Ga.), 45 Am. B. R. 37, 263 Fed. 954.

^{299.} *Matter of Jamauts* (C. C. A., 3d Cir.), 34 Am. B. R. 105, 219 Fed. 876, affg. 32 Am. B. R. 501; *Matter of Landersmaro* (D. C., N. J.), 38 Am. B. R. 685.

Inability of bankrupt.—A bankrupt, who was unable to read or write, and who knew nothing about modern methods of bookkeeping and entrusted it to his daughter who had

rupt's books were left by him in his office subject to the control of the trustee, he should not be charged with their concealment, in the absence of proof connecting him with the transaction.³⁰⁰ Books left in the bankrupt's safe, of which no one knew the combination but himself, and which remained intact until it came into the hands of the receiver, will be presumed to have been taken out by the bankrupt, and his discharge will be denied.³⁰¹ It has been held that a falsifying of books by the bankrupt's partner is not an objection to his discharge.³⁰² Although if he destroys or mutilates books of a partnership of which he is a member, his discharge should be refused.³⁰³

d. Intent to conceal financial condition.—The act complained of must have been done by the bankrupt with intent to conceal his financial condition.³⁰⁴ This means that the act must have been committed "knowingly."³⁰⁵ The omission of the word "fraudulent" by the amendment of 1903 relieves objecting creditors of the necessity of proving specific acts disclosing "fraudulent intent."³⁰⁶ Mere *scienter* and a purpose to conceal financial condition without the additional purpose of intent to defraud by such concealment are enough. Mere failure to keep books and records is not enough.³⁰⁷ But if the failure to keep such books is with an intent to conceal the bankrupt's financial condition, the offense is established,³⁰⁸ and an allegation in the specifications of objections to the effect that the bankrupt did with intent to conceal his financial condition fail to keep books of account or records from which such condition might be ascertained, is sufficient, although it did not specify what

been in the habit of opening a new set of books each year and destroying the old set, without any guilty intent, should not be denied a discharge under section 14b (2) of the Bankruptcy Act. *Matter of Rosenthal* (C. C. A., 2d Cir.), 30 Am. B. R. 693, 231 Fed. 449.

^{300.} *In re Eades* (C. C. A., 7th Cir.), 16 Am. B. R. 30, 143 Fed. 293.

^{301.} *Matter of Lewin* (D. C., N. Y.), 18 Am. B. R. 72, 155 Fed. 501.

^{302.} *In re Schultz, Jr.* (D. C., N. Y.), 6 Am. B. R. 91, 109 Fed. 264; *In re Garrison* (C. C. A., 2d Cir.), 17 Am. B. R. 831, 149 Fed. 178, holding that a bankrupt will not be refused a discharge upon the ground that he failed to keep proper books of account, showing the condition of a firm whose business was conducted by one of his partners in a distant State, and whose books were never under his control during the year the partnership was in existence.

^{303.} *In re Conley* (D. C., Ga.), 9 Am. B. R. 496, 120 Fed. 42.

^{304.} *In re Burstein* (D. C., Conn.), 20 Am. B. R. 399, 160 Fed. 765; *In re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; *Godschalk v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580; *In re Allendorf* (D. C., Iowa), 12 Am. B. R. 320, 129 Fed. 981; *In re Rauchenplat* (D. C., Porto Rico), 9 Am. B. R. 764; *In re Feldstein* (C. C. A., 2d Cir.), 8 Am. B. R. 160, 115 Fed. 259; *Matter of Napier* (Ref., Ky.), 23 Am. B. R. 560; *In re Bradin* (D. C., Pa.), 24 Am. B. R. 793, 179 Fed. 768; *In re Tanner* (D. C., Wash.), 27 Am. B. R. 615, 192 Fed. 572; *Matter of Barthier* (D.

C., Mass.), 33 Am. B. R. 900, 188 Fed. 394; *Matter of Silverstein* (D. C., N. Y.), 34 Am. B. R. 479, 225 Fed. 665; *Matter of Amster* (D. C., Ohio), 41 Am. B. R. 249, 249 Fed. 257; *Matter of Harrell* (D. C., Ga.), 45 Am. B. R. 37, 263 Fed. 954; *Thompson v. Lamb* (C. C. A., 3d Cir.), 45 Am. B. R. 316, 233 Fed. 61.

^{305.} *In re Allendorf* (D. C., Iowa), 12 Am. B. R. 320, 129 Fed. 981; *In re Mackenzie* (D. C., Conn.), 12 Am. B. R. 605, 132 Fed. 114.

^{306.} *Matter of Chass* (D. C., Pa.), 37 Am. B. R. 734.

^{307.} *In re Blalock* (D. C., So. Car.), 9 Am. B. R. 266, 118 Fed. 679; *In re Keefer* (D. C., N. Y.), 14 Am. B. R. 290, 135 Fed. 885; especially where it appears that the bankrupt had not been engaged in business for more than three years prior to the enactment of the bankruptcy act. *In re Prager* (D. C., W. Va.), 13 Am. B. R. 527, 124 Fed. 1,006.

Intent not to be presumed from either bad bookkeeping or mere failure to keep books. *In re Brockman* (D. C., Ky.), 21 Am. B. R. 251, 168 Fed. 1015.

The mere failure to keep books is not enough to justify the refusal of a discharge, but the omission must have been accompanied by a specific intent on the part of the debtor to conceal his financial condition, the burden being upon the objecting creditors to prove this intent. *In re Brown* (D. C., N. Y.), 29 Am. B. R. 73, 199 Fed. 356; *Sherwood Shoe Co. v. Wix* (C. C. A., 4th Cir.), 38 Am. B. R. 670.

^{308.} *In re Goldich* (D. C., Pa.), 21 Am. B. R. 249, 164 Fed. 882; *In re Hanna* (C. C. A., 2d Cir.), 21 Am. B. R. 843, 168 Fed. 238; *In re Schachter* (D. C., N. Y.), 22 Am. B. R. 389, 170 Fed. 683, holding that where within the four months' period, a

books of account the bankrupt should have kept.³⁰⁰ The act proclaims the presumption and intent of the law that honest merchants will keep account books which will disclose their true financial condition. If the evidence shows that a business was conducted without books of account so that nothing could be ascertained as to the bankrupt's purchases and sales, or the disposition of the proceeds of such sales, the intent to conceal the financial condition of the bankrupt will be presumed.³¹⁰ And so too the destruction of important books kept by a bankrupt in a business which would ordinarily require such books to be kept, the necessary result of which was to conceal his true financial condition, will be presumed to have been intentional.³¹¹ In either a failure to keep or a destruction of books of accounts, the bankrupt's intent to conceal his financial condition will be presumed if such was the natural and probable con-

bankrupt firm purchased certain goods not of a kind in which he dealt, and no reasonable excuse for its failure to make any entry of such purchase in its books of account is assigned, the presumption is that it intended to conceal its financial condition, and the individual partners are not entitled to a discharge; *In re Sabsevitz* (D. C., N. Y.), 28 Am. B. R. 623, 197 Fed. 109.

Intent to conceal; what constitutes.—In the case of *In re Marcus & Scherr* (D. C., N. Y.), 27 Am. B. R. 164, affd. 30 Am. B. R. 176, the court said: "The intent to conceal one's financial condition is a separate fact from the keeping of the books. The reasonable consequences of keeping imperfect books may be a concealment of one's financial condition, if the occasion ever arises when they are scrutinized, and that fact would be enough to charge one with responsibility for that result, if the law forbade keeping imperfect books. The general intent of the criminal law is of this kind, it only means that the actor must be aware of his acts and then charges him with such consequences as would naturally follow them, regardless of whether he had these in mind or not. When, however, as is sometimes the case, the law attaches no responsibility to an act unless the actor does have in mind the specific consequences, it is necessary as an additional element to prove that state of mind. This is such a case. Moreover, since the intent to conceal is different from the intent to keep imperfect books, the objectors must go further than to show merely that the bankrupts intended to keep the kind of books they kept; for they must show also that they intended these books to conceal from somebody—which must be their creditors—their financial condition. That involves not only knowledge of how the books were kept, but some anticipation that at a future time they might be examined by creditors and would then fail to enlighten them upon all the facts." *In re Weston* (C. C. A., 2d Cir.), 30 Am. B. R. 647, 206 Fed. 281, holding that failure of broker to record sales, etc., in books shows intent to conceal financial condition.

Where there was no evidence to show that bankrupts intended to conceal their financial condition by failing to keep sufficient books of account, and it appeared that they employed a thoroughly competent bookkeeper and left the books in his charge without themselves interfering with the manner in which he performed his duties, they should not be refused a discharge, even if their financial condition could not be accurately determined from the books. *In re Marcus* (C. C. A., 2d Cir.), 30 Am. B. R. 176, 203 Fed. 29, affg. 27 Am. B. R. 164, 192 Fed. 743.

^{300.} *Godshalk Co. v. Sterling* (C. C. A., 2d Cir.), 12 Am. B. R. 302, 129 Fed. 580; *In re Ginsburg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627; *In re Patterson* (D. C., N. Y.), 10 Am. B. R. 371, 121 Fed. 921. But see *Milgram v. Ost* (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

^{310.} *McKibbin v. Haskell* (C. C. A., 8th Cir.), 28 Am. B. R. 588, 196 Fed. 639; *In re Koelle* (D. C., Pa.), 22 Am. B. R. 515, 171 Fed. 267; *In re Hanna* (C. C. A., 2d Cir.), 21 Am. B. R. 843, 168 Fed. 238; *Matter of Newbury & Durham* (C. C. A., 2d Cir.), 31 Am. B. R. 365, 209 Fed. 195; *Matter of Landersman* (D. C., N. J.), 33 Am. B. R. 686; *Matter of Amster* (D. C., Ohio), 41 Am. B. R. 249, 249 Fed. 257, citing *Collier on Bankruptcy* (11th ed.), 381-383.

Where deposits in a bank by a bankrupt, which had been more or less regular, entirely ceased shortly before his bankruptcy, with one exception, which was to pay a note for borrowed money, and there is no written evidence and no evidence at all, except the oral testimony of the bankrupt, as to the money taken in by him during said period, during which time he paid notes and obligations of his relatives and even after petition was filed continued to make preferential payments to such persons and to use money which he then had for gambling purposes, his application for discharge should be denied because of his failure to keep books of account. *Matter of Steinburg* (D. C., Mass.), 41 Am. B. R. 476, 249 Fed. 960.

^{311.} *Matter of Acomb* (Ref., D. C., N. Y.), 33 Am. B. R. 854; *In re Hodge* (D. C., N. Y.), 30 Am. B. R. 522, 206 Fed. 824, in which the court says: "It is quite true that a mere failure to keep books or records or the mere destruction of those kept is not sufficient to justify the court in refusing a discharge. There must be circumstances and conditions from which the inference ought to be drawn and necessarily should be drawn that such failure or destruction was 'with intent to conceal his financial condition.' Here no other inference can reasonably be drawn from the destruction of this stub book and these paid checks. It is evident that the now bankrupt, then bankrupt in fact, destroyed these records, stub books, and checks for the purpose of concealing from his creditors the disposition he had made of this money. There was no other reason for the act. If he paid it out to credi-

sequences of his conduct.³¹³ But it has been suggested that a rule which raises a presumption of intent to conceal from a mere failure to keep books or to keep them properly, is too strict against the bankrupt, and that in every case the intent to conceal should affirmatively appear.³¹³ But no particular system of bookkeeping is required. The books kept may be as faulty and deficient as to in fact deceive creditors, but if they have not been so kept with the purpose to deceive the inhibition of the statute does not apply.³¹⁴ The failure of an illiterate bankrupt, who was engaged in a small business, to keep books of account will not raise the presumption that he intended to conceal his financial condition.³¹⁵ The failure of the superintendent of a mine to keep books of account, which are not required by his personal business, does not indicate a fraudulent intent for which he may be denied his discharge.³¹⁶

c. What constitutes failure, destruction or concealment.—The statute itself indicates what will constitute the offense. "Conceal" includes "secrete,

ture, workman, or for material, he knew where the most of it went and he should have shown where it went and for what purpose.

"Under such circumstances, a mere general statement of the bankrupt is not sufficient to show absence of intent to do that which the act itself, under the circumstances shown, necessarily results in. A sane intelligent man is presumed to intend the natural, probable and well-known consequences of his own willful acts."

313. *Presumption against bankrupt.*—It is not necessary for a creditor to prove the failure of the bankrupt to keep books of account where such books were necessary and proper. When satisfactory evidence of such fact is produced, the law determines the intent to have existed because the bankrupt must be presumed to have intended to conceal his financial conditions if such were the natural and probable consequences of his failure to keep books. *Matter of Chase* (D. C., Pa.), 37 Am. B. R. 734; *Matter of Amster* (D. C., Ohio), 41 Am. B. R. 249, 249 Fed. 237.

Inference of intent.—Where it is established that a bankrupt failed to keep proper books of account, the court may infer an "intent to conceal his financial condition" within the meaning of section 14b (3) of the bankruptcy act. It is not necessary to prove that the bankrupt's intent was fraudulent or that his acts were done in contemplation of bankruptcy. *Matter of Linker* (D. C., N. Y.), 33 Am. B. R. 708, 223 Fed. 173.

Failure to keep books.—A proprietor of a large department store who for two months after a competent bookkeeper had left his employ, failed to have the books kept so that his financial condition could be ascertained, is chargeable with intending the natural and probable consequences of his acts and omissions so as to bar a discharge. *Matter of Janavits* (C. C. A., 3d Cir.), 34 Am. B. R. 108, 233 Fed. 676, affg. 33 Am. B. R. 601.

If, in the absence of evidence, to overcome the presumption that a bankrupt intended the natural and probable consequences of his acts and omissions, the court, from all the facts and circumstances, is of the opinion that the bankrupt's failure to keep books and records was not with intent to conceal his financial condition, a discharge should not be refused. *Matter of Arnold* (D. C., N. J.), 35 Am. B. R. 740, 228 Fed. 75. Compare *Sheinberg & Weisberg v. Hoffman* (C. C. A., 3d Cir.), 35 Am. B. R. 34, 230 Fed. 243.

314. *Matter of Hindin* (D. C., Cal.), 34 Am. B. R. 114, 218 Fed. 638. Citing in re *Marcus & Schorr* (D. C., N. Y.), 37 Am. B. R. 164, 193 Fed. 743; in re *Brockman* (D. C., Ky.), 31 Am. B. R. 261, 188 Fed. 1015; in re *Brown* (D. C., N. Y.), 35 Am. B. R. 72, 260 Fed. 396;

Sherwood Shoe Co. v. Wix (C. C. A., 4th Cir.), 39 Am. B. R. 670, 240 Fed. 622. See cases cited in note 240, *supra*.

Presumption not inevitable.—Although there are cases where the failure to keep any systematic books or records will, of itself, require the conclusion that it was done with the intent to conceal, such conclusion is by no means inevitable. The inference is one of fact to be drawn from the proofs in a particular case. *Devorkin v. The Security Bank, etc., Co.* (C. C. A., 6th Cir.), 39 Am. B. R. 728, 243 Fed. 171; *Thompson v. Lamb* (C. C. A., 3d Cir.), 45 Am. B. R. 316, 260 Fed. 61.

Where from certain acts and omissions, two inferences may be drawn, the one pointing to a guilty or bad intent and the other perfectly consistent with honesty and absence of a bad purpose, it is the duty of the court to find in favor of honesty and absence of intent; and where the evidence upon objections to a bankrupt's discharge, on the ground that he failed to keep books of account with intent to conceal his financial condition, will justify a finding either way, the appellate court will not interfere with a finding in favor of the bankrupt made by the referee who had the bankrupt before him, heard him testify and noted his manner. In re *Brown* (D. C., N. Y.), 35 Am. B. R. 72, 190 Fed. 253.

314. *Sherwood Shoe Co. v. Wix* (C. C. A., 4th Cir.), 39 Am. B. R. 670.

315. *Matter of Plischer* (Ref., N. Y.), 35 Am. B. R. 464.

Small business transaction.—Transactions of a building contractor, conducting a small business for a few months examined and held that his failure to keep books or records was not with intent to conceal his financial condition, and that a discharge should not be denied him. *Matter of Arnold* (D. C., N. J.), 35 Am. B. R. 740, 228 Fed. 75. See also *Devorkin v. The Security Bank & Trust Co.* (C. C. A., 6th Cir.), 39 Am. B. R. 728, 243 Fed. 171; *Thompson v. Lamb* (C. C. A., 3d Cir.), 45 Am. B. R. 316, 263 Fed. 61.

316a. *Business not requiring accounts.*—Where the bankrupt was engaged in the business of promoting mines, which did not require any elaborate accounts, it appearing that he had no office or fixed place of residence where books might be kept, that he had no employees, and that each one of his mining deals was separate and complete in itself, his practice to rely entirely upon pocket memoranda, noting upon these memoranda the deposits and withdrawals from his bank account, and having his bank book balanced each month, was sufficient to disclose substantially the state of his financial affairs and would not warrant a finding that the failure to keep more complete records arose from any intention upon his part to conceal his financial

falsify and mutilate.”³¹⁵ The phrasing here is even broader than was that of the law of 1867. Any act or series of acts with relation to business records which may reasonably be held to be within the meaning of “destruction,” “concealment,” “secreting,” “falsifying,” “mutilation,” or “failure to keep” will be within the interdiction of the law. Where a man of business experience and intelligence conducting a business ordinarily requiring books to be kept, fails to keep them, it will be presumed that he intended to conceal his financial condition.³¹⁷ It is not enough for the bankrupt to keep an account of money received, but he must also have an account showing the disposition of his receipts and the absence of entries to that effect is a material omission in keeping books.^{317a} No particular form or method of keeping books is required; it will be sufficient if the accounts are kept in such a way as to show the bankrupt’s financial condition.³¹⁸ The test is this: If a competent accountant can from an examination of the books produced and in the possession of the trustee determine the true condition of the debtor they are sufficient to justify granting him a discharge.³¹⁹ But where a bankrupt, engaged in mercantile business, and carrying a large stock, fails to keep books of account from which a creditor or expert accountant might discover his financial condition and the amount of money which it is conceded he had borrowed, a discharge should be denied.³²⁰ An omission to make entries of payments to or loans from relatives should be explained.³²¹ A claim of mere negligence in bookkeeping will be rejected.³²² A failure to satisfactorily explain what has become of books of accounts kept by the bankrupt during all the time that he was engaged in

condition. In re Howard (C. C. A., 2d Cir.), 24 Am. B. R. 841, 180 Fed. 399; In re McCrea (C. C. A., 2d Cir.), 20 Am. B. R. 412, 161 Fed. 248.

316. Bankr. Act, § 1 (22).

Making false entries constitutes a failure to keep books, barring a discharge. Matter of Helfgott (D. C., N. Y.), 40 Am. B. R. 196, 245 Fed. 358.

317. In re Alvord (D. C., Ct.), 14 Am. B. R. 264, 135 Fed. 236; Matter of Sims (D. C., Ga.), 32 Am. B. R. 564, 213 Fed. 902; Matter of Rowe (D. C., N. Y.), 39 Am. B. R. 461, 240 Fed. 165; Matter of Amster (D. C., Ohio), 41 Am. B. R. 249, 249 Fed. 257. But see cases cited in note 313.

Failure to keep books.—Where a bankrupt has for some years intermingled his property with that of his wife, having transferred property to her in a manner calculated to stamp the transaction with fraud, and fails, even when he knew or should have known that he was a bankrupt, to keep books of account or any records from which the state of his business relations with his wife might be determined or his financial condition ascertained, sufficient cause exists for the denial of a discharge in bankruptcy. In re Graves (D. C., Pa.), 26 Am. B. R. 633, 189 Fed. 847.

Although the mere failure of a bankrupt to keep ordinary books of account for a cash sales business will not in and of itself be a bar to his discharge, yet this, taken in connection with his failure to make any deposits during the period prior to his bankruptcy, and his payment during this time of money due to relatives, and his utter failure to keep track of money received, and his disposal thereof, is sufficient to prevent his discharge. Sternburg v. Cohen & Co. (C. C. A., 1st Cir.), 42 Am. B. R. 456, 254 Fed. 1.

317a. Matter of Harrell (D. C., Ga.), 45 Am. B. R. 37, 263 Fed. 964.

318. In re Simon (D. C., N. Y.), 29 Am. B. R. 808, 201 Fed. 1004; Sherwood Shoe Co. v. Wix (C. C. A., 4th Cir.), 38 Am. B. R. 670, 240 Fed. 662.

319. Matter of Acomb (D. C., Ohio, Ref.), 33 Am. B. R. 854.

320. Matter of Linker (D. C., N. Y.), 33 Am. B. R. 709, 222 Fed. 173.

Insufficient books for mercantile business.—Where it appears that a bankrupt began business in a large commercial center three years prior to his adjudication; that he owes about \$7,500; that his trustees found on hand goods inventoried at \$4,000, and that the bankrupt made deposits and drew checks but only presented to the trustee on demand a check book and pass book from which it was impossible to determine the actual condition of the estate, and the only explanation of his failure is the loss of several hundred dollars in gambling, his discharge should be refused upon the ground that he failed to keep books “with intent to conceal his financial condition.” Matter of Shrimmer (D. C., N. Car.), 36 Am. B. R. 404, 228 Fed. 794.

Absence of books.—Where it appears that a partnership kept no books at all, that the only record they had for reference was the register record of cash receipts, and the invoices showing the purchases were simply filed for reference, but during the course of the business no record was made of these bills, so that there were absolutely no books by which the condition of the firm could be ascertained or kept, the members should be denied a discharge. Matter of Josephson (D. C., Ore.), 36 Am. B. R. 505, 229 Fed. 272.

321. Pomerkrantz v. Hopkins (D. C., Pa.), 21 Am. B. R. 857, 168 Fed. 444; In re Koelle (D. C., Pa.), 22 Am. B. R. 515, 171 Fed. 257.

322. Matter of Haskell (D. C., N. Y.), 29 Am. B. R. 914, 164 Fed. 301, holding that where the granting of a discharge is opposed upon the ground that no entries were made in the bankrupt’s books of account as to seven payments to near relatives or friends and it appears that the bankrupt never made entries in or examined his books, and that the omission was the fault of the book-

business will warrant a denial of his discharge.³²³ A failure to show by the books a large shrinkage of assets during a short period of time may prevent a discharge.³²⁴ Where a person keeps books in such a condition as to be suspicious on their face, a discharge should be refused,³²⁵ as where a partnership purchases goods not of a kind in which it dealt, and failed to make entries of such purchases in its books, there is a presumption of an intent to conceal its financial condition.³²⁶ If the method used is appropriate to the business conducted and indicates the character of the accounts and the identity of persons to whom they refer it will suffice.³²⁷ And where a business of sufficient magnitude to require books to be kept, and the only books found were check books, showing deposits and payments from a bank, some of them fictitious, there is evidence of a fraudulent intent to conceal the bankrupt's financial condition, justifying a denial of a discharge.³²⁸ The destruction of vouchers or other business papers is as fatal as would be the destruction of books.³²⁹ All books and records which are material to a proper understanding of the bankrupt's financial condition are within the protection of the act.³³⁰ The placing of certain books in the cellar as a mere incident of the work of closing out his business has been held

keeper, to whom the payments were reported, there should be some explanation of how and when and under what circumstances the bankrupt notified the bookkeeper of such payments, and the latter, if he had notice of the payments, should explain why he did not make the entries.

323. Failure to explain non-production of books of account.—Where bankrupt, who had kept books of account during all the time that he was engaged in business, is requested upon his examination before the referee to produce such books and promises to do so at a subsequent hearing, but, after several adjournments at his request, at a hearing six months later testifies that his wife had kept the books and that they cannot be found, he will be deemed to have concealed or destroyed his books of account with intent to conceal his true financial condition, so as to warrant a denial of his discharge in bankruptcy. *In re Wiedman* (D. C., N. Y.), 26 Am. B. R. 697, 188 Fed. 684.

324. *In re Brod* (D. C., Ga.), 21 Am. B. R. 426, 166 Fed. 1011.

325. *In re Leopold* (Ref., N. Y.), 5 Am. B. R. 278; *Matter of Schultz* (C. C. A., 2d Cir.), 41 Am. B. R. 367, 250 Fed. 103; *Matter of Baldwin* (D. C., N. Y.), 41 Am. B. R. 664, 253 Fed. 838.

Books improperly kept.—If the discharge is opposed on the ground of books improperly kept, and the evidence does not sustain the objection, the discharge will not be denied on the ground that he kept no books. *In re Halsell* (D. C., Tex.), 18 Am. B. R. 107, 123 Fed. 562.

Where a sale of lumber was entered in the books of a bankrupt firm and the bookkeeper credits the transferees of the lumber with having paid a greater sum than was in fact received, for the sole purpose of deceiving the general creditors into the belief that an ordinary sale of lumber had been made to an unsecured creditor, such entries are not sufficient ground for denying a discharge to the partner responsible for the transaction.

In re Hamilton (D. C., N. Y.), 13 Am. B. R. 333, 133 Fed. 823.

326. *In re Schachter* (D. C., N. Y.), 22 Am. B. R. 389, 170 Fed. 683.

327. *In re Brown & Co.* (C. C. A., 2d Cir.), 30 Am. B. R. 305, 204 Fed. 64.

Failure to take inventory.—Where the books of a bankrupt partnership were kept so as to show what goods they had on hand, stated at their cost value, and so that a person familiar with the particular trade could estimate with reasonable accuracy what discount there should be made from cost, in order to ascertain the firm's financial condition, the failure to take an inventory each year, stating not the cost of merchandise on hand, but its value at the time of the inventory, did not make bankrupts chargeable with keeping books from which their financial condition could not be ascertained. *In re Marcus* (C. C. A., 2d Cir.), 30 Am. B. R. 176, 203 Fed. 29.

328. *Matter of Newbury & Durham* (C. C. A., 2d Cir.), 31 Am. B. R. 365, 209 Fed. 195.

329. Destruction of bank books and checks.—*Godshalk Co. v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580; *Matter of Studebaker* (C. C. A., 2d Cir.), 11 Am. B. R. 384, 127 Fed. 951, revg. 10 Am. B. R. 205, 124 Fed. 945; *In re Hirschowitz* (D. C., Pa.), 27 Am. B. R. 701, 194 Fed. 562; *In re Hodge* (D. C., N. Y.), 30 Am. B. R. 523, 205 Fed. 824.

330. *In re Conley* (D. C., Ga.), 9 Am. B. R. 496, 130 Fed. 42, holding that where, at a time when the bankrupt was contemplating the filing of his petition in bankruptcy, he wilfully and intentionally destroyed the books of account of a firm of which he had been a member, and which were material to a proper understanding of his financial condition, his discharge should be denied.

not to prevent the bankrupt's discharge.³³¹ Where the business of a bankrupt is transacted through a corporation, as his agent, the failure of the corporation to keep books showing the transactions committed to such corporation, and of the bankrupt to record such transactions, warrants a denial of the bankrupt's discharge.³³² Where a wife acted as her husband's agent and was in complete control of his business with his consent, he is liable for her failure to keep satisfactory books, the failure to keep proper books being not a crime but merely civil misconduct.³³³ Other cases where this objection has been urged against a discharge will be found in the foot-note.³³⁴ The practitioner is, however, warned against those cases which turn on the existence of a "contemplation of bankruptcy" or a "fraudulent" intent to conceal financial condition. These elements, as has been seen, are no longer the law.

f. **Burden of proof.**—In this as in other grounds of objection to a discharge the burden is on the objecting creditor, and the act must be shown by a clear preponderance of evidence;³³⁵ but not, it is thought, with the same degree of certainty as in the objections already discussed. It will not be presumed that proper books of account were not kept because books are not found.³³⁶

VIII. FALSE STATEMENT OF CREDIT.

a. **In general.**—It is provided in subdivision 3 of subsection *a* of this section as amended by the amendatory act of 1910 that a bankrupt's discharge may be refused if he has "obtained money or property on credit upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person." This new objection to a discharge was added by the amendment of 1903, and will prove the most valuable only to careful traders.³³⁷ The amendment of 1910 inserted the words "money or," "by him," "or his representative" and "credit from such person."

b. **Elements of proof; pleading.**—The creditor alleging this objection must prove that the bankrupt (1) obtained money or property on credit, that he did so on (2) a statement of his financial condition relied on by the creditor, that such statement was (3) in writing, that it was (4) materially false, and (5) that it was so made to the creditor or his representative (6) for the purpose of obtaining credit from such creditor. To these should be added the usual elements, that the obtaining of property must have been (7) by the bankrupt or

³³¹ In re Murray (D. C., Ct.), 20 Am. B. R. 700, 162 Fed. 968.

³³² In re Berger (D. C., N. Y.), 29 Am. B. R. 712, 200 Fed. 325.

³³³ Matter of Janavits (C. C. A., 3d Cir.), 34 Am. B. R. 105, 219 Fed. 876.

³³⁴ Discharges granted.—Bauman v. Feist (C. C. A., 8th Cir.), 5 Am. B. R. 703, 107 Fed. 63; In re Corn (D. C., Ga.), 5 Am. B. R. 478, 106 Fed. 143; Sellers v. Bell (C. C. A., 5th Cir.), 2 Am. B. R. 529, 94 Fed. 501; In re Dews (D. C., E. I.), 3 Am. B. R. 691, 96 Fed. 181; In re Laféche (D. C., Vt.), 6 Am. B. R. 453, 109 Fed. 307; In re Rauchenplat (D. C., Porto Rico), 9 Am. B. R. 763; In re Garrison (C. C. A., 2d Cir.), 17 Am. B. R. 831, 149 Fed. 178; Devorkin v. The Security Bank, etc., Co. (C. C. A., 6th Cir.), 39 Am. B. R. 738, 243 Fed. 171.

Discharges refused.—In re Morgan (D. C., Ark.), 4 Am. B. R. 402, 101 Fed. 962; In re Idsall (D. C., Iowa), 2 Am. B. R. 741, 96 Fed. 314; In re Kenyon (D. C., Iowa), 7 Am. B. R. 627, 113 Fed. 658; In re McEachron (D. C., Wis.), 3 Am. B. R. 732, 116 Fed. 783; Matter of Sims (D.

C., Ga.), 32 Am. B. R. 564, 213 Fed. 992; Matter of Helfgott (D. C., N. Y.), 40 Am. B. R. 196, 243 Fed. 358; Matter of Amster (D. C., Ohio), 41 Am. B. R. 249, 249 Fed. 257; Matter of Schults (C. C. A., 2d Cir.), 41 Am. B. R. 367, 250 Fed. 103; Matter of Harrell (D. C., Ga.), 45 Am. B. R. 37, 263 Fed. 954; Matter of Gottlieb (C. C. A., 2d Cir.), 45 Am. B. R. 180, 262 Fed. 730.
On appeal.—In re Feldstein (D. C., N. Y.), 6 Am. B. R. 453, 108 Fed. 794; *affd.*, *a. c.*, 8 Am. B. R. 100, 115 Fed. 259.

³³⁵ In re Boasberg (Ref., N. Y.), 1 Am. B. R. 253; In re Phillips (D. C., N. Y.), 3 Am. B. R. 542, 96 Fed. 844; In re Garrison (C. C. A., 2d Cir.), 17 Am. B. R. 831, 149 Fed. 178; Garry v. Jefferson Bank (C. C. A., 5th Cir.), 26 Am. B. R. 511, 186 Fed. 461; Thompson v. Lamb (C. C. A., 3d Cir.), 45 Am. B. R. 516, 263 Fed. 61.

³³⁶ In re Cantor (Ref., D. C., N. Y.), 26 Am. B. R. 859.

³³⁷ See Report of Ex. Com. of Nat. Ass'n of Referees in Bankruptcy, published in March, 1900, p. 17.

by some one duly authorized by him.³³⁸ The effect of this new objection will be that every tradesman, whose credit is not unquestioned, will be asked to give a mercantile statement as a condition precedent to dealing. The specifications of objections should set out the false representation, and the name of the person alleged to have been defrauded.³³⁹ It has been held that this objection to a discharge may be pleaded by any creditor.³⁴⁰

c. Meaning and effect of the clause.—(1) **IN GENERAL.**—Nothing like this clause appears in any previous bankruptcy law.³⁴¹ Even the English law has no equivalent, though there, one who at the time of contracting a debt had not a reasonable expectation of paying it, is denied a discharge.³⁴² This ground for denying a discharge was evidently leveled particularly at the practice of making false statements of one's financial condition by a borrower or buyer for the purpose of obtaining from the person to whom such false statement is made, the articles or money derived "on credit."³⁴³ This provision as amended in 1910 would seem to apply to any false statement which has to do with the extension of credit affecting the bankruptcy proceeding. It is the falsity of the statement which controls. If false when made the creditor may interpose it as a bar to the debtor's discharge, and it is immaterial that the indebtedness not included was released prior to bankruptcy, or was omitted in the belief that the persons to whom he was indebted would not press him for payment.³⁴⁴ In effect,

338. *Matter of Troutman & Jesse* (D. C., Ky.), 40 Am. B. R. 418, 251 Fed. 900.

The amendment of 1903 applies to a false statement to obtain credit made before such amendment became effective. In re Scott (D. C., Del.), 11 Am. B. R. 327, 126 Fed. 981; In re Petersen (Ref., Minn.), 10 Am. B. R. 355.

Burden of proof.—While the burden of proof is upon the objecting creditor to establish the cause which he claims bars a discharge, yet, when such creditor shows that a materially false statement was known to be untrue when it was made, the burden of proof shifts to the bankrupt to show that it was not made with intent to deceive. In re Arenson (D. C., N. J.), 28 Am. B. R. 113, 195 Fed. 609.

339. In re Levey (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572.

340. In re Harr (D. C., Mo.), 16 Am. B. R. 213, 143 Fed. 421.

The right to object on this ground is not confined to the person defrauded but belongs to any party in interest. In re Carton & Co. (D. C., N. Y.), 17 Am. B. R. 343, 148 Fed. 63. In the *Matter of Pincker* (Ref., N. Y.), 25 Am. B. R. 494, the referee said: "It does not appear that the objecting creditor herein was a subscriber to the mercantile

agency to which the bankrupt made his statement, nor sold goods upon the strength thereof, yet under section 14-b (3) as it existed prior to the last amendment, such objection to discharge may be urged by any creditor and is not confined to the person defrauded." *Matter of Kretz* (D. C., Wash.), 32 Am. B. R. 365, 212 Fed. 784. Citing *Collier on Bankruptcy* (9th Ed.), 350 B.

341. Compare In re Steed (D. C., N. Car.), 6 Am. B. R. 73, 107 Fed. 682.

342. English Bankruptcy Act of 1890, § 8 (3) (d).

343. **Purpose of statement.**—The false statement in writing which is enough to deny a discharge implies a statement knowingly false, or made recklessly, without an honest belief in its truth, and with a purpose to mislead or deceive, and thereby obtain from the person to whom it is made property upon a credit. *Firestone v. Harvey* (C. C. A., 6th Cir.), 23 Am. B. R. 468, 174 Fed. 574.

Although a false statement in order to bar a discharge must have been made for the purpose of obtaining money or credits, it is not necessary that the sole purpose of the statement should have been to obtain money or credits. If that be one purpose, and the statement be knowingly false, it is sufficient to bar a discharge. *Matter of Shea* (D. C., Mass.), 40 Am. B. R. 175, 245 Fed. 363.

344. *Josephs v. Powell & Campbell* (C. C. A., 2d Cir.), 32 Am. B. R. 222, 213 Fed. 627, revg. In re Josephs (D. C., N. Y.), 30 Am. B. R. 598, 205 Fed. 548, holding that where bankrupt at the time of making a statement in writing for the purpose of obtaining credit owed certain relatives for money loaned, and their debts were not scheduled nor proven in the bankruptcy proceedings, but bankrupt asserted that such loans were made with the understanding that they were not to be paid back if he was unable to do so and were not to interfere with the claims of his other creditors, his discharge will not be refused, provided he obtain releases from such loans or consents that they be scheduled *sua pro tunc*.

It is the act of issuing the false statement, with fraudulent intent, for the purpose of inducing credit, which constitutes the objection to a discharge. In re Carton & Co. (D. C., N. Y.), 17 Am. B. R. 343, 148 Fed. 63.

Omission of loans to friends.—A bankrupt will be denied a discharge where, in a statement of his financial condition, sent out over his signature, there was no mention of loans made by relatives and friends, although the aggregate amount of said loans would not have materially curtailed the bankrupt's line

the objection means that, where a creditor has been defrauded by the purchaser's material misstatements as to his financial condition given for the purpose of obtaining credit, the creditor has the option of interposing a bar to a discharge affecting all debts, or of permitting the discharge to be granted, and then asserting his claim on after-acquired property, on the ground that his claim is not affected by the discharge.^{344a}

(2) OBTAINING MONEY OR PROPERTY ON CREDIT.—The phrase "obtaining property on credit," as used in the act prior to the amendment of 1910, included a borrowing of money on time. Thus, a bankrupt, who obtained a loan of money from a bank on the faith of a materially false statement in writing, will be denied a discharge,³⁴⁵ even though made prior to the four months' period, if the property was obtained within that time.³⁴⁶ The amendment of 1910 inserted the word "money," and removed any doubt which may have theretofore existed. If the bankrupt obtained pecuniary profit or benefit as a result of the credit which he received by making the false statement, it will constitute a bar to a discharge,^{346a} although made by him in respect to the property of another debtor.³⁴⁷ The quantity or value of the money or property obtained on credit upon a materially false statement in writing is not material. The discharge must be denied if money or property in any amount, not utterly trivial, is thus obtained.^{347a} Credit is obtained within the meaning of the act although the bankrupt gave his promissory note, secured by collateral, as part of the purchase price.³⁴⁸ False statements filed by private bankers with the State Comptroller and the Superintendent of Banks are not grounds for refusing a discharge.^{348a} The giving of a chattel mortgage upon property which the debtor did not own, as security for a loan, does not come within this subsection.³⁴⁹ It has been held that a statement made in an application for an indemnity bond does not fall within the clause, as such a bond is not property,³⁴⁹ but this conclusion may well be doubted because of the evident fact that the statements contained in the application lead to the extension of credit by the surety company to the principal, and if such statements are false, the principal should not be released from his liability by a discharge.³⁵⁰ It is not essential that the bank-

of credit. *Matter of Brener* (D. C., N. Y.), 20 Am. B. R. 644, 106 Fed. 930.

Omission of partnership indebtedness from financial statement.—Where upon the death of one member of a partnership it was agreed among the survivors that on the books of the firm the capital of the deceased should be credited to his estate as a liability due to it, and this indebtedness, so carried on the books, was omitted by the partnership from successive annual statements of its financial condition furnished to banks as a basis for accommodations, the omission of such indebtedness is a bar to the discharge of the partner using the same, although the bankrupts believed that the debt would not be enforced so as to embarrass them. *Matter of Waite* (D. C., Md.), 35 Am. B. R. 189, 223 Fed. 853.

False statement to secure credit.—Where a bankrupt secured a loan on a written application signed by him which contained a false statement of his present indebtedness, and a creditor took his note therefor, no part of which has been paid, an objection to his discharge based on said ground should be sustained, although said discharge would not operate to relieve the bankrupt from liability on the debt. *Matter of Armstrong* (D. C., Cal.), 40 Am. B. R. 770, 248 Fed. 202.

^{345.} *In re Pfaffinger* (C. C. A., 6th Cir.), 19 Am. B. R. 809, 154 Fed. 523, revg. 19 Am. B. R. 471; *In re Darevski* (D. C., Pa.), 22 Am. B. R. 571, 171 Fed. 288; *Cleland v. Iowa Loan &*

Trust Co. (C. C. A., 8th Cir.), 44 Am. B. R. 429, 260 Fed. 653.

Property has been held to include anything of value, hence money is property within the meaning of the phrase obtaining property on credit. *Carson, Pirie, Scott & Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1171.

False statement inducing credit at bank.—A bank which had received a false financial statement from a partnership as a basis for accommodations, whenever a note of the firm fell due, discounted a new note for less than the face of the old, so that when a voluntary petition in bankruptcy was filed by the firm the sum due the bank was considerably less than when the false statement was received. The discount of the new notes was passed to the credit of the bankrupts and they thereafter drew a check for the payment of the old note, so that, in form, there was the payment of an old loan, and the contracting of a new. *Held*, that the false statement is within the condemnation of section 14b(3) of the bankruptcy act, and the form of the transaction is within its letter and constitutes a bar to a discharge. *Matter of Waite* (D. C., Md.), 35 Am. B. R. 189, 223 Fed. 853. Followed in *Matter of Samet* (D. C., Md.), 39 Am. B. R. 632, 243 Fed. 203, which was affirmed in 40 Am. B. R. 450, 247 Fed. 690.

rupt should obtain for himself the identical property parted with on the faith of the false statement.³⁵¹

(3) **IN WRITING.**—Of this term the framers of the amendatory act of 1903 have said: "This objection, as is proper, will be of no avail when a commercial report is obtained in the haphazard fashion of a hasty interview. The statement must be in writing, which, of course, implies the signature of the person to be charged thereby." How far a statement made by an employee will avail depends, of course, on the authority given him by his employer and the latter's acquiescence. Where alleged false statements do not appear by the specifications of objection to have been made in writing they are not within the provisions of this section and the discharge should not be refused.³⁵²

(4) **A STATEMENT OF FINANCIAL CONDITION.**—A mere letter, if otherwise within the clause, would seem enough. Details are unnecessary, but the statement ought at least to inform the creditor of the net worth of the debtor, or perhaps of the total of his assets and liabilities.^{352a} In a majority of cases, these statements will be made on blanks calling for items, and so phrased as to avoid some of the legal pitfalls noted later. A bankrupt, who issues a statement of his financial condition under his signature and does not mention loans made to him by relatives and friends, will be denied a discharge, although the aggregate amount of said loans would not have materially curtailed his credit.³⁵³ An omission to fill out a blank furnished by the creditor does not constitute a "material statement;" there must be a direct statement, either negative or positive, which is false, to justify the denial of a bankrupt's discharge.³⁵⁴ It has been held that the giving of a check when the drawer has neither money or credit at the bank, is a "false statement" within the meaning of the act,^{354a} but the contrary view has also been taken.^{354b}

(5) **INTENT TO DECEIVE OR DEFRAUD.**—It has been held that an intent to defraud is essential; the word "false" means more than "erroneous" or "untrue," and imports an intention to deceive, and a materially false statement in writing must have been knowingly or intentionally untrue to bar a discharge.³⁵⁵ Intention to deceive is always material as an element of proof,

^{346.} *In re Terens* (D. C., Wis.), 22 Am. B. R. 895, 175 Fed. 495.

^{346a.} False statement by bankrupt broker that stocks were on hand, upon which customers dealing on margin relied in making further payments, held to bar a discharge. *Matter of Shea* (D. C., Mass.), 40 Am. B. R. 175, 245 Fed. 363.

^{347.} *Matter of Bleyer* (C. C. A., 2d Cir.), 33 Am. B. R. 76, 215 Fed. 896 (affg. 32 Am. B. R. 98, 210 Fed. 391), holding that where a bankrupt by false representations as to the solvency of a corporation of which he was president procured money from a bank on notes of the corporation indorsed by him, and devoted a large part of such money to his individual use, he should be refused a discharge under section 14b (3) of the bankruptcy act.

^{347a.} *Matter of Fackler* (D. C., Ohio), 39 Am. B. R. 742, 246 Fed. 864.

^{348.} *Matter of Wyllie, Jr.* (D. C., N. Y.), 32 Am. B. R. 145, 210 Fed. 954.

^{348a.} *Matter of Oliner* (C. C. A., 2d Cir.), 44 Am. B. R. 450, 262 Fed. 734.

^{348b.} *Matter of Hudson* (D. C., Ala.), 45 Am. B. R. 275, 262 Fed. 778.

^{349.} *In re Tanner* (D. C., Wash.), 27 Am. B. R. 615, 192 Fed. 572.

^{350.} *In re Dunfee* (D. C., N. Y.), 30 Am. B. R. 721, 206 Fed. 745.

^{351.} *In re Dresser & Co.* (D. C., N. Y.), 13 Am. B. R. 616, 144 Fed. 518.

^{352.} *In re Lewis* (D. C., N. Y.), 2 Am. B. R. 711, 163 Fed. 137.

^{352a.} *Omission of liabilities.*—*Matter of Fackler* (D. C., Ohio), 39 Am. B. R. 712, 246 Fed. 864; *Matter of Maaret* (D. C., N. Y.), 40 Am. B. R. 221, 245 Fed. 801.

^{353.} *Matter of Brener* (D. C., N. Y.), 20 Am. B. R. 614, 166 Fed. 930; *In re Miller* (D. C., Iowa), 27 Am. B. R. 606, 192 Fed. 730; *In re Arenson* (D. C., N. J.), 28 Am. B. R. 113, 196 Fed. 609; *Cleland v. Iowa Loan & Trust Co.* (C. C. A., 8th Cir.), 44 Am. B. R. 429, 260 Fed. 663.

^{354.} *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736.

^{354a.} *Falsity of statement, although blanks not filled in.*—Where a bankrupt in making a statement in writing on a blank form for the purpose of securing credit, deliberately states his "total liabilities" as \$461.00, when in fact to his knowledge they are \$3,268.60, and this is accompanied by an exaggeration of the valuation of his resources, so as to make it appear to the party extending the credit that he has resources in excess of his liabilities amounting to about \$3,500, when his liabilities are actually equal to, if not in excess of his resources, the omissions or failure to fill in the blanks cannot be attributed to inadvertence or failure of memory, and a discharge should be denied. *Matter of Smith* (D. C., N. Y.), 37 Am. B. R. 230, 232 Fed. 248.

and, by the weight of authority, it is essential to prove such an intent.³⁵⁶ It must be shown that the bankrupt's alleged false statement in writing was either knowingly false or made so recklessly as to warrant a finding that he acted fraudulently.³⁵⁷ If a debtor was misled into signing the statement by the creditor's agent, who filled it out and gave it to the debtor to sign, leaving certain blanks unfilled, the element of intention is lacking and the debtor's

Balance substantially correct.—A written statement of financial condition may not be defended merely by showing that the balance is substantially correct. *Matter of Maaget* (D. C., N. Y.), 40 Am. B. R. 221, 245 Fed. 804; *Matter of Reed* (D. C., Ga.), 43 Am. B. R. 132, 256 Fed. 412.

354a. *Matter of Robinson* (D. C., Mass.), 43 Am. B. R. 64, 256 Fed. 55.

354b. *Matter of Rea Brothers* (D. C., Mont.), 40 Am. B. R. 429, 251 Fed. 431.

355. *Franklin v. Monning Dry Goods Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 257, 217 Fed. 929 (quoting text with approval); *Schwabacher v. Riddle*, 99 Ill. 343; *Lynch v. Mercantile Trust Co.*, 18 Fed. 498; *Stone v. Covell*, 29 Mich. 359; *Cooper v. Schlesinger*, 111 U. S. 148, 28 L. Ed. 382; *In re Russell* (Ref., N. Y.), 5 Am. B. R. 608; *Matter of Brenner* (D. C., N. Y.), 20 Am. B. R. 644, 166 Fed. 930, holding that bankrupt will be denied a discharge where, in a statement of his financial condition, set out over his signature, there was no mention of loans made by relatives and friends, although the aggregate amount of said loans would not have materially curtailed the bankrupt's line of credit; *In re Main* (D. C., Iowa), 30 Am. B. R. 547, 205 Fed. 421; *Gilpin v. Merchants' Nat. Bank* (C. C. A., 3d Cir.), 21 Am. B. R. 429, 185 Fed. 607, revg. *In re Gilpin* (D. C., Pa.), 20 Am. B. R. 374, 160 Fed. 171; *In re Augspurger* (D. C., Ohio), 25 Am. B. R. 83, 181 Fed. 174; *Firestone v. Harvey* (C. C. A., 6th Cir.), 23 Am. B. R. 468, 174 Fed. 574; *Matter of Cloutier Bros.* (D. C., Me.), 36 Am. B. R. 319, 228 Fed. 560; *Doyle v. First Nat. Bank of Baltimore* (C. C. A., 4th Cir.), 36 Am. B. R. 331, 231 Fed. 649; *Aller-Wilmes Jewelry Co. v. Osborn* (C. C. A., 8th Cir.), 36 Am. B. R. 714, 231 Fed. 907. **Contrs:** *In re Terens* (D. C., Wis.), 22 Am. B. R. 895, 175 Fed. 496, and *In re Shaffer* (D. C., W. Va.), 22 Am. B. R. 147, 169 Fed. 724, holding that the good or mistaken faith with which a false statement is made cannot be taken into consideration. *Matter of Milhoff* (D. C., Ohio), 40 Am. B. R. 72, 243 Fed. 242; *Matter of Perlmutter* (D. C., N. J.), 43 Am. B. R. 362, 256 Fed. 802; *Matter of Hammage* (D. C., Cal.), 44 Am. B. R. 203; *Matter of Rosenfeld* (C. C. A., 2d Cir.), 44 Am. B. R. 390, 262 Fed. 876.

Intent to deceive.—The word "false" means more than merely erroneous or untrue, but is used in its primary legal sense as importing an intention to deceive; and a statement in writing for the purpose of obtaining credit, in order to constitute a bar to a discharge, must have been knowingly and intentionally untrue. *In re Arenson* (D. C., N. J.), 28 Am. B. R. 113, 196 Fed. 609.

The word "false," within the meaning of this clause must be construed to mean false with the knowledge of the party making the statement and further with the view of deceiving or misleading. *Matter of Josephson* (D. C., Ore.), 36 Am. B. R. 505, 229 Fed. 272.

Materially false statement.—A statement in writing to procure credit in order to bar a discharge must be a materially false statement, and the words mean more than simply erroneous or untrue, and import an intention to deceive. A bankrupt will be deemed to intend what he knowingly does. *Matter of Smith* (D. C., N. Y.), 37 Am. B. R. 230, 232 Fed. 248.

356. *In re Russell* (Ref., N. Y.), 5 Am. B. R. 608; *Turner v. Ward*, 154 U. S. 618; *In re Steed*

(D. C., No. Car.), 6 Am. B. R. 73, 107 Fed. 682; *Franklin v. Monning Dry Goods Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 257, 217 Fed. 929 (quoting text with approval); *Rauch v. Manchester-Smith Co.* (C. C. A., 4th Cir.), 39 Am. B. R. 484, 240 Fed. 687; *Matter of Goldberg* (D. C., Mass.), 43 Am. B. R. 127, 256 Fed. 541, citing *Collier on Bankruptcy* (10th ed.), § 353a. **Contrs:** *In re Epstein* (D. C., Ark.), 6 Am. B. R. 60, 109 Fed. 878.

Intentionally untrue.—To constitute a bar to a bankrupt's discharge under section 14-b (3) for obtaining property on credit "upon a materially false statement in writing" for the purpose of obtaining such property on credit, the written statement made by the bankrupt should be knowingly and intentionally untrue, and it is not sufficient that the statement be materially untrue. *Peck v. Lowenbein* (C. C. A., 4th Cir.), 24 Am. B. R. 133, 178 Fed. 178.

In re Shaffer (D. C., W. Va.), 22 Am. B. R. 147, 169 Fed. 724, Judge Dayton says: "Creditor must rely upon it (the statement) when parting with his property, and if he did so rely upon it, and it was materially false in fact, it is sufficient to defeat a discharge. If the creditor did not rely on it, or if the debtor did not make the statement for obtaining the property on credit, it will not bar a discharge, no matter how false the statement may be." In the case of *Schaffer v. Koblegard Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 898, 183 Fed. 71 (affirming the above case), it was held that to constitute a bar it must appear that the statement made by the bankrupt was "knowingly and intentionally untrue."

Where bankrupts had made repeated false statements in writing to creditors for the purpose of obtaining goods on credit and one statement in particular was made under such circumstances as to preclude any doubt that it was wilfully and knowingly so made, bankrupts' discharge should be denied. *In re Taff v. Conyers* (D. C., Ga.), 25 Am. B. R. 600, 183 Fed. 899.

Presumption of intent to deceive.—Where bankrupt who was active in the firm's business, knew that it had the previous year sustained great losses, and that inquiries were being made to the commercial agencies concerning the firm, his signature on the statement and his delivery thereof, together with his activity in the business and his participation in the advantages obtained by the deception, raise a presumption of an evil intention; and his mere assertion that he did not know the statement was false will not excuse him. *In re Simon* (D. C., N. Y.), 29 Am. B. R. 806, 201 Fed. 1004.

Fraudulent intent must be shown.—A statement in writing which overstated a bankrupt's assets and understated his liabilities to an extent sufficient to be material, is insufficient of itself to bar his discharge, but fraudulent intent on the bankrupt's part must be shown; and unless credit is shown to have been actually obtained by means of the untrue statement made with such fraudulent intent, no ground for refusal to grant a discharge is established. *In re O'Callaghan* (D. C., Mass.), 29 Am. B. R. 304, 199 Fed. 662.

357. Thus, where a bankrupt in preparing a statement in writing of his financial condition for the purpose of obtaining property on credit, in good faith, omitted an existing liability, he

discharge is not barred.³⁵⁸ So also if it appear that the statement was signed by the president of a corporation acting under the advice of his financial adviser, believing that the facts stated were true, he is not guilty of an intent to deceive.³⁵⁹ Where a statement contains an error made in good faith by the bankrupt's bookkeeper it is not false within the meaning of the act.³⁶⁰ These principles lead to the conclusion that if the bankrupt had no knowledge of the alleged false statement, or if the facts stated therein were honestly thought by him to be true it does not constitute a bar.³⁶¹

(6) **MATERIALITY OF FALSE STATEMENT.**—The statement also must be material to the transaction,³⁶² it must have been, if not the moving cause of the sale on credit, a contributing cause, *i. e.*, the seller must to an extent at least have relied on it.³⁶³ The statement must have been made within a reasonable time prior to the extension of credit; for instance where it contains

will not be denied a discharge under § 14-b (3). In *re Collins* (D. C., Ark.), 19 Am. B. R. 688, 157 Fed. 120. There must be knowledge of the bankrupt as to the falsity of the statement. *Hamlin v. Radford Grocery Co.* (Tex. Civ. App.), 36 Am. B. R. 373, 182 S. W. 716.

³⁵⁸ *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736; *Bank of Commerce & Savings v. Matthews* (C. C. A., 7th Cir.), 43 Am. B. R. 284, 257 Fed. 292. But see *In re Arenson* (D. C., N. J.), 28 Am. B. R. 113, 195 Fed. 609, holding that the fact that a financial statement made by the bankrupt for the purpose of obtaining credit was obtained on a representation that it was a mere matter of form, does not absolve him from the consequences of making a statement which he knows to be absolutely untrue.

³⁵⁹ *Matter of Stafford* (D. C., Conn.), 35 Am. B. R. 747, 221 Fed. 127.

Belief that statement was true.—Where a bankrupt, believing himself in a sound financial condition, away from his books, with his sick wife away from home and in a hurry to get back, made a statement as a general estimate rather than an itemized statement of his exact financial condition, he should not be denied a discharge, because he omitted certain of his debts. *Franklin v. Monning Dry Goods Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 257, 217 Fed. 929.

³⁶⁰ *In re Collins* (D. C. Ark.), 19 Am. B. R. 688, 157 Fed. 120.

³⁶¹ *Doyle v. First Nat. Bank of Baltimore* (C. C. A., 4th Cir.), 36 Am. B. R. 331, 231 Fed. 649; *Bank of Commerce & Savings v. Matthews* (C. C. A., 7th Cir.) 43 Am. B. R. 284, 257 Fed. 292; *Matter of Rosenfeld* (C. C. A., 2d Cir.), 44 Am. B. R. 890, 262 Fed. 876.

³⁶² *Addington v. Allen*, 11 Wend. (N. Y.) 375; *Bruce v. Burr*, 67 N. Y. 237; *Hanna v. Rayburn*, 84 Ill. 533.

³⁶³ *In re Goodhile* (D. C., Iowa), 12 Am. B. R. 380, 180 Fed. 782, holding that where the bankrupt obtained goods on credit which were not paid for at bankruptcy, upon a statement in writing which listed as part of her assets land which she, of her own knowledge, knew she did not own, her discharge will be denied; *Aller-Wilmes Jewelry Co. v. Osborn* (C. C. A., 8th Cir.), 36 Am. B. R. 714, 231 Fed. 907; *Matter of Kerner* (C. C. A., 2d Cir.), 41 Am. B. R. 507, 250 Fed. 993, *rev'g* 40 Am. B. R. 183, 245 Fed. 807; *Bank of Commerce & Savings v. Matthews* (C. C. A., 7th Cir.), 43 Am. B. R. 284, 257 Fed. 292. Compare *People v. Haynes*, 11 Wend. 557; *Phelps v. Court*, 83 N. Y. 436; *Matter of Kap-*

lain (D. C., Pa.), 15 Am. B. R. 534, 141 Fed. 463. See Am. Bankr. Dig., §§ 1020, 1022.

Credit induced by statement.—Where a creditor claims goods as against a trustee in bankruptcy on the ground that the bankrupt obtained such goods by false representations, it is not necessary that the false representations should be the sole and exclusive consideration for the credit, but only that they were a material consideration, without which in all probability the credit would not have been given. *In re Ganey* (D. C., N. Y.), 4 Am. B. R. 576, 103 Fed. 930. In the case of *In re O'Callaghan* (D. C., Mass.), 29 Am. B. R. 304, 199 Fed. 662, it was held that where the evidence tended to show that credit was extended with knowledge that the bankrupt was in difficulties and with intent to advance only so much as would postpone immediate collapse before an investigation, which would be necessary to justify further credit in any large amount, could be had, an objection to a discharge because of a false statement will not be sustained.

The statement must have been materially false, have been made with intent to deceive and the creditor must have relied upon it when extending credit. *In re Mintzer* (D. C., N. Y.), 28 Am. B. R. 743, 197 Fed. 648.

Statement relied on; evidence.—Where bankrupt's letter in January ordering goods was accepted a few days after its receipt by the objecting creditor, it cannot be said that in extending credit for goods so ordered, reliance was placed upon a copy of a financial statement furnished the objector by a commercial agency sometime in April following such date. *In re Main* (D. C., Iowa), 30 Am. B. R. 547, 205 Fed. 421; *In re McLellan* (D. C., N. Y.), 30 Am. B. R. 325, 204 Fed. 482; *Matter of Kean* (D. C., N. Y.), 38 Am. B. R. 628, 237 Fed. 682, holding that a statement made two years before credit was extended was not one to be relied on. See also *Carville v. Lane* (Me. Sup. Ct.), 40 Am. B. R. 344, 101 Atl. 968; *Matter of Nouman* (D. C., Mont.), 40 Am. B. R. 427, 251 Fed. 667.

Statement as to money in bank.—A bankrupt makes a willfully false statement when he represents and states in writing, for the purpose of obtaining credit and property, that he has money in bank, when he has drawn and

no reference as to its continuing character it will not be construed as binding the debtor in a transaction eighteen months after its date.³⁶⁴ It is not sufficient to avoid the consequences of a financial statement knowingly false that the amount of credit obtained was small, or that the amount owing at the time of bankruptcy was less than when the statement was made; the main question pertains to the falsity of the statement which induced the credit.³⁶⁵ A fair test would seem to be: was the statement so "materially false" as to warrant a suit for the rescission of the sale? Although it has been held sufficient if the goods were ordered but not actually delivered to the bankrupt.³⁶⁶ Numerous decisions in the State courts determining what are actionable false representations may be consulted with profit.

(7) **FOR THE PURPOSE OF OBTAINING CREDIT FROM THE CREDITOR.**—This element will presumably always exist where a sale results from the statement. Although prior to the amendment of 1910, omitting the word "such," the false statement had to be made with the intent of obtaining such credit as it was planned at the time to afford a basis for; since such amendment the statute would seem to apply to any false statement which has to do with the extension of credit affecting the bankruptcy proceedings.³⁶⁷ This change in the statute should be noted, where cases involving false statements made prior to said amendment are in question.

(8) **STATEMENTS MADE TO MERCANTILE AGENCIES FOR THE PURPOSE OF OBTAINING CREDIT.**—The statute provides that the false statement be "made to any person or his representative for the purpose of obtaining credit from such person."³⁶⁸ The words "such person" refer to the previous words "any person," and the statement is "made to such person" whenever it is made by the bankrupt himself or his duly authorized agent; and it is none the less "made," although the statement itself is not delivered when its contents are correctly communicated by the agent.³⁶⁹ The language of the clause does not necessarily import that the statement shall have been made for the purpose of inducing any particular person to rely upon it.³⁷⁰ Thus, a materially false statement in writing, made to a mercantile agency as a basis of credit and relied upon by customers of such agency, is equivalent to a statement made directly to the persons extending credit.³⁷¹ A false statement made to a mer-

delivered checks which, when presented and paid, will exhaust such credit, and he knows the fact, and does not disclose that he has drawn and delivered such checks. *Matter of Smith* (D. C., N. Y.), 37 Am. B. R. 230, 323 Fed. 248.

^{364.} *In re Braverman* (D. C., N. Y.), 28 Am. B. R. 513, 199 Fed. 863; *Matter of Kean* (D. C., N. Y.), 38 Am. B. R. 628, 237 Fed. 682.

^{365.} *In re Arenson* (D. C., N. J.), 28 Am. B. R. 113, 195 Fed. 609.

^{366.} *In re Simon* (D. C., N. Y.), 29 Am. B. R. 308, 201 Fed. 1004.

^{367.} *In re Puschkin* (D. C., N. Y.), 25 Am. B. R. 742, 183 Fed. 882; *Matter of Milhoff* (D. C., Ohio), 40 Am. B. R. 72, 243 Fed. 242.

^{368.} Creditor at time of bankruptcy intended.—*Matter of Milhoff* (D. C., Ohio), 40 Am. B. R. 72, 243 Fed. 242.

^{369.} Bankr. Act, § 14-b (3), *ante*.

^{370.} Statement signed by agent of copartnership.—Where false statements in writing for the purpose of obtaining credit were signed and issued by the agent and manager of a bankrupt copartnership, who was acting within the scope of his authority, the partners are liable for the acts of their agent, which may be set up against them upon their application for a discharge in bankruptcy. *In re Schwartz & Co.* (D. C., N. Y.), 28 Am. B. R. 670, 201 Fed. 106. See also *In re Reed* (D. C., Okl.), 26 Am. B. R. 286, 191 Fed. 920; *In re Berry* (D. C., N. Y.), 15 Am. B. R. 360, 302, 146 Fed. 623.

^{370.} Construction of statute.—*In re Dresser* (C. C. A., 2d Cir.), 16 Am. B. R. 561, 563, 146 Fed. 383, holding that the provisions of the section are not to receive the strict construction given to criminal statutes, but should receive a reasonable one to effectuate the intention of Congress, so far as that can be ascertained by the language employed. The court said: "We think that intention was to deprive any bankrupt of the benefit of a discharge who has obtained property from any person by means of a written statement false in material matters; and within the fair meaning of the clause and statement is made to such person if it was given to an agent for the purpose of using it in obtaining property for the bankrupt, and if its contents were communicated by the agent to such person."

^{371.} *Harmowith v. Mandel, Jr.* (C. C. A., 3d Cir.), 39 Am. B. R. 513, 243 Fed. 338.

Statements to commercial agencies.—*Judge Hough, in In re Carton* (D. C., N. Y.).

mercantile agency, or an officer thereof, is regarded as having been made to such agency as the representative of the debtor, which becomes his agent for the purpose of obtaining credit.³⁷² It was held, however, prior to the amendment of 1910, that the ordinary statements of financial condition, made to mercantile agencies for general circulation, are not "materially false statements" within the meaning of the statute, but that statements in the form of special reports may be.³⁷³ And in some recent cases it has been held that general statements to mercantile agencies, not specifically asked for by prospective creditors, are not included and a discharge should not be refused because of a false statement furnished to the agent of a mercantile agency so that it might fix the rating.

17 Am. B. R. 343, 148 Fed. 63, 67, manifestly concurs in this view, for he says: "If, however, such a report as is here shown, be obtained from a merchant by a commercial agency at the request, disclosed or undisclosed, of one or more of the agency's customers, it seems to me incredible that the merchant furnishing such report can be supposed to have given it for any other purpose than of enlightening those persons who habitually deal with him on credit as to his true financial condition. The custom of trade is so well known that when an agency applies to a merchant for a specially signed report of his condition, he must know that such report is for the special purpose of enabling those who usually vend him goods to decide upon his financial responsibility."

Where a bankrupt made a materially false statement in writing to a mercantile agency which recited that it was designed as a basis for credit, and later obtained property on credit from a customer of such mercantile agency, who relied on such statement in extending such credit, it was equivalent to a statement made directly to the person from whom the property was received and debarred the bankrupt from the right to a discharge. In re Augspurger (D. C., Ohio), 25 Am. B. R. 83, 181 Fed. 74.

In re Pincus (D. C., N. Y.), 17 Am. B. R. 331, 147 Fed. 21, it was in substance ruled that a written financial statement made by a party to a commercial agency, which shows on its face that it was made as a basis for credit with the associate members of such company, and which is communicated by such agency to members who give credit on the faith of it, is equivalent to one made directly to them, and if materially false, will debar the debtor from the right to a discharge in bankruptcy.

A statement in writing by a bankrupt to a mercantile agency, though false, will not bar his discharge unless the bankrupt referred the prospective creditor to the said statement as being a true statement of his financial condition, made for the purpose of obtaining credit. Matter of Foster (Ref., Miss.), 24 Am. B. R. 368.

When a person makes a statement to a mercantile agency, he makes it for the purpose of having the statement transmitted by the mercantile agency to its subscribers who propose to do business with him, and that

as to any person to whom his statement is thus transmitted by the mercantile agency and who becomes a creditor upon the faith of it, the statement has precisely the same effect as though it had been made in person by the debtor to the creditor and relied upon by the creditor. In re Russell & Birkett (Ref., N. Y.), 5 Am. B. R. 608.

In order to make a statement substantially true for the purpose of a mercantile agency, a party need not report his contingent liabilities where there is no fraudulent suppression of the fact. If the subscriber to the mercantile agency desires information in regard to such liabilities he should call for a "special report." So held in a case where a subscriber did not report a mortgage securing certain bonds which were supposed to be entirely good. In re Russell & Birkett (Ref., N. Y.), 5 Am. B. R. 608.

Statement made to mercantile agency "in strict confidence."—Where bankrupt furnished to a mercantile agency, upon request, a written statement of his financial condition "in strict confidence for commercial use only," the fact that the statement was materially false and was relied upon by a creditor in making sales to bankrupt more than a year later, is insufficient to bar a discharge, under § 14-b(3) of the bankruptcy act as it stood before the amendment of 1910, in the absence of proof that such statement was made to the mercantile agency as the agent either of the bankrupt or the objecting creditor. Novick v. Reed & Co. (C. C. A., 3d Cir.), 27 Am. B. R. 521, 192 Fed. 20.

Necessity that agency be representative of creditor.—False representations to a mercantile agency are not a bar to a discharge, unless it appear that the agency was, in some sense, the representative of a creditor from whom money or property was obtained, or that the representations made to them were, in some way, communicated to or relied upon by the creditor. Matter of Kretz (D. C., Wash.), 32 Am. B. R. 365, 212 Fed. 784.

372. Matter of Cloutier Bros. (D. C., Me.), 36 Am. B. R. 319, 228 Fed. 569; Matter of Milkhoff (D. C., Ohio), 40 Am. B. R. 72, 243 Fed. 242.

373. In re Russell (C. C. A., 2d Cir.), 23 Am. B. R. 850, 176 Fed. 253; Matter of Napier (Ref., Ky.), 23 Am. B. R. 560. It should be noticed that the amendment of 1910 was not considered in the decision of these cases.

in its books and not asked for by any particular customer.³⁷⁴ While within reasonable limits statements made to a mercantile agency are to be regarded as continuing, no invariable rule can be laid down as to the length of time during which the vendor may rely upon the statements made to such agency; each case depends upon its own facts and what is reasonable for a prudent and intelligent business man to do.³⁷⁵

(9) **BY THE BANKRUPT.**—This follows from the nature of the transactions here, in a sense, interdicted.³⁷⁶ A false statement by one partner, made in the course of the partnership business, will not be a bar to the discharge of a partner who did not participate therein and had no knowledge thereof,³⁷⁷ but will be a bar to the discharge of the partnership.³⁷⁸

374. Matter of Zopper (C. C. A., 2d Cir.), 33 Am. B. R. 652, 211 Fed. 936; *Ould & Co. v. Davis* (C. C. A., 4th Cir.), 40 Am. B. R. 185, 246 Fed. 228; *Matter of Oliner* (C. C. A., 2d Cir.), 44 Am. B. R. 450, 262 Fed. 734. *Contra*, *Harmowich v. Mandel, Jr.* (C. C. A., 3d Cir.), 39 Am. B. R. 513, 243 Fed. 338.

375. Continuing statements.—In *re Russell & Birkett* (Ref., N. Y.), 5 Am. B. R. 608.

Where a person, about a year prior to his adjudication, as an involuntary bankrupt, without solicitation, knowingly made a false and misleading statement to a mercantile agency, to obviate unfavorable reports, with regard to his financial standing, and within ten days attempted to correct said statement by another, which, while not so bad, was nearly so, and referred to it for the purpose of obtaining goods on credit, he will be denied his discharge; such statement, both in its original as well as its corrected form, was a continuing one, and unless recalled was for a reasonable time to be relied upon as stating the truth. In *re Kyte* (D. C., Pa.), 23 Am. B. R. 414, 174 Fed. 867. Statement made two years prior to extension of credit not sufficient, *Matter of Kean* (D. C., N. Y.), 38 Am. B. R. 625, 237 Fed. 652.

In *re Terens* (D. C., Wis.), 22 Am. B. R. 897, 173 Fed. 939, Judge Quarles says: "It is matter of common knowledge that such statements are frequently intended as a continuing representation for indefinite periods of time. I am of opinion that the date of the statement is immaterial, if property has in fact been obtained upon the strength of it within the four-months period, as is the case here. We are not called upon to decide whether under any circumstances the four-months limitation can be read into the third subdivision of section 14-b, and merely hold that, where goods have been furnished and credit has been extended on the faith of such statement within four months of the bankruptcy, the date of the property statement should be held immaterial."

About a year and six months before the filing of a petition in bankruptcy, bankrupt made a materially false statement in writing for the purpose of obtaining a large bill of goods on credit, which goods were paid for in full. The statement contained a provision that it was to be binding for purchases "now or hereafter made, unless changed by written authority from the undersigned." Subsequently and between six and nine months prior to the filing of the petition, other goods were purchased on credit from the same creditor, which were

never paid for. Upon objection to the bankrupt's discharge on the ground that these goods had been obtained on credit by reason of such statement, held, that this was not an obtaining of property on a false statement in writing within the contemplation of section 14-b (3) of the bankruptcy act. In *re Cotton & Preston* (D. C., Ga.), 25 Am. B. R. 517, 183 Fed. 181; *Ragan, Malone & Co. v. Cotton & Preston* (C. C. A., 5th Cir.), 29 Am. B. R. 597, 200 Fed. 546, in which case a similar statement was under consideration, and the court held that the fact that the first purchase of goods obtained thereunder had been paid for, did not preclude such creditors from urging the falsity of the statement as a bar to the firm's discharge in bankruptcy, it appearing that bankrupt's account was a running account, covering purchases made from time to time for little over one year, on which the credits made at no time left the account fully paid up, and that the statement was relied upon by the creditors in the subsequent credits, as well as the first. And see In *re O'Callaghan* (D. C., Mass.), 29 Am. B. R. 304, 199 Fed. 662; *Harmowich v. Mandel, Jr.* (C. C. A., 3d Cir.), 39 Am. B. R. 513, 243 Fed. 338; *Matter of Milhoff* (D. C., Ohio), 40 Am. B. R. 72, 243 Fed. 242.

376. As to fraud practiced by an agent of the bankrupt, see *Durst v. Barton*, 47 N. Y. 167; *Perley v. Catlin*, 31 Ill. 533.

377. False statement by partner.—In *re Cotton & Preston* (D. C., Ga.), 25 Am. B. R. 517, 183 Fed. 181; *Hardie v. Swafford Bros. Dry Goods Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 457, 165 Fed. 588, *rev'd*. In *re Hardie & Co.* (D. C., Tex.), 16 Am. B. R. 313, 143 Fed. 553; *Frank v. Michigan Paper Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 261, 179 Fed. 776; *Ragan, Malone & Co. v. Cotton & Preston* (C. C. A., 5th Cir.), 29 Am. B. R. 597, 200 Fed. 546; *Matter of Blank* (D. C., Pa.), 38 Am. B. R. 71, 236 Fed. 801.

378. *Frank v. Michigan Paper Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 261, 179 Fed. 776, holding that such bar to a discharge, however, by reason of a false statement in writing, is confined to such person or persons as actually made such statement with the intention to deceive, and to the partnership entity of which such person was a member, and the intent to deceive cannot be imputed to a partner who, prior to the bankruptcy proceeding against the firm, knew nothing whatever of the writing of the statement.

IX. FRAUDULENT TRANSFER.

a. In general.—If a bankrupt at any time within the four months' period has "transferred, removed, destroyed or concealed, or permitted to be removed, destroyed or concealed, any of his property with intent to hinder, delay or defraud his creditors," his discharge should be refused. Under the law of 1867, the making of both a fraudulent preference and a fraudulent transfer were objections to discharge. The original draft of the amendatory bill of 1903 was the same.³⁷⁹ Under the definition of transfer,³⁸⁰ it is difficult to conceive of a preference that does not amount to a transfer, and, if fraudulent, either transaction will come within the present clause. The words of subdivision 4 are doubtless a definition or explanation of the words "fraudulent transfer" there used. Hinder, delay or defraud creditors applies to the whole body of the bankrupt's creditors, and not a conversion of property belonging to a single creditor.³⁸¹

b. Elements of proof.—The creditor alleging this objection must show, in substance, the commission of the first act of bankruptcy. The variances between the phrasing here and that of § 3-a (1) are immaterial. "Destroyed" occurs here only, but it adds nothing, as "removed" may include it and "concealed"³⁸² surely does. The words of limitation refer to the four months' bankruptcy period, discussed under section three, *ante*. How far an adjudication on the first act of bankruptcy will be *res adjudicata* on an objection to a discharge need not be considered; a court which finds the first will not easily be persuaded to refuse to find the second. Nor is any discussion as to the technical meaning of the words important. Any transfer, destruction, or concealment of property within the inhibition of the statute of frauds, if within the four months' period, will, if seasonably pleaded and duly proven, bar a discharge.^{382a} If the transfer be made within the limited period it will be a bar although not knowingly and fraudulently made.³⁸³ If made prior to the four

379. Compare Report of Ex. Com. of National Association of Referees in Bankruptcy, previously mentioned.

380. See Bankr. Act, § 1 (25).

381. Matter of Berry & Co. (D. C., N. Y.), 15 Am. B. R. 360, 146 Fed. 623.

Fraud in order to bar a bankrupt's discharge must be a fraud against the estate. Hence, the mere fact that a bankrupt disposed of property on which a creditor had a lien is not a bar to a discharge, where it appears that if the security had remained it would have been insufficient to pay the creditor's claim. Matter of Huber (Ref., D. C., N. D.), 34 Am. B. R. 100.

382. Bankr. Act, § 1 (22).

382a. The word "conceal" is associated with transfer, remove and destroy, and any of these, when done with intent to hinder, delay or defraud creditors, works a denial of the discharge. Matter of Perlmutter (D. C., N. J.), 43 Am. B. R. 362, 256 Fed. 802.

383. In re Gift (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230. See In re Bracin (D. C., Pa.), 24 Am. B. R. 793, 179 Fed. 768; Pirvits v. Pithan (C. C. A., 8th Cir.), 27 Am. B. R. 621, 194 Fed. 403, holding that a fraudulent transfer to prevent payment of a judgment recovered in an action for personal injuries, bars a discharge; Matter of Perlmutter (D. C., N. J.), 43 Am. B. R. 362, 256 Fed. 802. Compare Matter of Braus (C. C. A., 2d Cir.), 40 Am. B. R. 668, 248 Fed. 55; Matter of Oliner (C. C. A., 2d Cir.), 44 Am. B. R. 450, 262 Fed. 734.

An unsuccessful attempt to transfer is not a bar to a discharge. Liller Bldg. Co. v. Reynolds

(C. C. A., 4th Cir.), 40 Am. B. R. 371, 247 Fed. 90.

Transfer for purpose of paying old creditors ratable proportion.—The bankruptcy act recognizes the distinction between intent to defraud and intent to prefer, and while it makes no distinction between intent to delay and intent to hinder, it does distinguish between intent to defraud and intent to delay or hinder. The statute must be construed according to its reasonable intent and only such transfers as not only hinder and delay but also operate as a fraud, i. e., those entered into with actual fraudulent intent or those where from the terms of the agreement or the nature of the transaction itself, the fraudulent intent is presumed to exist as an inference of law, will bar a discharge. A sale and assignment by insolvents, within four months prior to their bankruptcy, of all their property to a corporation formed for the purpose of purchasing the same, a fair consideration being received by the insolvents and turned over by them to an attorney representing them and certain of their creditors with the intent that the same shall be distributed by the attorney ratable among such creditors of the insolvents as would agree to compromise their claim for the amount received, is not such a transfer of property "with intent to hinder, delay or defraud creditors, as will debar the bankrupt from the right to a discharge. Matter of Julius Bros. (C. C. A., 2d Cir.), 32 Am. B. R. 800, 217 Fed. 3, reversing 31 Am. B. R. 132, 209 Fed. 371.

months' period it is no bar, even if made for the purpose of defeating a just claim.³⁸⁴ But in New York a conveyance of real estate made by a bankrupt long anterior to the four months' period, with intent to hinder, delay, and defraud creditors, may be alleged as a ground for objection to his discharge, where the conveyance is not recorded until within the four months' period;³⁸⁵ and whether such conveyance was made with intent to hinder, delay, and defraud creditors, is a question of fact.³⁸⁶ A preferential transfer consisting of a payment of money on account of an existing indebtedness, in the absence of evidence that such payment was made in fraud of creditors, is not within the meaning of this clause,³⁸⁷ nor is a transfer of a worthless equity of redemption.^{387a} An assignment of stock by a bankrupt to his wife to repay borrowed

A transfer of the furniture and fixtures of a restaurant by insolvents within four months prior to their bankruptcy to a relative, who does not assume the payment of their debts, is voluntary and without consideration, and is such a transfer of property with intent to hinder, delay or defraud creditors, as will bar the bankrupts from the right to a discharge. *Matter of Aymo and Barattia* (Ref., D. C., N. Y.), 35 Am. B. R. 13.

Fraudulent transfer in violation of Bulk Sales Act.—Where a bankrupt within four months preceding the filing of the petition in bankruptcy, transferred his stock of goods, and at the time executed a false affidavit, that he had no creditors in connection with his business, in order to avoid giving his transferee a written list of his creditors and to avoid notifying them as required by the Bulk Sales Act, his discharge should be refused on the ground that he made the transfer with intent to hinder, delay, and defraud his creditors. *Matter of DeNomme* (D. C., R. I.), 32 Am. B. R. 744, 214 Fed. 672.

³⁸⁴ *In re Wakefield* (D. C., N. Y.), 31 Am. B. R. 42, 207 Fed. 180; *Matter of Harris* (Ref., N. J.), 11 Am. B. R. 649; *In re Danehy* (C. C. A., 2d Cir.), 11 Am. B. R. 511, 130 Fed. 532; *Matter of Fackler* (D. C., Ohio), 39 Am. B. R. 742, 246 Fed. 864; *Gill v. White* (C. C. A., 9th Cir.), 41 Am. B. R. 606, 249 Fed. 50.

Transfers prior to four months' period no bar.—Where a husband more than four months prior to filing his petition conveyed to his wife for full value certain shares of corporate stock for the purpose of raising money to pay the expenses of an impending suit for breach of promise to marry, it is no ground for denying his discharge. *In re Brumbaugh* (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971.

Where a debtor, several months prior to his adjudication, turned over to his assignee for creditors' property which he believed to be amply sufficient to pay all his debts the fact that from eleven to twenty months prior to his adjudication he knowingly and fraudulently lost, disposed of, and squandered large sums is not sufficient grounds for

denying him a discharge. *In re Boner* (D. C., Va.), 22 Am. B. R. 151, 169 Fed. 727. And so where a bankrupt, with fraudulent intent, transferred an insurance policy to his wife, six years before his bankruptcy, it is not of itself a ground for refusing his discharge. *In re Schickerling* (C. C. A., 2d Cir.), 30 Am. B. R. 312, 204 Fed. 592.

³⁸⁵ *Matter of McKane* (D. C., N. Y.), 19 Am. B. R. 103, 152 Fed. 733.

³⁸⁶ *Matter of McKane* (D. C., N. Y.), 19 Am. B. R. 103, 152 Fed. 733; *Matter of Braus*, 40 Am. B. R. 688, 248 Fed. 55.

Deeds executed under secret agreement.—If deeds executed by a bankrupt to his father-in-law more than four months prior to adjudication were mere mortgages or if there was any secret agreement by which the bankrupt retained or was to have title, and he did not disclose these facts on his examination or in his schedules he is guilty of a concealment of assets and a discharge should be refused. *In re Wakefield* (D. C., N. Y.), 31 Am. B. R. 42, 207 Fed. 180.

³⁸⁷ *Matter of Maher* (D. C., Mass.), 16 Am. B. R. 340, 144 Fed. 503, affg. 15 Am. B. R. 786. See also *In re Battle* (D. C., N. Car.), 19 Am. B. R. 40, 154 Fed. 751; *In re McClellan* (D. C., N. Y.), 30 Am. B. R. 325, 204 Fed. 482; *In re Bouck* (D. C., N. Y.), 28 Am. B. R. 378, 190 Fed. 453; *Matter of Rivkin* (D. C., Conn.), 33 Am. B. R. 170, 216 Fed. 218.

A preference alone, even though it be a voidable one, is no bar to a bankrupt's discharge, since the giving of a preference does not constitute a conveyance of property with intent to delay or defraud creditors. *In re Friedrich* (D. C., Minn.), 28 Am. B. R. 656, 199 Fed. 193; *Devorkin v. The Security Bank & Trust Co.* (C. C. A., 6th Cir.), 39 Am. B. R. 738, 243 Fed. 171.

^{387a} *Devorkin v. The Security Bank and Trust Co.* (C. C. A., 6th Cir.), 39 Am. B. R. 738, 243 Fed. 171.

³⁸⁸ *In re Hedley* (D. C., N. Y.), 19 Am. B. R. 409, 156 Fed. 314. And see *In re Marcus* (C. C. A., 2d Cir.), 30 Am. B. R. 176, 203 Fed. 29, as to payments to wife during four months' period without intent to defraud.

money has been held not to defeat his right to a discharge.³⁸⁸ If a trustee fails in his action to set aside a fraudulent transfer, such transfer cannot be set up as a bar to a discharge.³⁸⁹ Cases cited in the proper paragraphs of section three of this work will be found valuable.³⁹⁰ Other cases are collected in the foot-note.³⁹¹

c. **General assignments as objections to discharge.**—That a general assignment is a transfer is elementary; that it amounts to an intent to hinder or delay creditors is now thought to be well settled.³⁹² It has been held, however, that a general assignment for the benefit of creditors, made under a state statute, and which gives no preferences, cannot be regarded in law as a transfer with intent to hinder, delay and defraud creditors, so as to bar a discharge, where there is an entire absence of fraud.^{392a}

X. PREVIOUS DISCHARGE IN A VOLUNTARY BANKRUPTCY WITHIN SIX YEARS.

a. **In general.**—The purpose of subdivision 5 is clear. Through oversight, the original law permitted discharges *ad libitum*, and instances of two and even three discharges to the same person in as many years are on record. The English law does not permit a second application, no matter after what duration of time.³⁹³ The law of 1867 allowed it only when the bankrupt's estate was sufficient to pay seventy per cent., but three-fourths of his creditors in value could consent to a discharge on his paying a smaller amount.³⁹⁴ The present clause is apparently an effort to omit the too harsh provisions of the former, and, at the same time, to escape the dangers lurking in any device which calls for the consent of creditors.³⁹⁵

b. **Effect and application.**—The amendment of 1903 was not retroactive, but only fixed a new condition of discharge in case of petitions filed after its passage.³⁹⁶ As to its effect where the creditors petition, but the bankrupt either consents to an adjudication or petition, and is adjudicated while the involuntary proceeding is pending, *quære*? If application for a discharge has been made and it has neither been granted nor refused, the limitation of the clause

³⁸⁸. In re Tiffany (D. C., N. Y.), 17 Am. B. R. 296, 147 Fed. 314. Compare Devorkin v. The Security Bank and Trust Co. (C. C. A., 6th Cir.), 39 Am. B. R. 738, 243 Fed. 171.

³⁸⁹. See pp. 90-98, *ante*.

³⁹⁰. In re Freeman, Fed. Cas. 5,082; In re Hannahs, Fed. Cas. 6,032; In re Wolfskill, Fed. Cas. 17,930; Matter of Singer (C. C. A., 2d Cir.), 41 Am. B. R. 503, 251 Fed. 51; Matter of Perlmutter (D. C., N. J.), 43 Am. B. R. 362, 256 Fed. 802. Compare In re Diehl, 15 Fed. 234. And see In re Jones, Fed. Cas. 7,446; In re Miller (D. C., Va.), 14 Am. B. R. 320, 135 Fed. 591.

³⁹¹. Failure of private bankers to transmit moneys received.—The receipt by bankrupts, engaged as private bankers, of moneys for transmission to a foreign country, and the deposit thereof in their name, does not constitute a transfer, removal or concealment of such moneys, although such funds went into their general account. Matter of Oliner (C. C. A., 2d Cir.), 44 Am. B. R. 450, 282 Fed. 734.

³⁹². In re Gutwillig (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475; s. c., on appeal, 1 Am. B. R. 858, 92 Fed. 337; In re Macon Nash, etc. (D. C., Ga.), 7 Am. B. R. 66, 112 Fed. 323; as, however, *revd.* by Carling v. Seymour Lumber Co. (C.

C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; In re Milgraum v. Ost (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827 (as to sufficiency of specifications). Compare also, under the former law, In re Chadwick et al., Fed. Cas. 2,580; In re Pierce, Fed. Cas. 11,141; Haas v. O'Brien, 66 N. Y. 597; Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377. See also under section 67, *post*, General assignments, p. 1076.

^{392a}. Feder v. Goetz (C. C. A., 2d Cir.), 45 Am. B. R. 57, 264 Fed. 619.

³⁹³. English Act of Bankruptcy of 1890, § 8(3) (k).

³⁹⁴. Act of 1867, § 30, R. S., § 5,116.

³⁹⁵. See Report of Ex. Com. of National Association of Referees in Bankruptcy, p. 13, previously mentioned.

³⁹⁶. In re Seaholm (C. C. A., 1st Cir.), 14 Am. B. R. 202, 136 Fed. 144, holding that the words "in voluntary proceedings" have reference to the proceedings in which a discharge was granted, and not to the proceeding in which the second discharge is sought, and where a bankrupt has been discharged from his indebtedness in a voluntary proceeding within six years, a second discharge upon his own application in a subsequent involuntary proceeding is properly withheld.

would not seem applicable. If an application for a discharge had been refused in one proceeding the question of the bankrupt's right to discharge from the same debts in a subsequent proceeding is *res adjudicata*.³⁹⁷ The rule would seem to be that the failure of a bankrupt to apply for a discharge in the prior proceedings precludes him from procuring a discharge in subsequent proceedings from the debts scheduled and provable in the prior proceedings.³⁹⁸ The discharge in the subsequent proceedings must except all debts provable in the first bankruptcy and which could have been discharged therein.³⁹⁹ And the fact that a debt proved in the first proceeding was put in judgment after a refusal of the bankrupt's discharge, does not create a new debt so as to entitle the bankrupt in the second bankruptcy proceeding to retry his right to a discharge from such debt.⁴⁰⁰ And where a discharge has been granted in voluntary proceedings a second discharge cannot be granted within six years in an involuntary proceeding.⁴⁰¹ An offer of composition by a voluntary bankrupt, which is accepted by the creditors and confirmed by the court amounts to a "discharge in bankruptcy" within this subdivision.^{401a}

c. Measure of time.—The six years unquestionably begin to run from the date of the order granting the discharge; the time is thus to be measured between such date and the application for the second discharge, not the date of filing a second petition in bankruptcy.⁴⁰² Where, within five years of his

397. *Kuntz v. Young* (C. C. A., 8th Cir.), 12 Am. B. R. 505, 131 Fed. 719; *In re Kuffler* (D. C., N. Y.), 19 Am. B. R. 181, 153 Fed. 667; *Matter of Julius Silverman* (C. C. A., 2d Cir.), 19 Am. B. R. 460, 157 Fed. 675; *In re Elby* (D. C., Iowa), 19 Am. B. R. 734, 157 Fed. 935.

Refusal *res adjudicata*.—It is a settled rule of law that, where a bankrupt has failed to apply for his order of discharge within the time limited by the statute, his right to such order is *res adjudicata*, and he cannot by any subsequent proceedings secure a discharge from the debts provable in the former proceedings. *In re Weintraub* (D. C., N. J.), 13 Am. B. R. 711, 133 Fed. 1000.

Discharge in second proceeding held pending appeal in the first.—Where bankrupts were denied their discharge upon the ground that their application for a discharge in a former bankruptcy, involving the same indebtedness, though applied for in time, and denied after a year from the date of the adjudication was *res adjudicata*, but no order was entered, an appeal from the order denying them a discharge in the second bankruptcy proceeding will not be disposed of until they have had an opportunity to enter an order denying the discharge in the first bankruptcy proceeding and take an appeal therefrom. *Matter of Elkind & Schwartz* (C. C. A., 2d Cir.), 23 Am. B. R. 166, 175 Fed. 64.

398. *Matter of Cooper* (D. C., N. J.), 37 Am. B. R. 625, 236 Fed. 298.

This rule seems to be opposed in the case of *Matter of Skaats* (D. C., Ala.), 37 Am. B. R. 579, 233 Fed. 817, in which it was held that the mere fact that a bankrupt, in a prior voluntary proceeding, failed to apply for a discharge, is not a bar to or *res adjudicata* on an application made within six years in a subsequent proceeding; it must be shown

that there was a discharge granted or denied by the court in the prior proceeding.

399. *In re Pullian* (D. C., Tenn.), 22 Am. B. R. 513, 171 Fed. 595.

The failure of a bankrupt to apply for a discharge within the prescribed time limit is a conclusive determination as to all parties then before the court, and in subsequent bankruptcy proceedings the said bankrupt will be granted a discharge, only as to such debts as were incurred since the institution of the first bankruptcy proceedings. *In re Van Borries* (D. C., Wis.), 21 Am. B. R. 849, 168 Fed. 718.

400. *In re Kuffler* (D. C., N. J.), 19 Am. B. R. 181, 153 Fed. 667, *affd.* 22 Am. B. R. 289, 168 Fed. 1021; *In re Schnabel* (D. C., N. Y.), 23 Am. B. R. 22, 166 Fed. 383.

Effect of failure to apply.—The failure of a bankrupt, through the neglect of his attorney, to apply for a discharge within the prescribed time limit, has the same effect as a judgment denying him a discharge from the debts involved in the bankruptcy proceedings and he may not thereafter institute a bankruptcy proceeding for the mere purpose of obtaining a discharge from debts scheduled and provable in the former proceeding. *In re Stone* (D. C., Ore.), 23 Am. B. R. 24, 172 Fed. 947.

401. *Matter of Neely* (D. C., N. Y.), 12 Am. B. R. 407, 134 Fed. 667; *In re Seaholm* (C. C. A., 1st Cir.), 14 Am. B. R. 292, 136 Fed. 144; *Matter of Haase* (D. C., N. Y.), 17 Am. B. R. 528, 155 Fed. 553.

401a. *Matter of Radley* (D. C., N. Y.), 42 Am. B. R. 261, 252 Fed. 205.

402. *In re Little* (C. C. A., 7th Cir.), 13 Am. B. R. 640, 137 Fed. 521; *In re Jordan* (D. C., Pa.), 15 Am. B. R. 449, 142 Fed. 292. The six years is to be measured backward from the time of the hearing. *Matter of Haase* (D. C., N. Y.), 17 Am. B. R. 528, 155 Fed. 553 (citing *Collier on Bankruptcy*); *In re Chase* (D. C., Mass.), 28 Am. B. R. 456, 196 Fed. 406. The

discharge, a voluntary bankrupt is again adjudicated a bankrupt, upon his own petition, his motion for leave to withdraw the proceedings because he could not obtain a discharge therein "within six years" after the granting of the former discharge, will be denied where his creditors object.⁴⁰³

XI. REFUSAL TO OBEY A LAWFUL ORDER, OR TO ANSWER A MATERIAL QUESTION APPROVED BY THE COURT.⁴⁰⁴

a. *In general.*—The nearest equivalent to this new objection is found in the act of 1841, whereby a discharge might be denied a bankrupt who should "wilfully omit or refuse to comply with any orders or directions of such court."⁴⁰⁵ Refusal to obey or to answer are in despite of the court, and the bankrupt may well say he thereby became liable for nothing more than a contempt. The amendatory act has added another consequence. Recalcitrancy is now also an objection to his discharge. But it must be "in the proceedings in bankruptcy."

b. *Refusal to obey.*—This seems to include failure to answer questions, provided the order requiring the answer is lawful. As has been seen, the words "lawful orders" occur elsewhere in the act. Whether the order is lawful or not will often be the only question. If authorized in words or by implication from the statute, it will be. Contempt of court, provided the order ignored was lawful, under this clause, becomes thus in effect an available objection to discharge. It is suggested, however, that mere neglect, not amounting to refusal to obey, would not be sufficient:

c. *Refusal to answer.*—This is not essentially different from refusal to obey. On refusal to answer a proper question, the court will usually order the bankrupt to answer. These words were inserted as a means to compel replies where the bankrupt asserts his privilege.⁴⁰⁶ It must appear in the report of the special master that the bankrupt refused to answer "a material question approved by the court."⁴⁰⁷ A bankrupt's refusal to answer a question, upon the ground that it will tend to degrade and incriminate him, will prevent his discharge, although he subsequently signifies his willingness to answer.⁴⁰⁸ But where there is nothing to show that a bankrupt, in giving evasive and disrespectful answers to questions concerning his property, wilfully concealed testimony, preventing his creditors from obtaining the property, his conduct is not ground for refusing to grant him a discharge.⁴⁰⁹ This clause is not in conflict with the fifth amendment to the constitution.⁴¹⁰

change in the text by inserting the words "application for the," is suggested by the court in the case of *In re Dunphy* (D. C., Me.), 30 Am. B. R. 760, 206 Fed. 680. It seems more reasonable to hold that the period terminates upon the application for the second discharge. In *Matter of Rubin* (D. C., N. J.), 43 Am. B. R. 729, 259 Fed. 607, it was held that the six years is measured backward from the date of the filing of the application for the discharge in the second proceeding and not from the hearing of the application by the court.

403. *Matter of Smith* (D. C., N. Y.), 19 Am. B. R. 63, 155 Fed. 688.

404. Note remarks of Judge Brawley, in *In re Nachman* (D. C., So. Car.), 8 Am. B. R. 180, 114 Fed. 995.

405. Act of 1841, § 4.

406. See p. 209, *ante*.

407. *Matter of Lenweaver* (D. C., N. Y.), 36 Am. B. R. 73, 226 Fed. 987.

Refusal to produce books and papers.—Where

a few days before a referee's hearing on objections to a discharge the objecting creditors serve notice on the bankrupts to produce certain papers, and at the hearing there is a controversy as to the receipt of and compliance with said notice, but the referee was not moved to compel production of said papers, such situation does not constitute a refusal "to answer any material question approved by the court." *Matter of Rea Bros.* (D. C., Mont.), 40 Am. B. R. 420, 251 Fed. 431.

408. *In re Weinreb* (C. C. A., 2d Cir.), 18 Am. B. R. 387, 153 Fed. 368.

409. The purpose of the penalties of the bankruptcy statute is to prevent bankrupts from concealing their property and defrauding their creditors. Ordinary questions of contumacy or contempt of court can be disposed of directly and of themselves are not to be corrected by the withholding of a discharge. *Matter of Fanning* (D. C., N. Y.), 19 Am. B. R. 55, 155 Fed. 701.

d. Effect of withdrawal of objections by creditors.—In determining whether a bankrupt is entitled to a discharge, the fact that creditors, who originally objected thereto, have withdrawn from the case, should have no weight, if the court be clearly convinced that the bankrupt has committed the frauds alleged by them; but if there be doubt as to bankrupt's guilt, that fact may properly be considered.⁴¹¹

XII. THE DISCHARGE.

a. In general.—The granting or withholding of a discharge is within the sound judicial discretion of the judge.⁴¹² But a voluntary bankrupt is entitled to his discharge as a legal right unless the objecting creditors establish his guilt, for the burden is not on the bankrupt to satisfy the court that he has done everything the law requires him to do and is guilty of none of the things which the law condemns.⁴¹³ If the judge sustains the specifications or any of them, an order refusing the discharge is granted and entered; such an order precludes another application in the same proceeding.⁴¹⁴ If he overrules them, an order of discharge follows. A discharge may not be refused because the bankrupt has been dilatory in bringing the matter to a hearing,⁴¹⁵ or because one or more debts will not be released by it.⁴¹⁶ The insanity of the bankrupt does not affect his right to a discharge.⁴¹⁷ The referee's findings are not usually reversed except for palpable error.⁴¹⁸ The findings of the special master or referee should specifically state the grounds for the denial of a discharge.⁴¹⁹ Unlike the certificate under the former law, the discharge of to-day is silent as to the debts affected thereby.⁴²⁰ Its effect can only be determined when it is asserted as a bar elsewhere.⁴²¹ Where a bankrupt has been denied a discharge in one proceeding he cannot in a second proceeding be discharged from debts provable in the former proceeding,⁴²² even though they are barred by the

410. In *re Dresser* (C. C. A., 2d Cir.), 16 Am. B. R. 561, 145 Fed. 1,021, holding that the proceeding for a discharge is not a criminal proceeding, and that the constitutional provision protects witnesses in criminal proceedings only.

411. In *re Hammerstein* (C. C. A., 2d Cir.), 26 Am. B. R. 757, 159 Fed. 37.

412. *Woods v. Little* (C. C. A., 3d Cir.), 13 Am. B. R. 742, 134 Fed. 229. A discharge should not be granted until the specifications of objection thereto have been disposed of. In *re Randall* (D. C., Pa.), 20 Am. B. R. 305, 159 Fed. 208.

Discretion of bankruptcy court.—Such a denial is discretionary with the bankruptcy court, but only in the same sense in which final orders and decrees in equity are so. Substantial errors in the interpretation or application of the principles and rules of equity jurisprudence governing the matter may be reviewed and corrected. *Lindeke v. Converse* (C. C. A., 8th Cir.), 28 Am. B. R. 596, 198 Fed. 618.

413. *Matter of Johnson* (D. C., Pa.), 32 Am. B. R. 448, 215 Fed. 748.

414. *Matter of Feigenbaum* (C. C. A., 2d Cir.), 9 Am. B. R. 595, 57 C. C. A. 409, 121 Fed. 69, revg. 7 Am. B. R. 339, 151 Fed. 508.

415. In *re Wolff* (D. C., Cal.), 13 Am. B. R. 95, 182 Fed. 390.

416. In *re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 94 Fed. 476, holding that the District Court in considering the application for a discharge can consider only the right to a discharge, not the effect of a discharge.

417. In *re Miller* (D. C., Pa.), 13 Am. B. R. 345, 133 Fed. 1017.

418. In *re Covington* (D. C., N. Car.), 6 Am. B. R. 373, 110 Fed. 143.

419. Necessity for pointing out offense.—In order to bar a bankrupt's discharge on the ground of having committed an offense punishable by imprisonment, in that he made false oath in relation to the proceedings in bankruptcy, it must be shown wherein the bankrupt made a false oath, and a finding that (1) in verifying the answer and (2) in giving his testimony, the bankrupt made a false oath "either in one or the other," is insufficient. In *re Mayer* (D. C., N. Y.), 28 Am. B. R. 342, 195 Fed. 571.

420. See Form No. 59, and compare *Audubon v. Schufeldt*, 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1,009. See also In *re Claff* (D. C., Mass.), 7 Am. B. R. 128, 111 Fed. 505.

421. See discussion under Section Seventeen, *post*, and compare for rulings in advance of discharge on application for stays, under Section Eleven and later under this section, subtitle "Effect of the Discharge."

422. In *re Kuffler* (D. C., N. Y.), 16 Am. B. R. 305, 144 Fed. 445; *Blumenthal v. Jones*, 208 U. S. 64, 19 Am. B. R. 288, 55 L. Ed. 390.

statute of limitations.⁴²³ A discharge may be amended after the term at which it was granted.⁴²⁴

b. *Postponement of discharge.*—Cases have arisen where it is appropriate to withhold temporarily or to postpone a discharge pending the determination of a suit or proceeding in which others beside the bankrupt are parties, where a discharge will tend to affect adversely the rights of such parties. As, for instance, where a bond was given to release certain property of the bankrupt from a writ of garnishment, granted in an action on a contract more than four months prior to bankruptcy;⁴²⁵ and so also when questions have arisen in respect to exempt property claimed by the bankrupt but as to which creditors have asserted certain rights.⁴²⁶

c. *Costs.*—Costs on contested applications for discharge are discretionary, and are often granted;⁴²⁷ but not to the attorney for the bankrupt out of the estate.⁴²⁸ In voluntary cases it has been held that costs may be allowed to the bankrupt's attorney.⁴²⁹ But in no case should such costs be charged against the objecting creditors.⁴³⁰

d. *Vacating discharge.*—It has been held that when, after discharge granted, it appears that a creditor has been bought off, this is *prima facie* evidence that the debtor was not entitled to discharge, and his discharge will be vacated.⁴³¹ A discharge will not be vacated on the application of a creditor whose claim will not be affected by the discharge.^{431a} Ignorance of counsel as to a rule of court regarding the time to offer evidence to sustain objections to a discharge is not a sufficient reason for vacating the order of discharge.^{431b}

423. In re Kuffler (D. C., N. Y.), 19 Am. B. R. 181, 153 Fed. 667.

424. In re Kaufman (D. C., N. Y.), 14 Am. B. R. 393, 136 Fed. 262, holding that a discharge releasing a partner from firm debts may be amended so as to release him as an individual from any liability on account of the debts of the firm.

425. Matter of Phillips & Co. (D. C., Ga.), 34 Am. B. R. 877, 224 Fed. 628; In re Maher (D. C., Ga.), 22 Am. B. R. 290, 109 Fed. 997.

426. *Delay of discharge.*—A bankrupt's discharge may be delayed for a reasonable time to enable a State court to settle a question as to the claim of a creditor in the exempt property of the bankrupt. Matter of Brown (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

427. *Suit in trover.*—Stay of discharge proper. Steinhauer & Wight, Inc. v. Robin Adair (Ga. Ct. of App.), 40 Am. B. R. 100.

428. Meinhard & Bro. v. Pincus (C. C. A., 5th Cir.), 29 Am. B. R. 619, 200 Fed. 736; In re Woodruff (D. C., Ga.), 2 Am. B. R. 678, 96 Fed. 317; In re Chastleberry (D. C., Ga.), 16 Am. B. R. 159, 143 Fed. 1018; Matter of Brown (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

429. The power to award costs against a creditor who files specifications of objections in opposition to a bankrupt's discharge is inherent in a district court as a court of equity, and may be exercised in proper cases, although such power is not specifically conferred by the bankruptcy act. Such power should, however, not be exercised unless it appears (1) either, on the one hand, that the bankrupt, since his adjudication, has acquired property, out of which costs, if against him, could be paid, or

that there were assets in his estate, against which, in a similar contingency, they would have been chargeable; or, (2) on the other hand, those elements being lacking, that the creditors' objection was without merit and intended solely to vex or delay. In re Wolpert (Ref., N. Y.), 1 Am. B. R. 436.

Where references were provoked by the bankrupt and costs were legitimately incurred for referee's compensation in conducting hearings before him of the specifications opposing the discharge of the bankrupt, these costs should be taxed to the losing party. Bragassa v. St. Louis Cycle Co. (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77.

In the Eastern District of New York a creditor upon filing specifications of objection to the granting of a bankrupt's discharge is required, under Rule 41, to deposit with the referee a sum sufficient to guarantee that the expenses of the reference will be paid. In re Frits (D. C., N. Y.), 23 Am. B. R. 84, 173 Fed. 560.

In the Northern District of New York the costs permitted on application for a discharge are the fees paid the referee and necessary disbursements. The docket fee is not taxable. In re Gaylord (D. C., N. Y.), 5 Am. B. R. 905, 533 Fed. 106.

430. In re Brundin (D. C., Minn.), 7 Am. B. R. 296, 112 Fed. 306; In re Gillardon (D. C., Pa.), 26 Am. B. R. 103, 187 Fed. 289; Matter of Kyte (D. C., Pa.), 26 Am. B. R. 507, 189 Fed. 531.

431. In re Christianson (D. C., N. Dak.), 23 Am. B. R. 710, 175 Fed. 867; In re Kross (D.

a. In general.—A discharge goes to the remedy; it does not cancel the debt. It destroys the remedy on all debts except those falling within the terms of § 17-a, discussed later.⁴³² It does not affect the estate in bankruptcy, so that proved debts may be charged against unadmisistered assets, delivered to the trustee after the closing of the estate,⁴³³ and the trustee may proceed after a discharge to compel the bankrupt to turn over assets that he has concealed.^{432a} Its effect on partnership debts and the debts of corporations has already been considered;⁴³⁴ its effect on the liabilities of codebtors will be examined later.⁴³⁵ It does not affect in any way the surplus remaining in the hands of the trustee of a bankrupt partnership nor the claims of individual creditors against such surplus,⁴³⁶ nor does it have any effect on the right of a trustee to recover any property of the bankrupt unlawfully or fraudulently conveyed.^{436a} But it discharges the bankrupt's personal liability although it does not affect a lien securing such liability.⁴³⁷ A discharge does not determine whether a particular claim is covered by the discharge or is excepted therefrom, that being a matter for subsequent determination.⁴³⁸ In determining the effect of a discharge decisions of the United States Supreme Court are controlling, since the question is a federal one.⁴³⁹

b. On liens.—A discharge is personal to the debtor. It follows, therefore, that a lien in good faith is not affected thereby;⁴⁴⁰ the effect of a discharge being to release the bankrupt's personal liability only.⁴⁴¹ Neither is a judgment evidencing a lien annulled or extinguished except in so far as it imposes a

C., N. Y.), 3 Am. B. R. 187, 96 Fed. 816; *In re Keller* (D. C., N. Y.), 31 Am. B. R. 51, 207 Fed. 118.

430. *In re Gillardon* (D. C., Pa.), 26 Am. B. R. 103, 187 Fed. 289.

431. *In re Dietz* (D. C., N. Y.), 3 Am. B. R. 316, 97 Fed. 563. See also *Bell v. Leggett*, 7 N. Y. 176.

431a. *Matter of Grodzensky* (D. C., Ga.), 40 Am. B. R. 861, 245 Fed. 753.

431b. *Matter of Groves* (D. C., Fla.), 39 Am. B. R. 853, 244 Fed. 197.

432. *Rate v. Am. Smelting & Refining Co.* (Mont. Sup. Ct.), 44 Am. B. R. 332, 184 Pac. 478, citing *Collier on Bankruptcy* (10th ed.) § 663; *Am. Improvement Co. v. Lilienthal* (Cal. Dist. Ct. of App.), 44 Am. B. R. 365, 184 Pac. 692; see for a peculiar case, *In re Clafl* (D. C., Mass.), 7 Am. B. R. 123, 111 Fed. 506. For instance, a debt for clothing purchased by the bankrupt for his children could not be sued after his discharge. *Schellenberg v. Mullaney*, 112 N. Y. App. Div. 384, 16 Am. B. R. 542, 98 N. Y. Supp. 432. A surrogate's court has jurisdiction and it is its duty to give effect to a discharge. *Matter of Peterson* (Surr. Ct., N. Y.), 137 N. Y. App. Div. 435, 22 Am. B. R. 549, 121 N. Y. Supp. 738.

Effect on leases.—A discharge of a debt existing on account of overdue rent is not "payment" within a statute giving a landlord a summary remedy for the eviction of a tenant for non-payment of rent. *Carter v. Sutton* (Ga. Sup. Ct.), 41 Am. B. R. 150, 94 S. E. 760.

433. *Matter of Lighthall* (D. C., N. Y.), 34 Am. B. R. 594, 221 Fed. 791.

433a. *Matter of Levy* (D. C., Pa.), 44 Am. B. R. 248, 261 Fed. 432, aff'd. 45 Am. B. R. 324, — Fed. —; *Matter of Margolis* (C. C. A., 2d Cir.), 45 Am. B. R. 412, 266 Fed. 203.

435. See discussion under Section Sixteen of this work.

436. *Johnson v. Norris* (C. C. A., 5th Cir.), 27 Am. B. R. 107, 190 Fed. 459.

436a. *Matter of Groves* (D. C., Fla.), 39 Am. B. R. 853, 244 Fed. 197.

437. *Jensen v. Dorr* (D. C., of App., Cal.), 23

Cal. App. 701, 33 Am. B. R. 87, 139 Pac. 659; *Butler Cotton Oil Co. v. Collins* (Ala. Sup. Ct.), 40 Am. B. R. 200, 75 So. 975.

438. *Hanan v. Long* (Sup. Ct., App. Div., N. Y.), 150 N. Y. App. Div. 327, 32 Am. B. R. 132, 124 N. Y. Supp. 786.

439. *Butler-Keyser Manufacturing Co. v. Mitchell & Co.* (Ala. Sup. Ct.), 37 Am. B. R. 195, 70 So. 665.

A bankruptcy court in which a discharge has been granted has no jurisdiction to determine the effect thereof in a State court in which an action against the bankrupt is pending or to interfere with the proceedings in the State court. *Matter of Weisberg* (D. C., Mich.), 43 Am. B. R. 616, 253 Fed. 833.

440. Compare *Bankr. Act*, § 67-d; *Am. Bankr. Dig.*, § 1149; *Paxton v. Scott* (Sup. Ct., Nebr.), 66 Nebr. 385, 10 Am. B. R. 80, 92 N. W. 611; *Elsbree v. Burt* (Sup. Ct., R. I.), 24 R. I. 322, 9 Am. B. R. 87, 53 Atl. 60; *Howard v. Cunliff* (Ct. App., Mo.), 96 Mo. App. 67, 10 Am. B. R. 71, 69 S. W. 737; *McDonald v. Taylor* (N. Y. App. Div.), 144 N. Y. App. Div. 329, 26 Am. B. R. 635, 128 N. Y. Supp. 1048. So held in Illinois in respect to an assignment of future earnings. *Mallin v. Wenham*, 209 Ill. 252, 13 Am. B. R. 210, 70 N. E. 564. But see *Leitch v. No. Pac. Ry. Co.*, 95 Minn. 35, 14 Am. B. R. 409, 103 N. W. 704; *In re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 163, 147 Fed. 538. The lien of an execution levied before bankruptcy would not be released by the bankrupt's discharge. *Bassett v. Thackara* (Sup. Ct., N. J.), 72 N. J. L. 81, 16 Am. B. R. 788, 60 Atl. 39. See also *Jensen v. Dorr* (Dist. Ct. of App., Cal.), 23 Cal. App. 701, 33 Am. B. R. 87, 139 Pac. 659; *McCarty v. Light* (Sup. Ct. App. Div., N. Y.), 155 N. Y. App. Div. 86, 33 Am. B. R. 863, 139 N. Y. Supp. 853; *Olsen v. Nelson* (Sup. Ct., Minn.), 125 Minn. 298, 32 Am. B. R. 297, 146 N. W. 1097; *Leslie Paper Co. v. Wheeler* (Sup. Ct., N. Dak.), 23 N. Dak. 477, 32 Am. B. R. 688, 137 N. W. 412; *Frey v. McGaw* (Md. Ct. of App.), 127 Md. 23, 35 Am. B. R. 822, 95 Atl. 960; *McBride v. Gibbs* (Ga. Sup. Ct.), 42 Am. B. R. 328, 96 S. E. 1004; *Monarch Discount Co. v. Chesapeake*

personal liability upon the bankrupt.⁴⁴² The discharge does not affect the right of the trustee or creditors of the bankrupt to have property previously disposed of by the bankrupt for the purpose of fraud, applied to the payment of his debts.⁴⁴³ This doctrine should not, however, be confused with the other which avoids all liens through legal proceedings if within four months of the bankruptcy.⁴⁴⁴ The bankruptcy law does not continue a dischargeable debt for the purpose of permitting a lien to be created after the adjudication, but only to preserve and enforce a lien in existence at the date of the adjudication.⁴⁴⁵ The discharge, when granted, relates back to the date of adjudication,^{446a} and property acquired by the bankrupt, intervening the filing of the petition and the granting of the discharge, is not appropriated to payment of his debts.^{446b} Thus, an assignment of unearned wages to secure a dischargeable debt creates no lien until the wages have been earned and cannot be enforced, as to wages earned after the date of adjudication, after the bankrupt has been discharged,⁴⁴⁶ and a similar rule has been applied to a mortgage on future crops.^{446a}

Am. Ry. Co. (Ill. Sup. Ct.), 42 Am. B. R. 497, 120 N. E. 743; Gray v. Bank of Hartford (Ark. Sup. Ct.), 43 Am. B. R. 166, 208 S. W. 302; Bisby v. Walker (Ia. Sup. Ct.), 45 Am. B. R. 173, 169 N. W. 467; Oilfields Syndicate v. American Improvement Co. (C. C. A., 9th Cir.), 44 Am. B. R. 490, 280 Fed. 905, aff'g. 43 Am. B. R. 325, 256 Fed. 979, citing Collier on Bankruptcy (11th ed.) 402; Am. Improvement Co. v. Lillenthal (Cal. Dist. Ct. of App.), 44 Am. B. R. 365, 184 Pac. 662.

Title acquired after mortgage given.—The discharge of a bankrupt does not obviate the attachment of a mortgage as a lien on property mortgaged where the title was acquired after the mortgage was given. *Bisby v. Walker (Ia. Sup. Ct.) 43 Am. B. R. 173, 169 N. W. 467.*

Effect on lien of mortgage.—Where a plaintiff claiming a lien on property of the bankrupt under a mortgage, brought an action of replevin based on such lien, it is immaterial that the court excluded evidence of the discharge of the defendant in bankruptcy. *Hoesler Manufacturing Co. v. Machajenski (Wis. Sup. Ct.), 163 Wis. 184, 37 Am. B. R. 156, 157 N. W. 702.*

441. Leslie Paper Co. v. Wheeler (Sup. Ct., N. Dak.), 23 N. Dak. 477, 32 Am. B. R. 688, 137 N. W. 412; Butler Cotton Oil Co. v. Collins (Ala. Sup. Ct.), 40 Am. B. R. 200, 75 So. 975.

Effect on exemptions.—A discharge does not affect the lien of a general judgment, nor the lien of a mortgage obtained more than four months prior to the filing of the petition in bankruptcy, relatively to property set apart as exempt under the bankrupt's claim of homestead exemption, although holders of such liens may have proved their claims in bankruptcy. *McBride v. Gibbs (Ga. Sup. Ct.), 42 Am. B. R. 323, 96 S. E. 1004.*

442. Olsen v. Nelson (Sup. Ct., Minn.), 125 Minn. 256, 32 Am. B. R. 297, 146 N. W. 1097.

443. The discharge of a debtor in bankruptcy is personal to the bankrupt and does not release his fraudulent grantees from liability for the fraud committed by them and in no way precludes the trustee from recovering property of the estate thus fraudulently transferred. Stephenson v. Bird (Sup. Ct., Ala.), 168 Ala. 363, 25 Am. B. R. 909, 53 So. 92. A discharge in bankruptcy does not necessarily affect a specific lien, but only releases the bankrupt from personal liability. Newberry Shoe Co. v. Collier (Sup. Ct. of App., Va.), 111 Va. 288, 25 Am. B. R. 130, 68 S. E. 974; Gregory Co. v. Cale (Sup. Ct., Minn.), 115 Minn. 508, 27 Am. B. R. 131, 133 N. W. 75; Robinson v. Tischler (Sup. Ct., Fla.), 99 Fla. 77, 34 Am. B. R. 137, 67 So. 565.

Levy upon exempt property under waiver of

exemption.—A discharge in bankruptcy takes away all personal liability for the debt discharged, but does not affect liens acquired against particular property before the discharge, so that a levy upon property exempt in bankruptcy, made after bankrupt's adjudication, but prior to his discharge, under a judgment entered on a warrant of attorney containing a waiver of exemptions, is not affected by the discharge. *Realty Co. v. Glosio (Pa. Com. Pleas, Alle. Co.), 27 Am. B. R. 53. See In re Harrington (D. C., N. Y.), 29 Am. B. R. 666, 200 Fed. 1010, citing text.*

Fraudulent transfer.—The discharge of a bankrupt does not inure to the benefit of his wife, so as to release property fraudulently conveyed to her from the payment of his debts. *Blick v. Nimmo (Md. Ct. of App.), 121 Md. 139, 30 Am. B. R. 770, 88 Atl. 116.*

Effect upon community property.—An adjudication against a husband in the State of Washington is also an adjudication against the community property and debts, and his discharge, discharges the community. *Gibbons v. Dexter Horton Trust & Savings Bank (D. C., Wash.), 35 Am. B. R. 632, 225 Fed. 424.*

*444. See Bankr. Act, § 67-f. A lien on property of the bankrupt, acquired within four months of the time he was adjudged a bankrupt, is not void unless the bankrupt was insolvent at the time the lien was obtained. Thus, in a State court suit, started within four months before bankrupt's adjudication, to set aside a deed to his wife of land alleged to have been paid for by bankrupt, but conveyed to his wife for the purpose of hindering, delaying and defrauding his creditors, in beginning which suit a *lis pendens* was recorded against the property involved in the suit, a decree had been entered by default declaring complainant's debt to be a lien, as of the date of the recordation of the *lis pendens*, upon such property, which meanwhile had been conveyed to bankrupt and allowed to him as a part of his homestead exemption. The bankrupt subsequently sought to set aside such decree on the ground that the debt had been discharged in bankruptcy and the right to a lien on the homestead property adjudicated against the complainant by the bankruptcy court. It was held, that in the absence of evidence showing that the bankrupt was insolvent at the time the lien attached, the lien was not affected by the discharge in bankruptcy and that the bankruptcy court had no jurisdiction of the homestead property and therefore could not adjudicate the rights of the parties with respect thereto. Newberry Shoe Co. v. Collier (Sup. Ct. of App., Va.), 111 Va. 288, 25 Am. B. R. 130, 68 S. E. 974.*

Likewise an execution *in personam*, founded on a debt provable in bankruptcy, cannot be enforced against the property of a bankrupt acquired subsequent to his discharge.⁴⁴⁷ Liens continuing valid, it often becomes necessary to destroy their effect on possible after-acquired property. Hence, the provisions in the State laws, permitting proceedings to compel the cancellation of docketed judgments barred by a discharge.⁴⁴⁸

445. *In re Harrington* (D. C., N. Y.), 29 Am. B. R. 666, 200 Fed. 1010 (quoting text), holding that since the provisions of the bankruptcy act are paramount to State statutes, the fact that under section 150 of the N. Y. Debtor and Creditor Law, the cancellation of record of such judgment could not be had until after the expiration of a year from bankrupt's discharge, is immaterial.

446a. *Rate v. Am. Smelting & Refining Co.* (Mont. Sup. Ct.), 44 Am. B. R. 332, 184 Pac. 478, citing *Collier on Bankruptcy* (10th ed.) 803.

446b. *Matter of Seal* (D. C., N. Y.), 44 Am. B. R. 556, 261 Fed. 112.

446. *Lien created by assignment of future wages.*—*In re Lineberry* (D. C., Ala.), 25 Am. B. R. 164, 183 Fed. 338; *Leitch v. Northern Pacific Ry. Co.* (Minn. Sup. Ct.), 95 Minn. 35, 14 Am. B. R. 409, 103 N. W. 704; and *In re Home Discount Company* (D. C., Ala.), 17 Am. B. R. 108, 147 Fed. 538, disapproving *Mallin v. Wenham* (Ill. Sup. Ct.), 200 Ill. 252, 13 Am. B. R. 210, 70 N. E. 504; *Rate v. Am. Smelting & Refining Co.* (Mont. Sup. Ct.), 44 Am. B. R. 332, 184 Pac. 478, citing *Collier on Bankruptcy* (10th ed.), p. 363. See also *Jefferson Transfer Co. v. Hull* (Wis. Sup. Ct.), 40 Am. B. R. 844, 160 N. W. 1. *Contra: Ratlines v. Levi* (Mass. Sup. Jud. Ct.), 42 Am. B. R. 712, 121 N. E. 500.

Garnishment.—An execution issued pursuant to section 1301 of the New York Code of Civil Procedure against a bankrupt's salary more than four months prior to the filing of the petition in bankruptcy does not create a specific lien upon income or earnings not yet due until after the discharge and satisfaction of the debt upon which the execution is issued. *Brenen v. Dahlstrom, etc., Door Co.* (N. Y. App. Div.), 44 Am. B. R. 386, 189 App. Div. (N. Y.) 685.

446a. *Butler Cotton Oil Co. v. Collins*, 40 Am. B. R. 200, 75 So. 975.

In the case of *In re West* (D. C., Or.), 11 Am. B. R. 782, 128 Fed. 205, the court said: "The theory of a lien upon the earnings of future labor is not that it attaches to such earnings from the moment of contract of pledge or assignment, but from the moment of their existence. It is needless to say that there can be no lien upon what does not exist. A pledge or assignment of future earnings in such a case is said to create an equitable interest in such wages. *Stott v. Frany*, 20 Or. 410, 23 Am. St. Rep. 132, 26 Pac. 271. This is true of wages earned upon a general employment, as well as those earned upon a definite contract. In this case the railroad company was under no obligation to employ the bankrupt, nor he to work for the company. If future earnings in such a case can be said to have a potential existence, they are the subject of an agreement for a lien; but the lien, or so-called equitable interest, does not attach until the wages come into existence, and until the lien does attach, there is no lien. The discharge in bankruptcy operated to discharge these obligations as of the date of the adjudication, so that the obligations were discharged before the wages intended as security were in existence. The law does not continue an obligation in order that there may be a lien, but only does so because there is one. The effect of the discharge upon the prospective liens was the same as though the debts had been paid before the assigned wages were earned. The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors. *Collier on Bankruptcy*, 809.

These debts cannot escape the operation of the Bankruptcy Law by an agreement for a lien upon what the debtor expected to earn, but did not earn until after the adjudication in bankruptcy."

447. *Peterson v. Calhoun* (Sup. Ct., Ga.), 137 Ga. 799, 32 Am. B. R. 854, 74 S. E. 519.

448. *In New York*, see § 1268 of the N. Y. Code of Civil Procedure; *Hussey v. Judson*, 43 N. Y. Misc. 370, 11 Am. B. R. 521, 87 N. Y. Supp. 490; *Matter of Peterson* (Surr. Ct., N. Y.), 137 N. Y. App. Div. 435, 22 Am. B. R. 549, 121 N. Y. Supp. 788. Only judgments entered before discharge are affected by this section. *Howe v. Noyes*, 47 N. Y. Misc. 333, 15 Am. B. R. 103, 98 N. Y. Supp. 841. See also *In re Harrington* (D. C., N. Y.), 29 Am. B. R. 666, 200 Fed. 1010, quoting text; *Nalbach v. Nalbach* (Pa. Com. Pl.), 45 Am. B. R. 208.

In Georgia the lien of a judgment obtained within four months of filing the petition in bankruptcy is not barred by the defendant's discharge. *McKenney v. Cheney*, 118 Ga. 387, 11 Am. B. R. 54, 45 S. E. 433; *In re Weaver* (D. C., Ga.), 16 Am. B. R. 265, 144 Fed. 229.

Effect in California as to excess over homestead exemption.—Plaintiff recovered judgment against defendant who was thereafter adjudged a bankrupt and subsequently received a discharge in bankruptcy. Plaintiff's claim, evidenced by the judgment, was one provable in bankruptcy. A judgment, under the law of California, is not a lien upon property covered by a valid declaration of homestead, regardless of its value, and the levy of an execution thereon creates no lien, but simply serves as a foundation for statutory proceedings to subject the excess above the statutory homestead exemption to the satisfaction of the judgment. At the time of defendant's discharge in bankruptcy no such proceeding had been initiated. Held, that the judgment was merely a personal liability released by defendant's discharge, so as to bar any proceeding to enforce it and that an execution, levied as a prerequisite to a proceeding to reach defendant's homestead property in excess of the statutory amount should be quashed and set aside. *Boggs v. Dunn* (Cal. Sup. Ct.), 100 Cal. 283, 26 Am. B. R. 816, 116 Pac. 743.

North Dakota statute.—*In Leslie Paper Co. v. Wheeler* (Sup. Ct., N. Dak.), 23 N. Dak. 477, 32 Am. B. R. 688, 137 N. W. 412, the court construed chapter 125 of Session Laws 1905 of North Dakota to mean that the legislative intent in the enactment thereof was merely to authorize the cancellation and satisfaction of record of such judgments only as are affected by a discharge in bankruptcy; and held that the legislative purpose was merely to give record notice that judgments extinguished by the bankruptcy proceedings no longer have any vitality to attach as liens to real estate subsequently acquired.

Judgment affecting property of third person.—When it appears that a judgment against a person discharged in bankruptcy may be a lien on property owned by a person not a party to the proceeding for cancellation of the judgment an absolute satisfaction of the judgment should not be ordered. *Olsen v. Nelson* (Sup. Ct., Minn.), 125 Minn. 290, 32 Am. B. R. 297, 148 N. W. 1,097.

449. N. Y. Code Civil Procedure, § 1291.

450. *Ulmer v. Doran*, 167 N. Y. App. Div. 269, 34 Am. B. R. 410, 111 N. Y. Supp. 1148. And see *In re Sims* (D. C., N. Y.), 23 Am. B. R. 890.

c. On lien of garnishee execution.—Where it is provided by State statute that an execution under a judgment becomes and continues a lien upon wages, earnings, salary, income from trust funds, and the like, to the amount prescribed, until such execution is fully satisfied,⁴⁴⁹ the earnings and income which become due after the discharge, belong to the bankrupt, and the order directing the levy upon such earnings and income should be modified.⁴⁵⁰

d. Discharge must be pleaded.—Being a bar to the remedy it must be pleaded.⁴⁵¹ The right to plead a discharge is personal to the bankrupt and where he does not rely thereon it cannot be set up by another.^{451a} The better practice is to procure a stay of all pending suits and to stay those that may be brought while the proceeding is pending, and then, when the discharge is granted, to plead it.⁴⁵² It seems, however, that a judgment entered after a petition is filed, but before the discharge, is a mere debt, and the discharge can be used as a bar to proceedings to enforce it. A judgment entered after the discharge, no matter when the suit was begun, is valid even as to the discharge; by not pleading it, the defendant has waived its benefits.⁴⁵³

XIV. EFFECT OF COMPOSITION.

This subject has already been discussed in another place.⁴⁵⁴ A composition in bankruptcy may be pleaded in bar of an action upon a debt discharged, and in order to be available it must be so pleaded.⁴⁵⁵ So long as an order confirming a composition stands, it must have the effect given it by this section, viz., the discharge of the bankrupt from his debts, "other than those agreed to be

176 Fed. 645, holding that wages which arise from services rendered after the petition is filed, are covered by the discharge and that a stay should be issued preventing levy after that time.

451. In re Rhutassel (D. C., Iowa), 2 Am. B. R. 697, 96 Fed. 597; Schreiber v. Shomaker Piano Forte Mfg. Co., 152 N. Y. App. Div. 817, 28 Am. B. R. 858, 137 N. Y. Supp. 747; First Nat'l Bank of Broadway v. Cootes (Sup. Ct., W. Va.), 74 W. Va. 112, 32 Am. B. R. 361, 81 S. E. 844 (citing Collier on Bankruptcy [8th ed.] 294); Bryan v. Orient Lumber & Coal Co. (Okla. Sup. Ct.), 37 Am. B. R. 206. See also discussion under section 17-IV, post, p. 448.

The burden of proof is on a judgment creditor to show that his claim is not barred by the debtor's discharge in bankruptcy; and where the question is to be disposed of from the facts alleged in the creditor's pleading, it must be construed in favor of the bankrupt. Matter of Grout (Sup. Ct., Vt.), 88 Vt. 318, 33 Am. B. R. 789, 92 Atl. 646; Schweigert-Ewald Lumber Co. v. Bauman (N. Dak. Sup. Ct.), 43 Am. B. R. 658, 172 N. W. 808; Matter of Weisberg (D. C., Mich.), 42 Am. B. R. 616, 253 Fed. 833. Compare Smith v. Hill (Mass. Sup. Ct.), 43 Am. B. R. 188, 122 N. E. 810.

Where a discharge in bankruptcy is pleaded as a defense to an action, and the plea is traversed, the burden is upon the defendant to prove his discharge; and, to carry this burden, he must put in evidence a certified copy of the order granting the discharge. Williams v. First Nat. Bank (Ga. Ct. of App.), 40 Am. B. R. 449, 94 S. E. 73.

In an action by a subsequent indorser against a prior bankrupt indorser, in which the defendant introduced in evidence a certified copy of the final order of discharge, the burden of proof was upon the plaintiffs to show that the debts were not duly scheduled, and that they had no notice of the bankruptcy proceedings. Mannheim v. Loewe (N. Y. App. Div.), 42 Am. B. R. 606, 185 App. Div. (N. Y.) 601.

A creditor is not guilty of contempt of the

bankruptcy court merely by taking proceedings in a State court to enforce a dischargeable claim, even with knowledge that the bankrupt has obtained a discharge. Matter of Weisberg (D. C., Mich.), 42 Am. B. R. 616, 253 Fed. 833.

451a. Alabama Great Southern Ry. v. Crawley (Miss. Sup. Ct.), 42 Am. B. R. 62, 79 So. 94.

Judgment on forfeited ballbond.—A bankrupt is not entitled under § 150 of the Debtors and Creditors Law of New York to have a judgment recovered on a forfeited ballbond discharged of record. Matter of Weber (N. Y. Ct. of App.), 32 Am. B. R. 730, 212 N. Y. 290.

452. See generally under Section Eleven of this work. Text quoted in In re Nuttall (D. C., N. Y.), 29 Am. B. R. 500, 201 Fed. 587; Herschman v. Bolster, 220 Mass. 137, 33 Am. B. R. 747, 107 N. E. 543; Crocker v. Bergh, 118 Minn. 316, 34 Am. B. R. 190, 137 N. W. 737.

Effect of § 150 of N. Y. Debtor and Creditor Law.—Where a judgment upon a cause of action ex contractu entered by default has been opened and prior to a second judgment by default the defendant has been discharged in bankruptcy, in which proceeding the plaintiff's claim was scheduled and the plaintiff given notice, the bankrupt is entitled to a discharge of the judgment under this section, and the fact that the bankrupt did not obtain a stay from the bankruptcy court or move to open a default taken subsequently to his discharge is immaterial. Walker v. Muir, 127 App. Div. 163, 21 Am. B. R. 273, 111 N. Y. Supp. 465; Matter of Halper (N. Y. City Ct.), 82 Misc. 205, 31 Am. B. R. 283, 143 N. Y. Supp. 1006; Matter of Weber (Ct. of App., N. Y.), 212 N. Y. 290, 32 Am. B. R. 730, 143 N. Y. Supp. 1149. See also Matter of Boardway (D. C., N. Y.), 41 Am. B. R. 478, 248 Fed. 364.

453. Herschman v. Bolster (Sup. Jud. Ct., Mass.), 220 Mass. 137, 33 Am. B. R. 747, 107 N. E. 543; Matter of Boardway (D. C., N. Y.), 41 Am. B. R. 478, 248 Fed. 364.

A discharge does not ipso facto oust the jurisdiction of the State court to render judgment. First Natl. Bank v. Cootes (Sup. Ct., W. Va.), 74 W. Va. 112, 32 Am. B. R. 361, 81

paid by the terms of the composition and those not affected by a discharge," and the order of confirmation can only be set aside within the time limited by section 12.⁴⁵⁶ But where an objecting creditor has filed specifications against discharge he is entitled to be heard on appeal on their merits, and his rights cannot be prejudiced by the vote of a majority of the other creditors expressing satisfaction with a proposed compromise.⁴⁵⁷ Where the discharge by order confirming a composition states that the bankrupt has not been guilty of any of the acts which would constitute a bar to the bankrupt's discharge and which composition was opposed by a creditor who alleged that the bankrupt had been guilty of a false statement inducing a sale to him on credit, such creditor is not barred from bringing a subsequent action based on the same deceit alleged as a basis for his opposition to the confirmation of the composition.⁴⁵⁸

S. E. 844, citing *Collier on Bankruptcy* (8th ed.), 294.

454. See under Section Twelve, *ante*.

A liquidating trustee to whom the assets of a bankrupt are transferred, pursuant to a composition agreement duly approved by the Federal court is a trustee for creditors and authorized by section 19 of the New York State Personal Property Law to maintain an action to set aside a fraudulent transfer by the alleged bankrupt, notwithstanding section 14 of the Bankruptcy Act. *Kobre Assets Corp. v. Baker* (N. Y. Sup. Ct.), 39 Am. B. R. 276, 178 App. Div. 62.

455. *Consolidated Rubber Tire Co. v. Equipment Co.*, 121 N. Y. App. Div. 764, 19 Am. B. R. 862, 864, 106 N. Y. Supp. 599. Effect of composition as discharge of bankrupt's liability as indorser, see *Easton Furniture Mfg. Co. v. Camines* (N. Y. App. Div.), 146 N. Y. App. Div. 436, 27 Am. B. R. 29, 131 N. Y. Supp. 157.

456. *In re Jersey Island Packing Co.* (D. C., Cal.), 18 Am. B. R. 417, 152 Fed. 839; *In re Wilkens* (D. C., N. Y.), 27 Am. B. R. 225, 191 Fed. 94; *Greenberger v. Schwartz* (Pa. Sup. Ct.), 42 Am. B. R. 239, 104 Atl. 574; *Am. Improvement Co. v. Lillenthal* (Cal. Dist. Ct. of App.), 44 Am. B. R. 365, 184 Pac. 692; *Oilfields Syndicate v. American Improvement Co.* (C. C. A., 9th Cir.), 44 Am. B. R. 490, 260 Fed. 905, affg. 43 Am. B. R. 325, 256 Fed. 979.

The word "discharge" in the last phrase of this subdivision refers to a discharge of the bankrupt after adjudication and does not refer to a composition before adjudication. *Oilfields Syndicate v. American Improvement Co.* (D. C., Cal.), 43 Am. B. R. 325, 256 Fed. 979.

Claim of indorser on note proved by indorsee.—The effect of a confirmation is to discharge absolutely the liability on a note given by the bankrupt and proven by the indorsee and the original payee cannot thereafter base a claim upon such note. *Matter of American Paper Co.* (D. C., N. J.), 40 Am. B. R. 121, 243 Fed. 753.

Effect on time of filing claims.—A creditor under a composition agreement which has been confirmed by the court is not relieved from filing his claim within one year by virtue of section 12c of the Bankruptcy Act. *Matter of Bickmore Shoe Co.* (D. C., Ga.), 45 Am. B. R. 24, 263 Fed. 926.

457. *Matter of Doyle* (C. C. A., 2d Cir.), 34 Am. B. R. 28, 220 Fed. 434.

458. *Friend v. Talcott*, 228 U. S. 27, 30 Am. B. R. 31, 57 L. Ed. 718.

SECTION FIFTEEN.

DISCHARGES, WHEN REVOKED.

§ 15. **Discharges, when Revoked.**—*a* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Analogous provisions: In U. S.: Act of 1867, § 34, R. S., § 5120; Act of 1841, § 4; Act of 1800, § 34.

In Eng.: Act of 1890, § 8 (8).

In Can.: None.

Cross-references: To the law: Jurisdiction to revoke discharges, § 2(12).

Proceedings on setting aside composition, § 13.

Discharges, when granted and practice thereon, § 14.

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DISCHARGES, WHEN REVOKED.

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I. COMPARATIVE LEGISLATION.

a. *Revocation under English act.*—There is no equivalent section in the English law, though a bankrupt's discharge may be revoked in certain cases as a penalty.¹

b. *Under our former laws.*—Our law of 1800, in effect, permitted the impeachment of a discharge whenever or wherever pleaded on any grounds which might have been urged against it in the court of bankruptcy. The act of 1841 provided for a like impeachment on a showing of "some fraud or a wilful concealment by him of his property, . . . contrary to the provisions of this act." The law of 1867, for the first time, provided for a direct proceeding to revoke. The sole ground of revocation, as under the present law, was that the discharge "was fraudulently obtained." The practice on such applications was also provided for; and the limitation was two years, instead of one.²

II. JURISDICTION TO REVOKE DISCHARGE.

a. *Collateral attack.*—The decisions under the law of 1867 on the question as to whether a discharge could be collaterally attacked were not entirely uniform, though the weight of authority was that a discharge once granted was not subject to attack elsewhere.³ There can be little doubt that this is the rule under the present law.⁴ The very nature of the proceeding results in the doctrine that the granting of a discharge is an adjudication between the bankrupt and all parties duly scheduled or with notice, amounting to *res adjudicata* that no other court will allow to be impeached.⁵ Besides, the present law, like its predecessor, declares that such discharge, "not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made."⁶

1. Eng. Act of Bankruptcy, § 8(8); General Rules, 240(3), 244-a.

2. § 34, Act of 1867, R. S., § 5,120.

3. *Dusenberry v. Hoyt*, 53 N. Y. 521; *Black v. Blazo*, 117 Mass. 17; *Corey v. Ripley*, 57 Me. 69; *Commercial Bank v. Buckner*, 20 How. 108; *In re Witkowski*, Fed. Cas. 17,920; *Stevens v. Brown*, 11 N. B. R. 568. *Contra*: *Perkins v. Gay*, 3 N. B. R. 772; *Beardsley v. Holl*, 36 Conn. 270.

4. Remedy by statute is exclusive and an order of discharge may not be questioned or attacked collaterally in any court, State or

Federal. The bankrupt cannot surrender or vacate his discharge. *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982; *Custard v. Wiggerson*, 130 Wis. 412, 17 Am. B. R. 337, 110 N. W. 263.

5. *Hudson v. Bingham*, 8 N. B. R. 494, and cases there cited; *Reed v. Bullington*, 49 Miss. 223, and cases cited.

6. Bankr. Act. § 21-f.

A certified copy of an order granting a discharge to a bankrupt cannot be impeached collaterally. *Custard v. Wiggerson*, 130 Wis. 412, 17 Am. B. R. 337, 110 N. W. 263.

b. **Jurisdiction to revoke is exclusive.**—It follows, also, under well-known canons of interpretation, that, this method of revocation being prescribed, it excludes all other methods in other courts,⁷ provided the invalidity of the discharge is based on one or more of the grounds specified in the act.⁸ It also excludes any other method amounting to an actual revocation, even in a court of bankruptcy. It seems, however, that such a court has still the usual jurisdiction, where there is no other remedy, to vary, recall, or annul its orders, including, of course, a discharge if application is seasonably made and justice requires it.⁹ In actual practice, the only difference between such an annulment and a revocation proper is that, in the former, a valid discharge may subsequently be granted; while, in the latter, the determination is final, subject, of course, to appeal.¹⁰

III. MEANING OF SECTION.

a. **In general.**—The striking similarity between this section and § 13, relative to the setting aside of a composition, both in phrasing and in purpose, should be noted. So also should the fact that the revocation of a discharge lifts the bar as to all debts, while § 17 chiefly has to do with those debts to which a discharge is never a bar.¹¹ This section does not apply where the discharge results by operation of law from the confirmation of the bankrupt's offer of composition.¹² The meaning of the various words and clauses is briefly discussed below.

b. **"Parties in interest."**—This phrase is used elsewhere in the statute. It has the same meaning as where the phrase is used in § 14, authorizing an objection to a discharge on the grounds therein stated. It may mean more than "creditor," but usually is an equivalent. It includes only those persons whose rights would be barred by the discharge.¹³ Only such persons can apply for a revocation.¹⁴ A creditor is not prevented from being a party in interest because

7. *Corey v. Ripley*, 57 Me. 69; *Commercial Bank v. Buckner*, 20 How. 108; *Nicholas v. Murray*, Fed. Cas. 10,223; *Way v. Howe*, 4 N. B. R. 677, 108 Mass. 502.

8. *Poillon v. Lawrence*, 77 N. Y. 207.

9. *In re Dupee*, Fed. Cas. 4,183; *In re Buchstein*, Fed. Cas. 2,076; *In re Dietz* (D. C., N. Y.), 3 Am. B. R. 316, 97 Fed. 563; *In re Bimberg* (D. C., N. Y.), 9 Am. B. R. 601, 121 Fed. 942. But compare *In re Rudwick* (D. C., Mass.), 2 Am. B. R. 114, 93 Fed. 787.

10. **Collateral attack in equity suit.**—In order to revoke a discharge, application must be made under section 15 to the bankruptcy court whose jurisdiction is exclusive; and the District Court has no jurisdiction to entertain a suit brought, not in such court as a court of bankruptcy, but under its general equitable jurisdiction, which collaterally attacks and seeks to set aside an order of discharge. *Atlantic Dynamite Co. v. Reger* (D. C., W. Va.), 29 Am. B. R. 659, 200 Fed. 1,002, quoting the above paragraphs a and b of the text with approval.

11. See discussion under Section Seventeen, post; *In re Mussey* (D. C., Mass.), 3

Am. B. R. 592, 99 Fed. 71; *In re Rhutassol* (D. C., Iowa), 2 Am. B. R. 697, 97 Fed. 951.

12. *In re Jersey Island Packing Co.* (D. C., Cal.), 18 Am. B. R. 417, 152 Fed. 839.

13. Compare Bankr. Act, § 17; *In re Fowler*, Fed. Cas. 4,999.

14. **Parties in interest.**—*In re Chandler* (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637; *Matter of Levy* (D. C., N. Y.), 36 Am. B. R. 181, 227 Fed. 1,011, holding that a creditor whose claim is wiped out by the discharge, but who would have the right to proceed against the debtor if the discharge were revoked is a "party in interest" within the meaning of this section.

Creditors who have not been notified of the bankruptcy proceedings are not estopped from asserting their rights by the bankrupt's discharge and, hence, are not "parties in interest." *In re Monroe* (D. C., Wash.), 7 Am. B. R. 706, 114 Fed. 398.

A wife who has failed to prove her claim for alimony in the bankruptcy proceedings, of which she had notice, is not a "party in interest." *Arrington v. Arrington* (D. C., N. Car.), 13 Am. B. R. 89, 132 Fed. 200. See cases cited in notes under Bankr. Act, § 14, subheading "Specifications of objections."

his claim is barred for failure to prove it within a year from the adjudication as required by § 57-n.¹⁵ It must appear that the creditor was such at the time of the bankruptcy.¹⁶ But the failure of a creditor to file proof of a claim, duly scheduled, has no bearing on his application for a discharge.¹⁷ A bankrupt cannot surrender or vacate his discharge. He may revive a discharged debt by a new promise, or waive his discharge by failing to plead it when sued, but he cannot vacate the order of discharge.¹⁸ It has been held, however, that a bankrupt may be permitted to open his discharge for the purpose of correcting a mistake in the schedules presumably made by his attorney.¹⁹

c. "Undue laches."—The meaning of this phrase, which, however, did not occur in the former law, is indicated by the cases decided under it, some of which are cited in the foot-note.²⁰ Each case turns on its own facts.²¹ It will at once be seen that these words are a limitation on those discussed in the next paragraph. Laches may prove a bar inside the year.

d. "Within one year."—This is a limitation and is strictly construed.²² The year undoubtedly begins to run from the date of the order of discharge.²³ While an application for revocation thus cannot be made after the year has elapsed, it is thought that application to the court to vary or annul the order

15. In re Bimberg (D. C., N. Y.), 9 Am. B. R. 601, 121 Fed. 942. But see Arrington v. Arrington (D. C., N. Car.), 13 Am. B. R. 89, 132 Fed. 200, holding that where a wife failed to prove her claim for alimony in the bankruptcy proceedings of which she had notice, her petition to have her husband's discharge set aside must be dismissed.

16. In re Chandler (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637, in which the court said: "We are of the opinion that the petition should have shown that the petitioners had at the time provable debts against the bankrupt, which were affected by his discharge. Otherwise they are not 'parties in interest,' within the meaning of the statute."

17. Matter of Walsh (D. C., N. Y.), 32 Am. B. R. 521, 213 Fed. 643. But see Arrington v. Arrington (D. C., N. Car.), 13 Am. B. R. 89, 132 Fed. 200, holding that a failure to prove a provable claim by a creditor who had notice of the proceedings may constitute laches.

18. In re Shaffer (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

19. Opening discharge to amend schedule.—In re McKee (D. C., N. Y.), 21 Am. B. R. 306, 165 Fed. 269, holding that, where upon a petition showing liabilities but no assets the members of a partnership were adjudicated bankrupts and granted a discharge, and upon their application made within the year of adjudication for leave to open the discharge, amend the schedules and proceed, it appears that at the time of the adjudication, there was an action pending against them on notes to which they had pleaded an unliquidated counterclaim, but by mistake neither the liability of the suit nor the possible asset represented by the counterclaim

was included in the schedules, the application for leave to open the discharge and to amend the schedules will be granted.

Where a bankrupt makes a sincere and honest effort to schedule a creditor, and a mistake is made as to the identity of the creditor, the estate should be reopened and the bankrupt given a chance to make his schedules conform to the facts. Matter of Adams (D. C., Ga.), 40 Am. B. R. 22, 242 Fed. 335.

20. In re Buchstein, Fed. Cas. 2,076; In re Murray et al., Fed. Cas. 9,953; In re McIntire, Fed. Cas. 8,823; In re Beck, 31 Fed. 654.

21. Undue laches, what constitutes.—In re Oleson (D. C., Iowa), 7 Am. B. R. 22, 110 Fed. 796; In re Hawk (C. C. A., 8th Cir.), 8 Am. B. R. 71, 114 Fed. 916; In re Downing (D. C., N. Y.), 28 Am. B. R. 778, 190 Fed. 329, holding that creditors who have taken an active part in the bankruptcy proceedings who, without reasonable excuse, delay for eight months after having received notice of the bankrupt's discharge to move for revocation, are guilty of laches.

Where the knowledge of fraud of the bankrupt did not come to creditors petitioning for a revocation of the discharge until after it was granted, the petitioners are not guilty of laches. In re Griffin Bros. (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537.

An application to revoke a discharge granted without objection, made by a creditor who failed to file objections within the time granted for that purpose, will be denied upon the ground of undue laches. In re Upson (D. C., N. Y.), 10 Am. B. R. 758, 124 Fed. 980.

22. Text cited in Matter of Bimberg (D. C., N. Y.), 9 Am. B. R. 601, 121 Fed. 942.

23. In re Shaffer (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

When to run.—In an action for revocation on the ground of fraud, the limitation begins to run from the date of the discharge and not from the discovery of the fraud. Mall & Co. v. Ullrich, 37 Fed. 653; In re Brown, Fed. Cas. 1,983, 19 N. B. R. 312.

may be made after that time, though a court will properly refuse such an application when plainly for the purpose of avoiding this limitation.²⁴

e. "Upon a trial."—The right to a jury trial in bankruptcy cases is fully discussed later.²⁵ It is very doubtful whether, under the present law, an application for revocation of a discharge can be submitted to a jury.²⁶ As stated elsewhere, a hearing before the judge or a special master is a trial.²⁷ But the referee, as such, can no more hear such an application than he can one for a discharge.

f. "Obtained through the fraud of the bankrupt."—These words are not essentially different from those in the former law.²⁸ Fraud is the only ground for revoking a discharge, as will appear hereafter.²⁹

g. "Facts did not warrant the discharge."—The section by these words makes it incumbent upon the applicant to plead and prove that the facts did not warrant the discharge.³⁰ These words are new. In actual practice they can mean little more than what is expressed in "obtained through the fraud of the bankrupt."

IV. GROUNDS FOR REVOCATION.

a. **Fraud as only ground.**—The section authorizes the revocation of the discharge "if it shall be made to appear that it was obtained through the fraud of the bankrupt." Fraud is thus the only ground specified in the statute for which a revocation may be granted.³¹ Coupled with the fraud in obtaining the discharge, grounds which would have originally prevented the granting of the discharge, had they been known and presented in time in the form of objections to its allowance, must be shown.³² If the bankrupt in obtaining his discharge submitted to the court a false affidavit as to giving notice to his creditors of his application therefor, the court would doubtless revoke the discharge.³³

b. **What constitutes fraud for such purpose.**—It would seem that the fraud required to be shown means fraud in fact,³⁴ as the intentional omission of

24. In re Dunee, Fed. Cas. 4,183; In re McKee (D. C., N. Y.), 21 Am. B. R. 306, 165 Fed. 269.

25. See discussion under Section Nineteen of this work.

26. See p. 409, *ante*.

27. See p. 361, *ante*.

28. § 34, Act of 1867, R. S., § 5,120.

29. In re Myers (D. C., N. Y.), 3 Am. B. R. 722, 100 Fed. 775; In re Shaffer (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

30. In re Toothaker Bros. (D. C., Ct.), 12 Am. B. R. 99, 128 Fed. 187, holding that facts need only be set forth sufficient to have warranted a refusal of discharge; it is not necessary to allege as a conclusion of law that the "facts did not warrant the discharge."

31. In re Meyers (D. C., N. Y.), 3 Am. B. R. 722, 100 Fed. 775; In re Shaffer (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982; In re Hansen (D. C., Or.), 5 Am. B. R. 747,

107 Fed. 252; In re Fritz (D. C., N. Y.), 23 Am. B. R. 84, 173 Fed. 560.

32. In re Griffin Bros. (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; In re Wright (D. C., N. Y.), 24 Am. B. R. 437, 177 Fed. 578, holding that the fraud by which the discharge was obtained must have related to fraud theretofore knowingly practiced by the bankrupt. It must have been an actual fraud, such as could have been urged against the granting of the discharge. See also In re Cuthbertson (D. C., So. Dak.), 29 Am. B. R. 823, 202 Fed. 266.

33. Matter of Walsh (D. C., N. Y.), 32 Am. B. R. 521, 213 Fed. 643.

34. The fraud required to be shown is fraud in fact, involving moral turpitude or intentional wrong, and does not include implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. In re Cuthbertson (D. C., S. Dak.), 29 Am. B. R. 823, 202 Fed. 266.

assets,³⁵ or of a creditor,³⁶ from the schedules. Thus, where the omission was due to mistake in law and the trustee was informed of the property,³⁷ or where the fraud complained of was committed years before the bankruptcy;³⁸ revocation will not usually be decreed. It was held under the former law that pleading and proof were limited to such acts as would have been available objections to the discharge.³⁹ It may be, however, that this is not now the law; it would seem that any act which amounts to a fraud committed by the bankrupt while obtaining his discharge is sufficient.⁴⁰ His verified petition for discharge may be so phrased as to make many acts or omissions in the bankruptcy, antedating the discharge proceeding, proper frauds that may be asserted on an application of this character. On the other hand, what might have been objections to a discharge may not prove available grounds for revocation. Thus, cases are possible, though not likely, where false swearing in the proceeding may not be a fraud on creditors; refusal to obey a lawful order is usually but a contempt of court. As a rule, however, through the link of the petition for discharge, objections to discharge are, if discovered after the discharge available in proceedings to revoke. It should also appear that grounds exist which, if presented on the application for a discharge, would have prevented the grant thereof.⁴¹ The buying of a creditor's claim for the purpose of defeating the bankrupt act is a ground for revocation.⁴²

c. Knowledge of fraud.—The section requires that "knowledge of the fraud has come to the petitioner since the granting of the discharge." This is essential,⁴³ and, therefore, jurisdictional. Knowledge of the petitioner's attorney has been held to be his knowledge, and revocation refused where it antedates the discharge.⁴⁴ Similar words will be found in the law of 1867.⁴⁵ The pur-

35. In *re Meyers* (D. C., N. Y.), 3 Am. B. R. 722, 100 Fed. 777; In *re Augenstein*, 16 N. B. R. 252; In *re Roosa* (D. C., Iowa), 9 Am. B. R. 531, 119 Fed. 542, holding that where the bankrupt makes no reference in her schedules to her interest in her father's estate, which was vested in her when she filed her petition, and subsequently conveys the same by warranty deed for more than sufficient to pay her debts in full, her discharge must be revoked and set aside upon the application of a creditor, to whom, through the fraud of the bankrupt, notice of the application for discharge was sent to a wrong address. Compare In *re Cuthbertson* (D. C., So. Dak.), 29 Am. B. R. 823, 202 Fed. 266, holding that where the bankrupt who, prior to bankruptcy, had transferred certain real estate to a trustee, so that he might conduct litigation for the purpose of reducing liens on said land, was advised by her counsel, after stating the situation to him, that she had no interest in the land and that it should not be referred to in her bankruptcy proceedings, her failure to schedule such property, or turn it over to her trustee in bankruptcy, did not constitute such fraud as would warrant the revocation of her discharge.

Evidence insufficient.—*Gage v. Penfield* (C. C. A., 7th Cir.), 41 Am. B. R. 322, 249 Fed. 961.

36. *Symonds v. Barnes*, 6 N. B. R. 377; In *re Herrick*, Fed. Cas. 6,419.

37. In *re Hansen* (D. C., Or.), 5 Am. B. R. 747, 107 Fed. 252.

38. In *re Hoover* (D. C., Pa.), 5 Am. B. R. 247, 105 Fed. 354; In *re Corwin*, Fed. Cas. 3,259.

39. This was due to the phrasing of § 34 of that law, which see. Note, also; *Ashley v. Robinson*, 29 Ala. 112; *Poillon v. Lawrence*, 77 N. Y. 207, 214.

40. For instance, *Batchelder v. Low*, 43 Vt. 662; *Alston v. Robinett*, 37 Tex. 56.

41. In *re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 637; In *re Oliver* (D. C., N. J.), 13 Am. B. R. 582, 133 Fed. 832, holding that a petition for revocation which contains no allegation showing a violation of § 14 is defective and must be dismissed.

42. *Matter of Luftig* (D. C., Mass.), 15 Am. B. R. 773, 162 Fed. 322.

43. Note In *re Marrienneaux's*, Fed. Cas. 9,088. See In *re Cuthbertson* (D. C., S. Dak.), 29 Am. B. R. 823, 202 Fed. 266.

44. In *re Douglas*, 11 Fed. 403; In *re Mauzy* (D. C., W. Va.), 21 Am. B. R. 50, 61, 163 Fed. 900.

45. See § 34, Act of 1867.

pose of this limitation is to restrict this process to those frauds which shall be discovered after the discharge.⁴⁶ Otherwise, an application for revocation would be equivalent to a retrial before appeal.

V. PRACTICE.

It should be borne in mind that, under this section, the power of the judge to revoke a discharge is confined and limited. It must be exercised (a) upon application of parties in interest; (b) within one year after it has been granted; (c) upon a trial in which it must be shown by petitioners that they have (d) not been guilty of undue laches; (e) that the discharge was obtained through the fraud of the bankrupt; (f) that the knowledge of said fraud has come to the petitioners since the granting of the discharge; and (g) that the actual facts did not warrant the discharge. In each and every one of these particulars the burden of proof is upon the petitioners, and each requirement of the statute is absolutely essential to be proven.⁴⁷ The act, and also the rules and forms are silent as to the practice. The application should be made to the judge and not a referee. The trial must be had before the judge unless he refers it to the referee as a special master.⁴⁸ If for revocation, it should be by petition. The petition should show that the petitioners had provable claims.⁴⁹ What has been said touching objections to a discharge should be read in this connection.⁵⁰ The grounds on which the application rests should be strictly pleaded.⁵¹ Allegations should be made showing that knowledge of the facts constituting grounds for the revocation came to the petitioner since the granting of the discharge.⁵² Amendments will sometimes be allowed.⁵³ An amendment should not be permitted after the expiration of a year from the date of the discharge, within which period the application for a revocation is required to be made.⁵⁴ Reasonable notice should be given the bankrupt, and, it is suggested, should be by personal service; under the analogies of the statute, also, the usual ten-day notice to creditors by mail would seem wise.⁵⁵ The practice on the hearing and afterward does not differ from that on a contested dis-

46. In re Mauzy (D. C., W. Va.), 21 Am. B. R. 59, 163 Fed. 900.

47. In re Mauzy (D. C., W. Va.), 21 Am. B. R. 59, 61, 163 Fed. 900.

48. In re Meyers (D. C., N. Y.), 3 Am. B. R. 722, 100 Fed. 775. See, for practice, under § 14, p. 343, *ante*.

49. In re Chandler (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637, holding that simply an allegation that the petitioners are creditors of the bankrupt is insufficient. For form of petition to revoke discharge, see Hagar & Alexander's Bankr. Forms (2d ed.), Form No. 286.

50. See pp. 351-366, *ante*.

51. In re McIntire, Fed. Cas. 8,823; Lathrop v. Stewart, 6 McLean, 630.

A petition is insufficient which fails to show what property by the bankrupt, or what representations were made in his schedules as to the property surrendered by him, or that any creditor was deceived as to the facts, or when the alleged fraud was dis-

covered. Vary v. Jackson (C. C. A., 5th Cir.), 21 Am. B. R. 334, 164 Fed. 840.

52. In re Oliver (D. C., N. J.), 13 Am. B. R. 582, 133 Fed. 832.

53. In re Griffin Bros. (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; In re Oliver (D. C., N. J.), 13 Am. B. R. 582, 133 Fed. 832, holding that where the petition does not show that the knowledge of the alleged facts came to petitioner since the granting of the discharge, but in an affidavit of the petitioner annexed thereto, he swears that he obtained such information after the discharge was granted, the petition may be amended to cure the defect.

54. In re Wright (D. C., N. Y.), 24 Am. B. R. 437, 177 Fed. 578; In re Shaffer (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

Under the prior bankrupt act, such an amendment was not permitted after the expiration of the time limited by the act. In re Sims, 4 Fed. 440; Mall v. Ullrich, 37 Fed. 653.

55. Compare Bankr. Act, § 58, and see under § 14, *ante*.

charge.⁵⁶ But here the moving creditor, it would seem, should conform more strictly to his pleadings.⁵⁷

VI. EFFECT OF REVOCATION OF DISCHARGE.

a. In general.—The revocation of a discharge makes the discharge a nullity, excepting as to those who have acted on the faith of it while operative. The successful party may recover costs.⁵⁸

b. Application of § 64-c.—It is provided in subsection *c* of § 64, in effect, that in case the discharge is revoked the property acquired by the bankrupt since the adjudication of bankruptcy shall be applied in payment in full of claims of creditors who sold such property, and the residue, if any, shall be applied to the payment of debts which were owing at the time of the adjudication. A similar effect is given to the setting aside of the confirmation of a composition.⁵⁹ That after-acquired property may be administered in the pending bankruptcy proceeding is one of the anomalies of the statute.⁶⁰ If the trustee is still undischarged, title to property acquired up to the date of the order revoking vests in the trustee, who must thereupon distribute as provided by this section; if there be no trustee, the case may be reopened and one appointed in the usual way.⁶¹ If there be a surplus, it can be paid only to those creditors in the original proceeding whose claims were filed within a year from the beginning of that proceeding.⁶²

56. See pp. 362-366, *ante*.

57. In *re* Cuthbertson (D. C., So. Dak.),
29 Am. B. R. 829, 202 Fed. 266, citing text.

58. In *re* Holgate, Fed. Cas. 6,601.

59. See pp. 331-334, *ante*.

60. Compare subdivision (c) in § 64; *post*.

61. See Bankr. Act, § 2 (8).

62. In *re* Shaffer (D. C., N. Car.), 4 Am.
B. R. 728, 104 Fed. 982.

SECTION SIXTEEN.

CO-DEBTORS OF BANKRUPTS.

§ 16. **Co-Debtors of Bankrupts.**—*a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

Analogous provisions: In U. S.: Act of 1867, § 33, R. S., 5118; Act of 1841, § 4; Act of 1800, § 34.

In Eng.: Act of 1883, § 30 (4).

In Can.: Act of 1919, § 61.

Cross-references: To the law: Bankruptcy of partners, § 5.

Discharge of bankrupt, when granted, § 14-b.

Revocation of discharge, § 15.

Debts not affected by discharge, § 17.

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I. SCOPE OF SECTION.

a. Declaratory of the law.— This section is declaratory of a general principle of law. It results from two well-settled doctrines: (1) that a discharge in bankruptcy affects only the personal liability of the debtor, and not that liability as to other persons,¹ (2) and that such a discharge is by operation of law and not by consent.² It was well settled under the former law that the principle thus stated applied only to a discharge in bankruptcy,³ and not to any act of the parties affecting a release;⁴ also that, the creditor having still the right to collect from any other person liable on the debt, a pending suit against such other is not affected by the discharge.⁵ The reported cases under that law are thus as applicable now as then.⁶ The section is applicable even though the discharge is effected by the consent of the creditor, as by a composition.⁷ The right to execution or supplementary proceedings against the co-debtor is not affected by the bankruptcy proceedings.⁸

b. Construction.— This section should be strictly construed if in derogation of common-law rights and of the express statutory provision of the State where the question arises.⁹

c. One person as principal and surety.— If the surety is also liable as principal and as such his obligation is discharged in bankruptcy, he will also be discharged as surety; no such anomaly can reasonably exist in the law, as discharging a man who is liable both as principal and surety in one capacity, and not in the other.¹⁰

d. Effect of creditor's acts.— It makes no difference under this section whether the creditor proves his claim and gets his dividend.¹¹ The co-debtor or surety may protect himself by proving the claim, and cannot complain if the debtor does not.¹² When the creditor in effect consents to the discharge — as when he has knowledge of a sufficient objection and does not plead it — the discharge being by operation of law only, the liability of the surety remains.¹³

e. Whether discharged co-debtor is a necessary party.— If one of two or more joint debtors is discharged, and suit is brought on the joint debt, it

1. *Meyer v. Dewey*, 103 U. S. 301; *Stephenson v. Bird*, 168 Ala. 363, 422, 25 Am. B. R. 909, 53 So. 92, 93; *Holland v. Cunliff*, 96 Mo. App. 67, 10 Am. B. R. 71, 69 S. W. 737; *First Nat. Bank of Portal v. Lee* (N. Dak. Sup. Ct.), 25 N. Dak. 197, 34 Am. B. R. 655, 141 N. W. 716.

The rights of a creditor against third parties liable jointly with the bankrupt or secondarily for him are not impaired by the bankrupt's adjudication nor by the bankrupt's discharge. *Polk v. Stephens* (Ark. Sup. Ct.), 118 Ark. 438, 35 Am. B. R. 183, 176 S. W. 689.

2. *Mason v. Bancroft*, 1 Abb. N. C. 415; *Ex parte Jacobs*, 44 L. J. B. 34. See *Anthony v. Sturdivant*, 174 Ala. 521, 27 Am. B. R. 356, 56 So. 571.

3. Compare *In re McDonald*, Fed. Cas. 6,753; *Matter of Benedict* (Ref., N. Y.), 18 Am. B. R. 604.

4. *Brown v. Carr*, 7 Bing. 508; *Sigourney v. Williams*, 1 Grav. 623.

5. *Lewis v. U. S.*, 92 U. S. 418, 23 L. Ed. 513; *In re Levy*, Fed. Cas. 8 297; *Payne v. Albe*, 7 Bush (Ky.), 244; *Linn v. Hamilton*, 34 N. J. 305.

6. See *Cent. Dig.*, Vol. 6, "Bankruptcy," §§ 782-786.

7. *Matter of American Paper Co.* (D. C., N. J.), 42 Am. B. R. 716, 255 Fed. 121. *Contra Matter of Benedict* (Ref., N. Y.), 18 Am. B. R. 604. For cases under present law, see *Am. Bankr. Dig.*, §§ 1137-1145.

8. *In re De Long* (Ref., N. Y.), 1 Am. B. R. 66; *Penny v. Taylor*, Fed. Cas. 10,957.

9. *Matter of Benedict* (Ref., N. Y.), 18 Am. B. R. 604.

10. *Murphy v. Nicholson* (N. J. Ct. of Er. & App.), 87 N. J. L. 278, 34 Am. B. R. 670, 94 Atl. 62.

11. *Clopton v. Spratt*, 52 Miss. 251.

12. See *Bankr. Act*, § 57-1.

13. *In re McDonald*, Fed. Cas. 8,753; *Ex parte Jacobs*, 44 L. J. B. 34.

has been a mooted question whether the discharged joint debtor was a necessary party.¹⁴ Since he can unquestionably be made a party, his discharge being only available in bar, the safer practice is to join him as a defendant.

II. JOINT DEBTS.

a. *Of partners.*—The question of the debts of partners is discussed elsewhere in this work.¹⁵ The words of the section express the rule of law applicable to discharges granted to members of firms as distinguished from partnership discharges. The analogous clause of the former law was held to imply that an individual partner was entitled to a discharge from partnership debts.¹⁶ The same inference follows from the words of the present section.¹⁷

b. *Of co-debtors.*—A like rule applies here as where two parties make a note jointly, or are joint obligors on a bond.^{17a} But, where one of two or more joint obligors have been discharged, the others cannot, it seems, insist on contribution, though this doctrine may well be questioned.¹⁸

III. SURETY DEBTS.

a. *Of indorsers.*—Under the principle stated, the discharge of the maker of a note does not affect the indorser in any way; the holder may proceed and collect the entire debt from him.¹⁹ Familiar principles, however, exonerate the indorser of a demand note, the holder of which is guilty of undue laches in presentment;²⁰ but the liability of an indorser is not discharged even though the creditor accepts payments under a composition agreement.²¹

b. *Of obligors on bonds.*—The rule as to the obligors of bonds is the same. The obligor continues liable though the principal or a co-obligor be discharged.²² This is peculiarly so where the bond runs to the people, bankruptcy

14. *Camp v. Gifford*, 7 Hill, 169. *Contra*: *Jenks v. Opp.*, 43 Ind. 108; *Dorn v. O'Neale*, 6 Nev. 155.

15. See under §§ 5 and 17 of this work.

16. *In re Downing*, Fed. Cas. 4,044. See also, for effect of English discharge on individual liability, *Ex parte Hammond*, L. R., 16 Eq. 614.

17. *Deaf and Dumb Institute v. Crockett*, 117 N. Y. App. Div. 269, 102 N. Y. Supp. 412, 17 Am. B. R. 233. Compare under § 5, *ante*.

17a. *First National Bank v. Hoffman* (Kan. Sup. Ct.), 41 Am. B. R. 350, 171 Pac. 13.

18. *Tobias v. Rogers*, 13 N. Y. 59. But compare *Miller v. Gillespie*, 59 Mo. 220.

19. *National Bank of South Reading v. Sawyer*, 3 N. B. N. Rep. 226; *Smith v. Wheeler*, 55 N. Y. App. Div. 170, 66 N. Y. Supp. 780; *King v. Central Bank*, 6 Ga. 257; *Tiernan Extra. v. Woodruff*, 5 McLean, 350; *Guild v. Butler*, 16 N. B. R. 347; *In re Curtis*, 109 La. 171, 9 Am. B. R. 268, 33 So. 125; *Stauffer, etc., Co. v. Abington Co.* (Sup. Ct., La.), 131 La. 715, 32 Am. B. R. 120, 60 So. 202; *Bromberg v. Self* (Ala. Ct. of App.), 43 Am. B. R. 103, 80 So. 631.

20. *In re Crawford*, Fed. Cas. 3,364.
21. *Matter of Am. Paper Co.* (D. C., N. J.), 42 Am. B. R. 716, 255 Fed. 121. See also *Easton Furniture Co. v. Caminas* (N. Y. App. Div.), 146 N. Y. App. Div. 436, 27 Am. B. R. 29, 131 N. Y. Supp. 157. *Contra*: *Matter of Benedict* (Ref., N. Y.), 13 Am. B. R. 604.

22. *Brown & Brown Coal Co. v. Antezak* (Sup. Ct., Mich.), 164 Mich. 110, 25 Am. B. R. 896, 128 N. W. 774; *Abendroth v. Van Dolsen*, 131 U. S. 66; *In re Stevens*, Fed. Cas. 13,393; *In re De Long* (Ref., N. Y.), 1 Am. B. R. 66; *De Loach v. Kennedy* (Ga. Ct. of App.), 43 Am. B. R. 558,

99 S. E. 314, citing *Collier on Bankruptcy* (11th ed.) 420. See Am. Bankr. Dig., §§ 1133, 1142.

Upon the dissolution of a corporation the bankruptcy of the defendant does not discharge the surety in the dissolving bond. *National Surety Co. v. Medlock* (Ct. of App., Ga.), 2 Ga. App. 665, 19 Am. B. R. 664, 58 S. E. 1131.

Guarantor of lease.—A guarantor of the payment of the rent reserved in a lease is not discharged by the bankruptcy of the tenant. *Witthaus v. Zimmerman*, 91 N. Y. App. Div. 202, 11 Am. B. R. 314, 86 N. Y. Supp. 315.

Appeal bond.—Where the defendant in an attachment suit files a petition in bankruptcy and is finally discharged, his surety on an appeal bond in such an attachment suit is not discharged thereby; and while a judgment may issue against the bankrupt accompanied by a perpetual stay of execution, the surety may be compelled to answer according to the terms of his obligation. *Brown & Brown Coal Co. v. Antezak* (Sup. Ct., Mich.), 164 Mich. 110, 25 Am. B. R. 896, 128 N. W. 774. See also *Chewning v. Knight* (Ala. Ct. of App.), 41 Am. B. R. 254, 77 So. 969.

Forthcoming bond.—If a judgment is duly scheduled, the bankrupt debtor is entitled to a discharge, but nothing in section 67f requires an abrogation of the liability of the sureties on the bankrupt's forthcoming bond that had already become fixed in favor of the judgment creditors. *Evans v. Rea* (Texas Civ. App.), 39 Am. B. R. 333, 193 S. W. 707.

Effect on liability of surety on bond.—The ordinary rule that the release of a principal

not, as a rule, affecting such liabilities.²³ A discharge of a principal on a bond given to secure his faithful performance of a building contract, broken prior to his bankruptcy, releases him from his express obligation to indemnify his surety on such bond in case of loss. If the surety pays the loss he is subrogated to the rights of the creditor for the protection of whom the bond was given.²⁴

c. **Attachment bonds.**—Under the former law, the decisions on this point whether a surety on an attachment bond is released by the bankruptcy of the principal were about equally divided.²⁵ Such bonds being as a rule conditioned to pay a sum of money if the suit should go against the principal, the liability could not arise until the judgment was granted. The bankruptcy intervening, the principal could thus stay the entry of the judgment, and later plead his discharge in bar, and the liability of the sureties thus would never accrue. In these circumstances, the New York rule, resting on the doctrine that the law of 1867 did not dissolve the lien of the attachment and that the bond was a substituted security, held that the plaintiff should be allowed to proceed to judgment, which, if granted, fixed the liability of the sureties.²⁶ The rule under the present bankruptcy act is the same in New York and other States and the creditor is entitled to a special judgment against the bankrupt, execution not to be issued thereon, as a basis for the future action against the surety. And this is so though the attachment was issued within four months of the adjudication.²⁷ On the other hand a rule was adopted in Massachusetts denying the fiction of substituted security and holding that such a bond was a mere personal liability which did not accrue

debtor likewise releases the surety relates to a release by the voluntary action of the creditor, and does not apply to a release or discharge by operation of law as in bankruptcy. *Failor v. Wehe* (Kan. Sup. Ct.), 37 Am. B. R. 311, 158 Pac. 74.

Surety on injunction bond.—Where the liability of a principal and surety on an injunction bond is joint and several, and the liability of the surety does not depend upon the rendition of a judgment against the principal, a discharge in bankruptcy of the principal does not release the surety from liability. *Martin Furniture Co. v. Massey* (Tenn. Sup. Ct.), 37 Am. B. R. 380, 186 S. W. 451.

23. *U. S. v. Knight*, 14 Pet. 315, 10 L. ed. 301; *U. S. v. Herron*, 20 Wall. 251, 22 L. ed. 275; *Rice v. Murphy*, 109 Me. 101, 32 Am. B. R. 665, 82 Atl. 842.

Stay of discharge pending enforcement of rights against garnishees and sureties on garnishment bond, see *In re Maher* (D. C., Ga.), 22 Am. B. R. 290, 169 Fed. 997.

24. *Williams v. United States Fidelity and Guaranty Co.*, 236 U. S. 549, 34 Am. B. R. 181, 59 L. ed. 713, revg. 11 Ga. App. 635, 28 Am. B. R. 802, 75 S. E. 1067.

25. See *Holyoke v. Adams*, 1 Hun (N. Y.), 223, and other cases, *post*.

26. *McCombs v. Allen*, 18 Hun (N. Y.), 190; *affd.* 82 N. Y. 114. See also *In re Albrecht*, Fed. Cas. 145; *Zoller v. Janvrin*, 49 N. H. 114.

27. *In re Maaget* (D. C., N. Y.), 23 Am. B. R. 14, 173 Fed. 232; *Schunack v. Art Novelty Co.* (Sup. Ct., Ct.), 84 Conn. 331,

26 Am. B. R. 731, 80 Atl. 290. See Am. Bankr. Dig. § 1144.

Special judgment against bankrupt and action against surety.—In *U. S. Wind Engine & Pump Co. v. North Pennsylvania Iron Co.*, 227 Pa. St. 262, 75 Atl. 1094, in considering the question, "Is there anything in the law or practice of Pennsylvania to prevent or discountenance a special judgment against one discharged in bankruptcy?" the court said: "The appellee has secured its discharge, and its personal liability is gone; but that does not constitute any reason why a judgment against it should not be entered for the special purpose of fixing and enforcing the liability of the surety. The surety took the risk of appellee's insolvency, a risk that the appellant was supposedly protected against by the very bond in question. So it would be most unfair, to allow the substitution of the bond for the goods attached, and then to deny the formal relief necessary in order to enforce its terms against the surety. There is nothing in our laws or practice or in the announced public policy of the State to require such a ruling." See also *In re Marshall Paper Co.* (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872, 43 C. C. A. 38; *Holyoke v. Adams*, 59 N. Y. 233; *Brown v. Antezak* (Mich.), 164 Mich. 110, 25 Am. B. R. 898, 128 N. W. 774; *Kendrick & Roberts v. Warren Bros.*, 110 Md. 47, 72, 72 Atl. 461.

Sureties on attachment bonds.—Where in a suit in attachment a claimant of the property attached gives bond with sureties and takes possession of the property, a discharge

until judgment in the principal action, by allowing a stay or a plea in bar, relieved the sureties.²⁸ The latter seems to have been the view of the Supreme Court, though its decision is not authoritative.²⁹ This latter view was adopted in a recent decision in Maryland where the attachment was granted within four months of the adjudication,³⁰ and in Louisiana it has been held, where the property of the debtor was attached and released on bond less than four months before he was adjudged a bankrupt, and the debtor was discharged, that the surety on the bond was released from all liability.³¹ A similar result has been reached in reference to a bond given to discharge a garnishment in an action against the bankrupt upon a claim provable in bankruptcy at the time of his discharge, commenced within the four months' period and pending at the time of his discharge.³² In such case the surety is relieved, not because of the discharge of the bankrupt, but because the lien acquired by the garnish-

in bankruptcy of the claimant before trial of the suit does not release him and his sureties on the bond. *Sanderson v. Buckley* (Miss. Sup. Ct.), 37 Am. B. R. 379, 72 So. 148.

Where a suit has been commenced more than four months prior to the bankruptcy of defendant by attachment of defendant's personal property, which attachment was discharged upon the giving of a bond conditioned for the payment of any judgment that might be recovered, defendant's discharge in bankruptcy, duly pleaded by him, is not a bar to the prosecution of the suit to judgment, although a judgment therein could not be enforced against defendant and the only effect thereof would be to enable plaintiff to charge the sureties on the attachment bond. In such case the court can render a special judgment, with a perpetual stay of execution against defendant, for the purpose of enabling the plaintiff to bring suit against the sureties on the attachment bond. *Butterick Pub. Co. v. Bowen Co.* (R. I. Sup. Ct.), 33 R. I. 40, 26 Am. B. R. 718, 80 Atl. 277.

28. *Hamilton v. Bryant*, 114 Mass. 543; *Braley v. Boomer*, 116 Mass. 527; *Johnson v. Collins*, 117 Mass. 343. Although under a subsequent Massachusetts statute a special judgment is authorized which seems to change the rule laid down in the preceding cases. *Rosenthal v. Nove*, 175 Mass. 559, 56 N. E. 884.

29. *Wolf v. Stix*, 90 U. S. 1, 23 L. ed. 146; *Hill v. Harding*, 107 U. S. 631, 27 L. ed. 493, is a case where the attachment was before the interdicted period.

30. *Crook-Horner Co. v. Gilpin* (Md. Ct. of App.), 112 Md. 1, 23 Am. B. R. 350, 75 Atl. 1049.

The distinction between the two views is explained in *Schunack v. Art Metal Novelty Co.* (Sup. Ct., Ct.), 84 Conn. 331, 26 Am. B. R. 731, 80 Atl. 290, as follows: "In New York the attachment is regarded as not only non-existent, but as possessing no other importance in the situation than as if it had never existed. The Maryland court, on the contrary, discovers such a relation between

the bond and the attachment by virtue of the office of the former under the statute, and of its compulsory substitution for the attachment by the operation of the machinery of the law, set in motion as a statutory incident of the attachment, as to entitle the bond to be regarded in the eye of the law as dependent for its life and efficiency upon the life and efficiency of the attachment."

31. *Windisch-Muhlhauser Brewing Co. v. Simms* (Sup. Ct., La.), 129 La. 134, 26 Am. B. R. 714, 55 La. 739, in which the court said: "Section 16 of the Bankruptcy Act of 1898 merely recognizes this general rule of law. Section 67-f of the same statute, however, strikes with nullity all levies, attachments, or liens obtained through legal proceedings against an insolvent at any time within four months prior to the filing of a petition in bankruptcy in case he is adjudged a bankrupt. It is difficult to conceive how attachment proceedings thus pronounced null and void can produce any legal effect. The attachment being dissolved by operation of the statute, nothing is left but a suit *in personam* which is stayed by the pendency of the bankruptcy proceedings. In such a case, the subsequent discharge of the debtor extinguishes the obligation on which the suit was based, and renders it legally impossible for the creditor to recover judgment against his former debtor. Where an attachment is released on bond, the condition is that the defendant will satisfy such judgment, to the value of the property attached, as may be rendered against him in the pending suit. C. P. art. 259. No proceeding can be had against the surety on such a bond until after the judgment has been rendered against the defendant, and execution issued thereon, and a return of *nulla bona* made by the sheriff. *Id.* Where no judgment can be rendered and executed against the defendant in attachment, the statutory liability of the surety on the release bond can never arise."

32. *Klipstein v. Allen Miles Co.* (C. C. A., 5th Cir.), 14 Am. B. R. 15, 136 Fed. 385, approved in *In re Mercedes Import Co.* (D. C., N. Y.), 20 Am. B. R. 648.

ment is avoided by the bankruptcy proceedings, which destroyed the remedy by which a judgment can be recovered against the bankrupt.³³

d. **Appeal, replevin, and jail bonds.**— If the law of the State does not permit the discharge to be pleaded in the appellate court, the discharge of the principal does not relieve the surety of an appeal bond. If it may be pleaded in such court, no final judgment being possible against the principal, the surety is relieved.³⁴ Replevin bonds being merely for the return of a chattel in kind or value, and the trustee having succeeded to the bankrupt's interest, the discharge cannot be pleaded in bar; the liability of the surety may thus ultimately be fixed, and the discharge does not release it.³⁵ In bail bonds, the rule is well settled that, if there has been no breach of the conditions before discharge granted, the sureties will be released, but, if there has, then a liability has accrued which may still be enforced *pro tanto* against them.³⁶ A like doctrine saves to those interested the liabilities of sureties on administrator's and guardian's bonds, and the like.³⁷ It is thought, however, that a court of bankruptcy will stay proceedings in most of the suits in which any of the bonds mentioned in this paragraph have been given, at least until the creditor has had reasonable opportunity to ascertain and collect his dividend; this that he may apply the same in reduction of the amount due from the sureties before entering up judgment against them.³⁸

e. **Of directors of corporations.**— Directors are sureties in a qualified sense only. Being such, they are, however, within the intendment of this section of the law, and are not released by the discharge of their corporation from any liability to its creditors given by law.³⁹

33. *Klipstein v. Allen Miles Co.* (C. C. A., 5th Cir.), 14 Am. B. R. 15, 136 Fed. 385.

34. *Knapp v. Anderson*, 71 N. Y. 466; *Flagg v. Tyler*, 6 Mass. 32; *Hall v. Fowler*, 6 Hill, 630; *Odell v. Wootten*, 38 Ga. 225. And see *Goyer Co. v. Jones*, 79 Misc. 253, 8 Am. B. R. 437, 30 So. 651; *Sprague, Werner & Co. v. Fisher* (Mich. Sup. Ct.), 40 Am. B. R. 750, 165 N. W. 858. See Am. Bankr. Dig. § 1145.

Discharge pending appeal.— Where pending an appeal from a judgment of a justice's court against him, the defendant is discharged in bankruptcy, and he pleads his discharge rendered in his favor, the surety upon charge in the higher court, and judgment is the appeal bond conditioned to pay such judgment as may be rendered against the defendant is not liable. *Goyer Co. v. Jones*, 79 Misc. 253, 8 Am. B. R. 437, 30 So. 651. Compare *Bailey v. Reeves* (Sup. Ct. Miss.), 102 Miss. 438, 28 Am. B. R. 850, 59 So. 800.

A surety on an appeal bond is liable thereon, although his principal, the judgment debtor, was relieved from the payment of the judgment by his discharge in bankruptcy. Where a statutory bond is given in an appeal to the District Court from a judgment of a city court (Kans. Gen. St. 1909, §§ 6483,

6493), and the appeal is dismissed for want of prosecution, the subsequent discharge of the appellants by virtue of the Bankruptcy Act does not bar an action against the surety on the appeal bond. *Fallor v. Wehe* (Kan. Sup. Ct.), 57 Am. B. R. 311, 158 Pac. 74.

35. *Flagg v. Tyler*, 6 Mass. 32. Compare also *Pinkard v. Willis*, 24 Tex. Civ. App. 69, 57 S. W. 891; *De Loach v. Kennedy* (Ga. Ct. of App.), 43 Am. B. R. 558, 99 S. E. 314, citing *Collins on Bankruptcy* (11th ed.), 420; *Steinhauer & Wight, Inc. v. Robin Adair* (Ga. Ct. of App.), 40 Am. B. R. 160 (trover bond).

36. *Olcott v. Lilly*, 4 Johns. (N. Y.), 409; *Richardson v. McIntyre*, 4 Wash. C. C. 413; *Bennett v. Alexander*, 1 Cranch C. C. 90; *Claffia v. Coogan*, 48 N. H. 411.

37. *Miller v. Gillespie*, 59 Mo. 220; *Jones v. Knox*, 8 N. B. R. 559; *Reits v. People*, 16 N. E. R. 10; *Jones v. Russell*, 44 Ga. 460. But see *Mayor v. Walker*, 11 N. B. R. 478. Compare also *Baer v. Grell* (Mun. Ct., N. Y.), 6 Am. B. R. 428; *Goding v. Rosenthal*, 180 Mass. 43, 61 N. E. 222.

Action for escape.—The fact that since the commencement of an action against a sheriff for the escape of a judgment debtor, arrested upon a body execution, the debtor has been discharged in bankruptcy is no defense. *Baer v. Grell* (Mun. Ct., N. Y.), 6 Am. B. R. 428.

38. In re *Martin* (D. C., N. Y.), 5 Am. B. R. 423, 105 Fed. 753.

39. In re *Marshall Paper Co.* (D. C., Mass., 3 Am. B. R. 653, 95 Fed. 419; a. c., on appeal, 4 Am. B. R. 463, 102 Fed. 872. Compare § 4-b as amended by the act of 1903.

SECTION SEVENTEEN.

DEBTS NOT AFFECTED BY A DISCHARGE.

§ 17. Debts not Affected by a Discharge.—*a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are¹ *liabilities** for² obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, *or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction or for criminal conversation;** (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

Analogous provisions: In U. S.: As to discharge being a release, Act of 1867, § 34, R. S., § 5119; Act of 1841, § 4; Act of 1800, § 34; As to debts not affected by a discharge, Act of 1867, § 33, R. S., § 5117; Act of 1841, § 1; As to effect on taxes, Act of 1867, § 28, R. S., § 5101; Act of 1800, § 62.

In Eng.: As to discharge being a release, Act of 1883, § 20 (2); As to debts not affected by a discharge, Act of 1883, § 30 (1); Act of 1890, § 10.

In Can.: Act of 1919, § 61.

Cross-references: To the law: Duty of bankrupt to schedule debts, § 7-a(8).

Composition, not to be confirmed if bankrupt guilty of acts barring discharge, § 12-d.

Setting aside composition for fraud, § 13.

Discharge, when granted, § 14-b.

Revocation of discharge for fraud, § 15.

Offenses under the bankruptcy act, § 29-b.

Proof and allowance of claims, § 63.

Taxes to be paid, § 64-a.

1. Here the words "judgments in actions," in the original law were stricken out by the amendatory act of 1903 and the word "liabilities" substituted therefor.

2. Here the words "frauds, or" were stricken out by the amendatory act of 1903.

* Amendments of 1903 in italics, except that the words "or for breach of promise of marriage accompanied by seduction," were inserted by amendment of 1917, approved March 2, 1917.

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a. Excepted debts in England and Canada.—The English act of 1883 provided broadly that all provable debts shall be released by the discharge, except, in substance, (a) a recognizance, or (b) any debt to the crown or for an offense or any liability on a bail bond given for the appearance of a person charged with an offense against a statute relating to the public revenues, or (c) any debt or liability incurred by means of fraud or fraudulent breach of trust. The amendatory act of 1890 excepted also any liability under a judgment for seduction, support, or criminal conversation. Save in its silence as to debts not scheduled, therefore, the English statute is not materially different from ours. Useful precedents will be found in the reported cases under the English law.³ In Canada the excepted debts are similar to those just mentioned in England with the addition of debts for necessities of life.⁴

b. Under our law of 1867.—The differences between the analogous clause in the former law and that now under discussion will appear in subsequent paragraphs. The effect of a discharge on the liability of co-debtors has been considered in the previous section. Aside from this, the former law⁵ excepted from the discharge only (a) fraudulent debts and (b) fiduciary debts. Fiduciary debts only were excepted by the law of 1841, though a discharge could be impeached for fraud or wilful concealment of property wherever pleaded.⁶ There were no excepted classes, save debts to the United States, recognized by the law of 1800.⁷ The tendency is clearly to increase the exceptions; this tendency keeping pace with the widening out of the meaning of the word "debt." In both these directions, the present law, as amended in 1903, has gone further than any other bankruptcy law.

c. Scope of section.—(1) IN GENERAL.—This section and section fourteen on "Discharges," and section sixty-three, on "Provable Debts," should be read together.⁸ There are no ambiguous or doubtful words or phrases in

3. See Baldwin on Bankruptcy (8th ed.), pp. 608-612, and cases cited.

4a. Canadian Bankr. Act of 1919, § 61.

4. Act of 1867, § 33, R. S., § 5,117.

5. Act of 1841, §§ 1, 4.

6. Act of 1800, § 62.

7. Crawford v. Burke, 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147; Katsenstein v. Reid, Murdock & Co. (Ct. Civ. A., Texas), 41 Tex. Civ. App. 106, 16 Am. B. R. 740, 91 S. W. 360.

this section, nor do its provisions, when naturally and fairly read, clash in any particular with those of § 63-a. While § 17 limits the exception from the operation of a discharge to such of the demands or liabilities as are "provable debts," § 63-a limits provability to the classes of demands or liabilities therein defined.⁸ In view of the well known purposes of the bankruptcy law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed therein.⁹

(2) **PROOF OF NON-DISCHARGEABLE DEBT.**—The effect of the discharge is declared by prescribing that only provable debts shall be released, and then that even certain provable debts shall be excepted. It follows, therefore, that dividends may be paid on a debt, and yet it be not affected by a discharge. In this connection, the practitioner should also bear in mind the following familiar rules: The discharge is available as a plea in bar in a suit on the debt, no more; and, therefore, does not affect vested liens on the bankrupt's property. Nor is it material whether the debt was proved; if it could have been proved, it will be discharged.¹⁰ But, the present law containing no provision that the proving of a debt shall constitute a waiver of other remedies, the creditor loses no remedy by proving; and, unless a discharge is granted and pleaded, a subsequent suit can be maintained.¹¹

d. **Determining effect of discharge.**—The court in which the debt is proceeded on is the only proper forum to determine whether a discharge releases such debt.¹² This was not so under the former law. Nor have the courts under the present law, always recognized this distinction between the two statutes.¹³ Thus, a discharge should be granted even if the only debt scheduled is clearly not dischargeable.¹⁴ But the Federal courts are often asked to pass upon the effect of discharges not yet granted, as where application is made to stay a suit on a debt to which, it is claimed, the discharge will prove a bar. In so doing, such court will usually determine the question in accordance with the law and decisions of the State in which the debt originated, though, if that law conflicts with the bankruptcy law, the latter will control.¹⁵ Where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order of discharge makes out a *prima facie* defense, the burden then being cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge.¹⁶ If the debt has been reduced to judgment, the Federal court, while not bound by the

8. *Matter of United Button Co.* (D. C., Del.), 15 Am. B. R. 390, 140 Fed. 495; *affd.* 17 Am. B. R. 565, 149 Fed. 48.

9. *Gleason v. Shaw*, 236 U. S. 558, 34 Am. B. R. 177, 159 L. ed. 717, *affg.* 28 Am. B. R. 473, 196 Fed. 359.

10. See *Dean v. Justices* (Sup. Ct., Mass.), 173 Mass. 453, 2 Am. B. R. 163, 53 N. E. 893; *In re Stansfield*, Fed. Cas. 13,294; *Lamb v. Brown*, Fed. Cas. 8,011; *In re Kuffler* (D. C., N. Y.), 18 Am. B. R. 587, 153 Fed. 667.

11. *Dingee v. Becker*, Fed. Cas. 3,919; *Whitney v. Crafts*, 10 Mass. 23.

12. *In re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 94 Fed. 476; *In re Rhutassel* (D. C., Iowa), 2 Am. B. R. 697, 96 Fed. 597; *In re Thomas* (D. C., Iowa), 1 Am. B. R.

515, 92 Fed. 912; *In re Mussey* (D. C., Mass.), 3 Am. B. R. 592, 99 Fed. 71, holding that the scope of a bankruptcy discharge as affecting debts proved in a prior insolvency proceeding must be left for determination to the creditors' suits to enforce such debts.

13. Compare *Audubon v. Shufelt*, 181 U. S. 575, 5 Am. B. R. 829, 45 L. ed. 1009.

14. *In re McCarthy* (D. C., Ill.), 7 Am. B. R. 40, 111 Fed. 151; *In re Tinker* (D. C., N. Y.), 3 Am. B. R. 580, 99 Fed. 79. *Contra*: *In re Maples* (D. C., Mont.), 5 Am. B. R. 428, 105 Fed. 919.

15. *Woolsey v. Cade*, 15 N. B. R. 238.

16. *Kreitlein v. Feger*, 238 U. S. 31, 34 Am. B. R. 862, 59 L. Ed. 1184, *revg.* 52 Ind. App. 199, 28 Am. B. R. 908, 97 N. E. 819.

recitals of the judgment, will usually determine the nature of the action from the record of the State court,¹⁷ and stay or refuse a stay accordingly.¹⁸

II. WHAT DEBTS ARE DISCHARGEABLE.

a. Provable debts.—(1) **IN GENERAL.**—Only provable debts are dischargeable.¹⁹ If the debt falls within the category of provable debts enumerated in § 63-a, it is quite as clearly covered by the discharge, unless within the excepted classes.²⁰ An unliquidated claim, which might have been liquidated and proved under § 63-b, is discharged.²¹ A surety debt, as in the case of the liability of the bankrupt on a bond to secure the performance of a building contract, is discharged as to the bankrupt principal thereon, and the surety is subrogated to the rights of the creditor.²² Since only provable debts are discharged, none post-dating the petition in bankruptcy are affected by the discharge.²³ The fact that the debtor's sole purpose in going into bankruptcy was to discharge a particular debt will not affect the validity of the discharge when obtained.²⁴ Reference should be made to § 63a and the cases cited thereunder for the purpose of determining whether a debt is dischargeable as provable. It will not be feasible in this place to declare more than a few general principles in respect to provable debts.

(2) **DEBTS SUSCEPTIBLE OF PROOF, BUT DISALLOWED.**—Provable debts here referred to are not necessarily those which have been proved; debts susceptible of being proved under the act are included.²⁵ A debt which is disallowed because without foundation is not therefore non-provable. The court may determine whether an alleged claim against a bankrupt's estate is valid, and if

17. *Knott v. Putnam* (D. C., Vt.), 6 Am. B. R. 80, 107 Fed. 907, and many cases, *post*, in this section. Compare *Burnham v. Pidcock*, 58 N. Y. App. Div. 273, 5 Am. B. R. 590, 68 N. Y. Supp. 1007; *In re Bullis*, 68 App. Div. 508, 7 Am. B. R. 238, 62 N. Y. Supp. 1047, *affd.* 171 N. Y. 689; *Barnes Mfg. Co. v. Norden* (Sup. Ct., N. J.), 67 N. J. Law 493, 7 Am. B. R. 553, 51 Atl. 454; *Berry v. Jackson* (Sup. Ct. Ga.), 115 Ga. 196, 8 Am. B. R. 485, 41 S. E. 698; *In re Patterson*, Fed. Cas. 10,817; *In re Whitehouse*, Fed. Cas. 17,564; *Warner v. Cronkrite*, Fed. Cas. 17,180.

18. For additional discussion of effect of discharge, see this section, *post*, subtitle "Pleading Discharge," p. 448.

19. See Bankr. Act, § 63. *In re American Vacuum Cleaner Co.* (D. C., N. J.), 26 Am. B. R. 621, 192 Fed. 939; *Almond v. Coalson* (Ga. Ct. of App.), 43 Am. B. R. 674, 99 S. E. 707. For interesting case see *Graham v. Richardson* (Sup. Ct., Ga.), 115 Ga. 1002, 8 Am. B. R. 700, 42 S. E. 374, holding that a debt contracted for the purchase price of personalty is released, there being no vendor's lien.

Provable debts will be discharged especially where they are included in the present schedules, unless excepted from the discharge in terms; that is, "specifically" named as excepted. *In re Kuffer* (D. C., N. Y.), 19 Am. B. R. 181, 153 Fed. 667.

20. *Tindle v. Birkett* (Ct. App., N. Y.), 15 Am. B. R. 179, 183 N. Y. 267, *affd.* 205 U. S. 183, 18 Am. B. R. 121, 51 L. Ed. 762; *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 666, 49

L. ed. 147; *In re United Button Co.* (D. C., Del.), 15 Am. B. R. 390, 140 Fed. 495; *Bank of La Fayette v. Phipps* (Ga. Ct. of App.), 44 Am. B. R. 563, 101 S. E. 696.

21. A "provable debt," as used in section 17 of the bankruptcy act, means any claim that the creditor may make provable through the means provided by section 63-b. *In re Hilton* (D. C., N. Y.), 4 Am. B. R. 774, 104 Fed. 981.

22. *Williams et al v. U. S. Fidelity Co.*, 236 U. S. 549, 34 Am. B. R. 181, 59 L. Ed. 713, *revg.* 18 Am. B. R. 802.

23. *In re Burka* (D. C., Mo.), 5 Am. B. R. 12, 104 Fed. 326; *In re Marcus* (D. C., Mass.), 5 Am. B. R. 19, 104 Fed. 331; *affd.* s. c., 5 Am. B. R. 365, 105 Fed. 907; *Ruhl-Koblegard Co. v. Gillespie*, 61 W. Va. 554, 23 Am. B. R. 643, 56 S. E. 898.

24. *Finnegan v. Hall*, 35 N. Y. Misc. 773, 6 Am. B. R. 648, 72 N. Y. Supp. 347.

25. *Wood v. Carr*, 113 Ky. 303, 10 Am. B. R. 577, 13 S. W. 762; *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 666, 49 L. Ed. 147, where the court said: "Under this section, whether the discharge of the defendants in bankruptcy shall operate as a discharge of the plaintiff's debt, it not having been reduced to judgment, depends upon the fact whether the debt was 'provable' under the Bankruptcy Act, that is, susceptible of being proved." *Tindle v. Birkett*, 205 U. S. 783, 18 Am. B. R. 121, 51 L. Ed. 762; *Clark v. Rogers*, 228 U. S. 534, 30 Am. B. R. 39, 46, 57 L. Ed. 953.

it is ascertained that there is no basis for the claim it may be disallowed, but this does not mean, necessarily, that the claim is non-provable, and therefore not dischargeable.²⁶ It has been held that a discharge will not be granted where the only claims scheduled by the bankrupt are disputed and not admitted by him to be debts,²⁷ but a claim disputed by the bankrupt may be provable, and if it is it follows by operation of law, regardless of the action of the bankrupt that it is dischargeable.²⁸

(3) JUDGMENT DEBTS.—A debt scheduled in a bankruptcy under a former law, but kept alive by a subsequent judgment, will, because provable, be released.²⁹ This includes judgments entered prior to bankruptcy, provided such judgments are provable and not subject to the exceptions, and all proceedings thereunder are nullified.³⁰ A claim reduced to judgment after the commencement of the bankruptcy proceedings, although not scheduled, may be discharged, where the creditor had actual notice of the bankruptcy proceedings in time to file and prove his claim.³¹

(4) FINES, PENALTIES AND DEBTS DUE GOVERNMENT.—Broad and ancient principles also exclude obligations to the State or sovereign, and this, too, whether specially excepted by the law or not; thus, fines imposed as penalties for crimes,³² or for contempt of court,^{32a} the obligation of the father of a bastard

26. *Lesser v. Gray*, 236 U. S. 70, 34 Am. B. R. 8, 59 L. ed. 471.

27. *Matter of Gulick* (D. C., N. Y.), 26 Am. B. R. 632, 190 Fed. 52, in which the court says: "Two of the claims filed in this case appear to be dischargeable, but the point is that the bankrupt does not admit that they are debts. He may prefer to get a discharge instead of litigating the claim on the merits; but until he admits that they are debts, I do not see what power a bankruptcy court has to discharge such contested claims because they may be established as debts."

28. *Hargadine-McKittrick Dry Goods Co. v. Hudson* (C. C. A., 8th Cir.), 10 Am. B. R. 225, 122 Fed. 232, holding that a claim disallowed for the reason that it was barred by the statute of limitations before the adjudication is a provable debt and released by the bankrupt's discharge; the term "provable debts" does not mean only such debts as are valid and against the allowance of which no defense can be successfully interposed.

29. *In re Herrman* (D. C., N. Y.), 4 Am. B. R. 139, 102 Fed. 753; *affd.* 106 Fed. 987. Compare *In re Clafl* (D. C., Mass.), 7 Am. B. R. 128, 111 Fed. 506; *Dean v. Justices* (Sup. Ct., Mass.), 173 Mass. 453, 2 Am. B. R. 163, 53 N. E. 893.

30. *Kruegel v. Murphy and Bolanz* (Tex. Civ. App.), 35 Am. B. R. 676, 177 S. W. 1018.

31. Release from subsequent judgment.—In the case of *Claster v. Sobie*, 22 Pa. Super. Ct. 631, 10 Am. B. R. 446, it was held that in case a claim is reduced to judgment, as was done in the case at bar, after the bankruptcy proceedings had been commenced, and although the claim was not scheduled, yet, if the creditor has actual knowledge of the

pendency of the bankruptcy proceedings in time to file and prove his claim, the bankrupt is nevertheless discharged from all liability on such judgment. The court, in referring to the provisions of section 17 of the bankruptcy act, says: "It is very clear from this provision the plaintiffs having admitted that they had knowledge of the proceedings in bankruptcy, that the defendant was discharged from all personal liability on the note upon which the judgment was entered. It follows, of course, that the judgment had no validity, and that all proceedings thereunder were absolutely void." *Valdosta Guano Co. v. Green & Sutton* (Ga. Sup. Ct.), 44 Am. B. R. 562, 101 S. E. 538.

A claim, provable in bankruptcy, was duly scheduled by a debtor in voluntary bankruptcy proceedings instituted in his true name, the correct name and address of the creditor being given, and a discharge in bankruptcy subsequently had. At the time of bankrupt's adjudication, there was pending in justice's court, an action on said claim by the creditor, wherein, because of a mistake, either of the justice or the creditor, bankrupt was sued by a wrong name and judgment recovered. No evidence was given that the creditor had ever dealt with bankrupt under such wrong name. It was held that bankrupt, by his discharge in bankruptcy, was released from the legal obligation sought to be enforced against him under an execution on the judgment obtained in the justice's court action. *Finnell v. Armoura* (Sup. Ct., Utah), 39 Utah, 316, 26 Am. B. R. 802, 117 Pac. 49.

32. *In re Moore* (D. C., Ky.), 6 Am. B. R. 590, 111 Fed. 145. *Contra*: *In re Alderson* (D. C., W. Va.), 3 Am. B. R. 544, 98 Fed. 588. Compare also *People v. Spaulding*, 10 Paige (N. Y.), 284, and subsequent appeals, 7 Hill, 301, 4 How. (U. S.), 21.

32a. *Matter of Francisco* (D. C., N. Y.), 41 A. B. R. 87, 245 Fed. 216.

child to support it and protect the community from that duty,³³ and, of course, all debts due a state so long as the latter acts in a sovereign capacity.³⁴ Under the earlier acts it was held that all debts due the United States were not dischargeable, although not expressly excepted,³⁵ but it has been held that there was a deliberate change in purpose in the present act with reference to debts due the United States and that they are dischargeable, unless for taxes.^{36a}

b. As dependent on the person claiming.—While, as a rule, the debt of every creditor entitled to prove a claim is dischargeable, yet the effect of such discharge is sometimes limited by citizenship or the claimant's relation to other persons or business entities. Thus, the debt of an alien, whether resident or not, is discharged,³⁶ though the discharge cannot be pleaded in a foreign court. On the other hand, the debt of an alien bankrupt discharged by the courts of this country may still be sued on here.³⁷ This is contrary to the English rule,³⁸ and a bankruptcy agreement between the two countries has often been discussed. If the bankrupt, by the laws of his State, is liable for his wife's debts, as for necessities, his discharge will release them.³⁹ So if a woman marries after filing a petition in bankruptcy and thereafter procures a discharge, such discharge will not only release her but also her husband. The status of the claim is fixed at the time of the petition.⁴⁰ If, on the other hand, she is alone responsible, his discharge will not affect her liability.⁴¹ For the dischargeability of debts already barred by the statute of limitations, and those purely contingent at the time of the bankruptcy, see under section sixty-three, *post*.

c. As dependent on the nature of the liability.—(1) **LIABILITY FOR TORTS.**—(I) *In general.*—Under previous laws, liabilities for torts were not discharged unless in judgment,⁴² and this though liquidation was not essential to bring a debt within the excepted classes. The use of the word "judgment" in the act passed in 1898 seemed to emphasize this rule. It is surely still the law where the wrongs relied on are within the terms of subdivision 2 of § 17.⁴³

(II) *Effect of amendment of 1903.*—The amendment of 1903 has substituted the word "liabilities" in place of the word "judgments." And the provision as it now stands affords some basis for the claim that the exception from the operation of the discharge of particular liabilities for torts implies that such liabilities in general are not discharged. But this implication does not carry far. The amendment was to an exception in the statute which states what debts shall not be discharged rather than what shall be. A negative provision that liabilities for certain torts shall not be discharged, does not of itself make all other tort liabilities provable debts. Although the language is not wholly in harmony with the other sections of the act, it is apparent that Congress intended by the amendment to preclude the possibility of claims for certain torts being discharged, whether reduced to judgment or not. But there is no evident intention to bring in claims for torts which were never provable under the earlier bankruptcy act.⁴⁴ When, however, the tort

33. *In re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 964; *Hawes v. Cooksey*, 13 Ohio 242.

34. *State v. Shelton*, 47 Conn. 400; *Commonwealth v. Hutchinson*, 10 Pa. St. 466.

35. *United States v. Herron*, 20 Wall. 251, 22 L. ed. 275, and cases cited.

36a. *McPhee v. United States* (Colo. Sup. Ct.), 42 Am. B. R. 42, 174 Pac. 808. See also *Guarantee Title & Trust Co. v. Title Guarantee & S. Co.*, 224 U. S. 152, 27 Am. B. R. 873, 32 S. Ct. 487, 56 L. ed. 706.

36. *Pattison v. Willbur*, 10 R. I. 448; *Ring v. Eickerson*, 2 McCrary 259; *Morency v. Landry* (N. H. Sup. Ct.), 45 Am. B. R. 48, 108 Atl. 855. Note also *In re Cladell* (D. C., N. Y.), 2 Am. B. R. 424, 101 Fed. 246.

37. *Zarega's Case*, Fed. Cas. 18,204; *In re Shepard*, Fed. Cas. 12,753.

38. *Potter v. Brown*, 5 East, 124; *Cook's Bankruptcy Law*, 520.

39. *Vanderhayden v. Mallory*, 1 N. Y. 452.

40. *Chadwick v. Starrett*, 27 Me. 138.

grows out of or is the result of consent or a contract, on broad principles and irrespective of the amendment, it will, it is thought, even if not in judgment, be discharged.⁴⁵

(III) *Liabilities which are dischargeable.*—If a creditor waives his tort and presents his claim with the other creditors of the estate, his debt is dischargeable as one in contract, regardless of the tort.⁴⁶ But this rule would not apply where the claim was based upon a tort coming within the excepted classes.⁴⁷ If a debt is founded on a contract it is a provable debt and dischargeable, although the creditor has elected to bring an action for fraud.⁴⁸ A judgment in an action for a tort, which does not fall within any of the excepted classes, is a provable debt and may be discharged.⁴⁹ When it is necessary to consider whether a judgment is released by a discharge, the fact must be determined by the record, and not by any allegation or proof outside of it.⁵⁰

(2) *LIABILITIES FOR CONVERSION.*—Under the Bankruptcy Act of 1867 liabilities for conversion were held to be dischargeable.⁵¹ Under the present act such liabilities are dischargeable where the conversion is merely technical, with out actual fraud or malice.⁵² But the liability for a conversion which shows a design or willingness to inflict wrong upon another, or the reckless disregard of the rights of another, is not dischargeable.⁵³ The change from "judgments" to "liabilities" has affected the doctrine only to fix it more firmly. Thus, dischargeability will be decreed in all cases, such as those of agents, brokers,

41. *Mobley v. Cureton*, 6 S. C. 49; *Alling v. Egan*, 11 Rob. (La.) 244.

42. *In re Book*, Fed. Cas. 1,637; *In re Wiggers*, Fed. Cas. 17,623; *Hays v. Ford*, 55 Ind. 52; *Comstock v. Grout*, 17 Vt. 512.

43. Thus, see *Hun v. Cary*, 82 N. Y. 65; *Williamson v. Dickens*, 27 N. C. 259.

44. *Matter of N. Y. Tunnel Co. (C. C. A., 2d Cir.)*, 20 Am. B. R. 25, 159 Fed. 688, holding that claim for unliquidated damages founded upon tort is not provable in bankruptcy. *Boyd v. Applewhite (Miss. Sup. Ct.)*, 45 Am. B. R. 325, 84 So. 16.

For discussion of this amendment in connection with § 63, providing as to what debts are provable, see *Brown v. United Button Co. (C. C. A., 3d Cir.)*, 17 Am. B. R. 565, 149 Fed. 48.

45. Thus, where the liability is for conversion, breach of promise of marriage, or seduction on the ground of loss of services, see subsequent paragraphs. On this subject, generally, see discussion under Section Sixty-three of this work, *post*. *Reinhardt v. Friederich (Ind. App. Ct.)*, 58 Ind. App. 421, 34 Am. B. R. 633, 108 N. E. 258, in which a question as to the dischargeability of a claim for damages for malpractice was considered.

46. *Tindle v. Birkett*, 18 Am. B. R. 121, 205 U. S. 183, 185, 51 L. Ed. 762; *Mackel v. Rochester (D. C., Mont.)*, 14 Am. B. R. 420, 135 Fed. 904.

47. *Mackel v. Rochester (D. C., Mont.)*, 14 Am. B. R. 429, 135 Fed. 904, so held when the claim was based upon the actual fraud of the defendant.

48. *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147; *Fechter v. Postell*, 114 N. Y. App. Div. 776, 17 Am. B.

R. 316, 100 N. Y. Supp. 207, where the rule was applied that a debt founded upon contract, express or implied, is provable against the bankrupt's estate, and therefore dischargeable, although the creditor may have elected to bring his action in trover as for a fraudulent conversion instead of in assumpsit; *Reinhardt v. Friederich (Ind. App. Ct.)*, 58 Ind. App. 421, 34 Am. B. R. 633, 108 N. E. 258 (citing text); *Roth v. Pechin (Pa. Sup. Ct.)*, 41 Am. B. R. 845, 103 Atl. 894.

Action on contract.—A complaint in an action for breach of contract to pay a certain sum in cash and collected profits of a certain company, and a balance of accounts receivable less outstanding debts, does not state an action in tort, where there is no allegation of a wrongful withholding by the defendant other than an allegation that he agreed to act as agent for the plaintiff in collecting the claims, hence, a judgment for the plaintiffs in such an action is discharged by the subsequent bankruptcy of the defendant. *Hanan v. Long (App. Div., N. Y.)*, 150 N. Y. App. Div. 327, 32 Am. B. R. 132, 134 N. Y. Supp. 786.

49. *Matter of Madigan (D. C., N. Y.)*, 41 Am. B. R. 770, 254 Fed. 221.

50. *Burnham v. Pidcock*, 58 N. Y. App. Div. 273, 5 Am. B. R. 590, 68 N. Y. Supp. 1,007, citing *Collier on Bankruptcy* (3d Ed.), p. 197.

51. *Henequin v. Clews*, 111 U. S. 676, 29 L. Ed. 565, affg. 77 N. Y. 427; *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406; *Chapman v. Forsyth*, 2 How. 303; *Hayman*

factors, auctioneers, conditional vendees, and the like, where there is neither a technical trust in the inception of the contractual relation nor moral turpitude in the breach of it; and cases *contra* under the former laws are no longer reliable.⁵⁵ If suit is brought for the conversion of stock against a broker, the purchase of the stock is affirmed, and there is a waiver of fraud alleged in such purchase, and the broker's liability for the conversion is released by his discharge.⁵⁶ Any claim for the conversion of personal property, possession of which was not obtained by false representation or pretenses or by actual fraud and wilful and intentional wrong, is released by the bankrupt's discharge.⁵⁷

v. Pond, 48 Mass. 328. *Contra*: Johnson v. Worden, 47 Vt. 457; Treadwell v. Holloway, 46 Cal. 547; Meador v. Sharpe, 54 Ga. 125. Compare also Cole v. Roach, 37 Tex. 413.

52. In re Basch (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761; Burnham v. Pidcock, 33 N. Y. Misc. 65, 5 Am. B. R. 42, 66 N. Y. Supp. 806; a. c. on appeal, 59 N. Y. App. Div. 273, 5 Am. B. R. 590, 68 N. Y. Supp. 1007; Watertown v. Hall, 66 N. Y. App. Div. 84, 7 Am. B. R. 716, 72 N. Y. Supp. 466; Cushman v. Arkell, 65 N. Y. App. Div. 130, 72 N. Y. Supp. 655; Matter of Levitan (D. C., N. J.), 34 Am. B. R. 789, 224 Fed. 241; Ulner v. Doran, 167 N. Y. App. Div. 259, 34 Am. B. R. 410, 152 N. Y. Supp. 655; In re Arnao (D. C., N. Y.), 32 Am. B. R. 88, 210 Fed. 395; Fechter v. Pastel, 114 N. Y. App. Div. 776, 17 Am. B. R. 316, 100 N. Y. Supp. 207. See Am. B. R. Dig., § 1124.

A judgment for a conversion of moneys received by the bankrupt upon sales on commission is not within any of the exceptions created by section 17 of the bankruptcy law and is released by his discharge. In re Benedict, 37 N. Y. Misc. 230, 8 Am. B. R. 463, 75 N. Y. Supp. 165. Stockbrokers who repledge securities deposited with them as collateral for loans, thus misapplying such securities are not guilty of a wilful and malicious injury within the meaning of this section. Wood v. Fisk, 215 N. Y. 233, 35 Am. B. R. 46, 109 N. E. 177.

A debt, due by reason of the failure of the bankrupt to remit money collected by virtue of a mere contract of agency to collect and pay over to his principals money loaned by him for them, is dischargeable. Bracken v. Milner (C. C., Mo.), 5 Am. B. R. 23, 104 Fed. 522. So, where a debt was contracted by the bankrupt under an agreement with the claimant prior to the bankruptcy, whereby the bankrupt was to sell a certain commodity and pay over a proportionate amount of the sale price, and the bankrupt fails to remit, such debt is dischargeable. Bryant v. Kinyon (Sup. Ct. Mich.), 127 Mich. 152, 6 Am. B. R. 237, 86 N. W. 531.

Misappropriation by partner.—The exceptions of a discharge from a judgment for

fraud or for a debt for fraud while acting in a fiduciary capacity do not apply to a misappropriation of money by a partner while engaged in the conduct of the partnership business. Gee v. Gee (Sup. Ct., Minn.), 84 Minn. 384, 7 Am. B. R. 500, 87 N. W. 1,116.

A bailee's discharge in bankruptcy is a defense to an action for the conversion of money held by him. Lewis v. Shaw, 122 N. Y. App. Div. 96, 19 Am. B. R. 866, 106 N. Y. Supp. 1012.

Fraudulent conversion of property by commission merchant.—A discharge in bankruptcy is a bar to an action against the bankrupt, based upon the fact that the defendants fraudulently converted to their own use a certain lot of fertilizer, or its proceeds after sale, which was consigned to the defendants to be sold on commission and accounted for by them as agents of the plaintiff; the title to the fertilizer, except after sale in due course, and thereafter to the proceeds, being specifically reserved to the plaintiff. Butler-Kyser Manufacturing Co. v. Mitchell & Co. (Ala. Sup. Ct.), 37 Am. B. R. 195, 70 So. 665.

53. McIntyre v. Kavanaugh, 242 U. S. 138, 38 Am. B. R. 165, affg. 31 Am. B. R. 712, 210 N. Y. 175, 104 N. E. 135; Ulner v. Doran, 167 N. Y. App. Div. 259, 34 Am. B. R. 410, 152 N. Y. Supp. 655. Compare Ennis v. Stoppani (D. C., N. Y.), 22 Am. B. R. 679, 171 Fed. 755; Maxwell v. Martin, 130 N. Y. App. Div. 80, 22 Am. B. R. 93, 114 N. Y. Supp. 349; Andrews v. Dresser, 214 N. Y. 671, 108 N. E. 1088; Wood v. Fisk, 215 N. Y. 233, 35 Am. B. R. 46, 109 N. E. 1095. See also discussion under III, b, 5, "Willful and malicious injuries to person or property of another," *post*, p. 436.

55. As, for instance, Mayor v. Walker, 11 N. B. R. 478.

56. In re Ennis & Stoppani (D. C., N. Y.), 22 Am. B. R. 679, 171 Fed. 755; Maxwell v. Martin, 130 N. Y. App. Div. 80, 22 Am. B. R. 93, 114 N. Y. Supp. 349; Wood v. Fisk, 215 N. Y. 233, 35 Am. B. R. 46, 109 N. E. 1095; Clark v. Milliken (App. Term, N. Y.), 70 N. Y. Misc. 492, 25 Am. B. R. 680, 127 N. Y. Supp. 339.

(3) **LIABILITIES FOR BREACH OF PROMISE OF MARRIAGE.**—Such liabilities are dischargeable in bankruptcy, except where it appear that the breach of promise of marriage was accompanied by seduction, in which case since the amendment of March 2, 1917, the liability is not dischargeable. The cases as to breach of promise alone are uniform.⁶¹ And it was held that the liability was dischargeable although seduction accompanied the breach of promise.⁶² It was held prior to the amendment that in the absence of proof to the contrary, it will be presumed that a judgment in an action for breach of promise to marry, accompanied by a charge of seduction, was awarded for the seduction, and was therefore non-dischargeable.⁶³

(4) **SUPPORT OF WIFE AND CHILDREN.**—Contracts and judgments binding a husband to support his wife,⁶⁴ or a father to support his children,⁶⁵ are not released by discharge. To hold otherwise would be giving an effect to the bankruptcy act which was never intended. It is not to be conceived that an act intended for the relief of debtors who are in financial distress will be extended to relieve them from their natural obligations to support their wives and children.

57. *Maxwell v. Martin*, 130 N. Y. App. Div. 80, 22 Am. B. R. 93, 114 N. Y. Supp. 349, citing *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659; *In re Wenham*, 16 Am. B. R. 690, 153 Fed. 910; *In re Adler*, 18 Am. B. R. 240, 152 Fed. 422; *Lewis v. Shaw*, 122 N. Y. App. Div. 89, 19 Am. B. R. 866, 106 N. Y. Supp. 1012; *Fechter v. Pastel*, 114 N. Y. App. Div. 776, 17 Am. B. R. 316, 100 N. Y. Supp. 207; *Sabinal Nat. Bank v. Bryant* (Tex. Civ. App.), 39 Am. B. R. 304, 191 S. W. 1179.

61. **Breach of promise of marriage.**—*In re McCauley* (D. C., N. Y.), 4 Am. B. R. 122, 101 Fed. 223; *In re Fife* (D. C., Penn.), 6 Am. B. R. 258, 109 Fed. 880; *In re Brumbaugh* (D. C., Penn.), 12 Am. B. R. 204, 128 Fed. 971; *Bond v. Milliken*, 134 Iowa, 447, 17 Am. B. R. 811, 109 N. W. 774. Compare *In re Sidle*, Fed. Cas. 12,844.

62. *Disler v. McCauley*, 66 N. Y. App. Div. 42, 7 Am. B. R. 142, 73 N. Y. Supp. 270; *rev. s. c.*, 35 N. Y. Misc. 411, 6 Am. B. R. 491, 71 N. Y. Supp. 949; *Finnegan v. Hall*, 35 N. Y. Misc. 773, 6 Am. B. R. 648, 72 N. Y. Supp. 347.

63. *In re Warth* (C. C. A., 2d Cir.), 29 Am. B. R. 210, 200 Fed. 408; *Matter of Komar* (D. C., N. Y.), 37 Am. B. R. 683, 234 Fed. 378; *Matter of Grounds* (D. C., N. Y.), 32 Am. B. R. 774, 215 Fed. 280.

64. *Matter of Vadner* (D. C., Nev.), 42 Am. B. R. 465, 259 Fed. 614, citing *Collier on Bankruptcy* (11th Ed.), 430.

Liability for support of wife.—*Audubon v. Shufeldt*, 181 U. S. 575, 5 Am. B. R. 832, 45 L. Ed. 1009, which related especially to a claim of alimony, but the reasoning applies equally to any claim arising upon a contract or judgment binding the husband to support his wife; *Dunbar v. Dunbar*, 190 U. S. 340, 10 Am. B. R. 139, 47 L. Ed. 1084, holding that a husband's obligation to support his divorced wife under an agreement to pay her an annuity "during her life or until she remarries," is not a contingent liability provable under the act, and his discharge in bankruptcy does not release him therefrom.

A note given by a husband to a third person who assigned it to the wife under an

agreement between husband and wife that the note and cash transferred at the time would be in full satisfaction for the support, maintenance and alimony that might be awarded to her in pending divorce proceedings, is not dischargeable in bankruptcy. *Blackstock v. Blackstock* (C. C. A., 8th Cir.), 45 Am. B. R. 192, 265 Fed. 249.

Bond of third person.—The liability arising on a bond given by the bankrupt to secure the performance of a contract between a husband and his wife providing for the payment of monthly sums for the support of the wife is a debt which is dischargeable in bankruptcy. *Matter of Sullivan* (D. C., N. Y.), 45 Am. B. R. 131, 262 Fed. 574.

65. **A father's liability under an agreement with his divorced wife to pay to her for the support of his minor children until they respectively become of age,** is not a provable debt against his estate in bankruptcy and is not released by his discharge. *Dunbar v. Dunbar*, 190 U. S. 340, 10 Am. B. R. 139, 47 L. Ed. 1084. In the case of *In re Hubbard* (D. C., Ill.), 3 Am. B. R. 528, 98 Fed. 710, it was held that a discharge in bankruptcy did not release the bankrupt from the obligation to obey an order made by a State court, requiring him to pay a certain sum for the support of his minor children.

Liability for support of bastard.—*In re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 954, it was held that a judgment in a bastardy proceeding against the putative father, adjudging him to pay a certain sum to the mother of the child for its maintenance, was not such a debt as would be released by the discharge of the father in bankruptcy, and it was put upon the ground that by virtue of the judgment and bond given thereon, the father became liable for the maintenance of the illegitimate son, the same as if he were his legitimate offspring, and that the bankruptcy law was never intended to affect the liability of the father for the support of his children. But in *McKittrick v. Cahoon*, 89 Minn. 283, 10 Am. B. R. 139, 95 N. W. 223, it was held that where by an order in bastardy proceedings the putative father of a natural child was

(5) **LIABILITY OF FACTOR.**—The liability of a factor to his principal for the proceeds of all goods consigned to him and sold before a demand by the principal for a return of all goods unsold is dischargeable in bankruptcy.⁶⁶ But the refusal of the factor upon grounds not legally tenable and imposed in bad faith to return goods unsold, after demand, renders his liability therefor a debt not dischargeable.⁶⁷

(6) **LIABILITY OF STOCKHOLDERS, DIRECTORS, AND PARTNERS.**—A stockholder's liability for the debts of a corporation declared by a decree which established the amount chargeable is a provable debt and is released by his discharge.⁶⁸ The liability of the director of a discharged corporation has already been discussed.⁶⁹ Partnership debts may also be discharged,⁷⁰ but the effect of the individual discharge of a partner on his partnership debts depends on circumstances.⁷¹ It has been held that a judgment against a partnership is not released by the discharge of a member of the firm.⁷²

III. DEBTS NOT DISCHARGEABLE.

a. **Taxes.**—The first exception from the dischargeability of debts includes debts of the bankrupt which "are due as a tax levied by the United States, the State, county, district or municipality in which he resides." This follows from the doctrine that the liabilities to the sovereign will not be affected, unless he by express words extends the provisions of a statute to himself.⁷³ Indeed, it is thought that taxes would be excepted from the general dischargeability of provable debts, even were the statute silent. There is hardly enough in § 64-a, giving them priority of payment, to warrant the claim that the sovereign intended to waive his exemption here. Besides, the words used in § 63-a seem to take taxes out of the class known as "provable debts," and thus they could not be discharged in any event. Local assessments are, of course, "taxes" in the sense here used, so long as they are levied by one of the governmental entities indicated.⁷⁴ And State franchise taxes imposed on corporations under a State statute are taxes within the meaning of this exception.⁷⁵

required to pay a monthly stipend for its support, and upon refusal a final money judgment was obtained for the total amount due, the rights of the person entitled to recover under the order of filiation were merged in the judgment, and the debt evidenced thereby was not excepted from the operation of section 17 of the bankruptcy act.

66. *Mathieu v. Goldberg* (C. C., N. Y.), 19 Am. B. R. 191, 156 Fed. 541; *In re Adler* (C. C. A., 2d Cir.), 18 Am. B. R. 240, 152 Fed. 422; *In re Benedict*, 38 N. Y. Misc. 230, 8 Am. B. R. 463, 75 N. Y. Supp. 165.

Goods consigned for sale.—The provisions of section 17(4), excepting from discharge debts created by the bankrupt's fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity, do not embrace a debt arising from the sale of goods consigned to the bankrupt for sale upon commission, and upon an alleged contract to return the goods or their specific proceeds. *In re Basch* (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761.

67. *Mathieu v. Goldberg* (C. C., N. Y.), 19 Am. B. R. 191, 156 Fed. 541.

68. *Dight v. Chapman*, 44 Ore. 265, 12 Am. B. R. 743, 75 Pac. 585.

69. See §§ 4, 14 and 18, *ante*. Compare *In re Marshall Paper Co.* (D. C., Mass.), 2 Am. B. R. 653, 95 Fed. 419; s. c., *affd.*, 4 Am. B. R. 468, 102 Fed. 872.

70. *N. Y. Deaf & Dumb Institute v. Crockett*, 117 N. Y. App. Div. 269, 17 Am. B. R. 233, 102 N. Y. Supp. 373, holding that an individual member of a firm may, on his application, made in his own right, obtain a discharge not only from his individual debts but from his firm liabilities, and that the existence or non-existence of firm assets is immaterial to the decision of this question.

71. See discussion under Sections Four and Fourteen, *ante*. Compare *In re Schultz* (D. C., N. Y.), 6 Am. B. R. 91, 109 Fed. 264.

72. *Dodge v. Kaufman*, 46 N. Y. Misc. 248, 91 N. Y. Supp. 727.

73. See *In re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 964, and cases cited.

74. See *In re Ott* (D. C., Iowa), 2 Am. B. R. 637, 95 Fed. 274. See also Report of Ex. Com. of National Ass'n of Referees in Bankruptcy, published March, 1900, p. 19.

75. *Matter of Ashland Co.* (D. C., Mass.), 36 Am. B. R. 194, 229 Fed. 829.

b. **Liabilities for certain specified acts.**—(1) **IN GENERAL.**—The second subdivision of this section excepts from discharge debts which are based upon “liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation.” This subdivision is exceedingly comprehensive in its character, although in some respects it is not as broad as before the amendment of 1903.⁷⁶

(2) **EFFECT OF AMENDMENT OF 1903.**—Some important changes were made in this subdivision by the amendment of 1903. The most vital is the substitution of the word “liabilities” for the words “judgments in actions” at the beginning of this subdivision. This is a substantial return to the phrasing used in the former law,⁷⁷ departed from, it is thought, by the framers of the present statute because of uncertainty whether the word “debt” there used included a “judgment.” This doubt now being removed,⁷⁸ the unwisdom of the change made by the original statute becomes apparent.⁷⁹ To be sure, it will stimulate litigation, but no bankruptcy law should free debtors of fraudulent liabilities or moral duties, merely because a court has not measured them up in terms of dollars; the use of the phrase “judgments in actions” made this more than likely. The words in the English law are, as to fraudulent and fiduciary obligations, “debt or liability”⁸⁰ (the latter of which words is carefully defined⁸¹), and as to alimony and affiliation obligations, “judgments.”⁸² The distinction thus made between moral duties, which must be liquidated, and debts for fraud, which need not be, is narrow and unwise; a bankrupt who is also a moral delinquent should not complain if he is harassed by suits to enforce duties. It is thought, therefore, that the opening of the door accomplished by the amendatory act of 1903 will prove the part of wisdom. It has, at any rate, put an end to the elasticity of construction evidenced by those cases which perforce have already overlooked the literal meaning of “judgment” and construed it to mean “liability.”⁸³

(3) **LIABILITIES FOR FRAUD.**—Before the amendment a bankrupt might have been released from a debt contracted in fraud unless the fraud had been determined and a judgment therefor had been rendered. As the law now

76. In re Bullis, 68 N. Y. App. Div. 506, 7 Am. B. R. 238, 73 N. Y. Supp. 1047; s. c., in U. S. Supreme Court *sud nom.* Bullis v. O'Beirne, 195 U. S. 606, 13 Am. B. R. 108, 49 L. Ed. 340; Brandt v. Klement (Ga. Ct. of App.), 40 Am. B. R. 161, 93 S. E. 255.

77. Act of 1867, § 33, R. S., § 5,117.

78. Boynton v. Ball, 121 U. S. 457, 30 L. Ed. 985. Compare also In re Pinkel (Ref., N. Y.), 1 Am. B. R. 333.

79. Thus, note the unwillingness of the courts in the cases set out in the foot-notes, *post*, in this section, to construe the words “judgments in actions” strictly, and observe the confusion and delays and, in some cases, denials of justice, which would result, if bankruptcy proceedings must be halted while the holder of one out of perhaps a hundred liabilities proceeds to liquidate his claim and thus intrench himself against a discharge.

80. Eng. Act of Bankruptcy of 1883, § 30 (1).

81. *Id.*, § 37 (8).

82. Eng. Act of Bankruptcy of 1890, § 10.

83. In re Sullivan (Ref., N. Y.), 2 Am.

B. R. 30; In re Lewensohn (D. C., N. Y.), 3 Am. B. R. 594, 99 Fed. 73; In re Cole (D. C., N. Y.), 5 Am. B. R. 780, 106 Fed. 837; Smith & Wallace Co. v. Lambert (Sup. Ct., N. J.), 69 N. J. Law 487, 11 Am. B. R. 252, 55 Atl. 88, holding that the words “judgments in action,” as used in the act before amendment, refer to judgments exclusively and not to mere debts. Compare also In re Rhutassel (D. C., Iowa), 2 Am. B. R. 697, 96 Fed. 597; also Morse v. Kaufman (Sup. Ct., Va.), 4 Va. Sup. Ct. 172, 7 Am. B. R. 549; Howe v. Noyes, 47 N. Y. Misc. 338, 15 Am. B. R. 103, 93 N. Y. Supp. 476.

Under the act prior to the amendment of 1903, the United States Supreme Court held that only a judgment for damages based upon actual as distinguished from constructive fraud is not discharged by the discharge of the defendant bankrupt. Bullis v. O'Beirne, 195 U. S. 606, 13 Am. B. R. 108, 49 L. Ed. 340; Tindle v. Birkett, 183 N. Y. 267, 15 Am. B. R. 179, 76 N. E. 25, *affd.* 205 U. S. 183, 51 L. Ed. 762.

stands the frauds which will bar discharge are those connected with the obtaining of property by "false pretenses or false representations,"⁸⁴ Only those liabilities strictly within subdivision 2 are now not affected by a discharge. Such frauds as well as those included within the original section are frauds in fact involving moral turpitude or intentional wrong.⁸⁵ As to what is and what is not fraud, each case turns on its own facts.⁸⁶ When a judgment has been entered, the record considered as a whole will determine whether the debt is in fraud.⁸⁷ In order that a judgment may be one recovered for fraud so as to prevent its discharge, the record in the action must show that fraud and deceit was the "gist and gravamen" of the action.⁸⁸

84. *Mackel v. Rochester* (D. C., Mont.), 14 Am. B. R. 429, 135 Fed. 904.

85. *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586; *Hennequin v. Clewes*, 111 U. S. 678, 28 L. Ed. 565; *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 248; *Noble v. Hammond*, 129 U. S. 65, 32 L. Ed. 621; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. Ed. 723; *In re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 94 Fed. 476.

The character of the fraud necessary to save a demand or judgment, from the operation of the act, is positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without imputation of bad faith or immorality. *Louisville & Nashville R. Co. v. Bryant* (Ky. Ct. of App.), 149 Ky. 359, 28 Am. B. R. 867, 149 S. W. 830.

The term "fraud," as employed in the bankrupt act of 1867, received a definite construction by the Supreme Court of the United States in *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586. Mr. Justice Field, speaking for the court, said: "The fraud referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. Such a construction of the statute is consonant with equity and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankruptcy system." As the term "fraud" is expressed in the same connection, with the term "embezzlement" in the act of July 1, 1898, it must receive the same construction as given in the act of 1867. *Western Union, etc., Co. v. Hurd* (C. C., Mo.), 8 Am. B. R. 633, 116 Fed. 422.

Intentional fraud necessary to bar operation of discharge.—Frauds which will bar the operation of a discharge in bankruptcy are those connected with the obtaining of property by false pretenses, or "false representations," involving moral turpitude or intentional wrong; implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality, is insuffi-

cient. *Cooper Grocery Co. v. Gaddy* (Civ. App., Tex.), 27 Am. B. R. 422, 141 S. W. 823, quoting text.

Claim by customer against brokers.—Where a customer of a firm of stock brokers deposited bonds as collateral security for the price of stock which he directed them to purchase, and they, subsequently without the knowledge of the customer pledged the stock and bonds, on which they had been charging him interest and crediting dividends, with a bank for a loan of their own, which was later called and the stock and bonds sold in partial satisfaction thereof, and the brokers were declared bankrupts, the claim of the customer was a provable debt, within the meaning of section 63a (4), released by the discharge in bankruptcy, and was not a fraudulent debt within the meaning of subdivisions 2 and 4 of section 17 of the bankruptcy act. *Pitcairn v. Scully* (Common Pleas, Pa.), 62 Pittsb. Leg. J. 507, 33 Am. B. R. 870.

The transfer of property used as basis of credit after the credit was given does not amount to such fraud as to make the debt non-dischargeable. *Gregory v. Pierce* (Ia. Sup. Ct.), 44 Am. B. R. 36, 172 N. W. 288.

86. *In re Rhutassel* (D. C., Iowa), 2 Am. B. R. 607, 96 Fed. 597; *In re Bullis*, 68 N. Y. App. Div. 508, 7 Am. B. R. 238, 73 N. Y. Supp. 1047; *Culver v. Torrey*, 34 N. Y. Misc. 793, 69 N. Y. Supp. 919; *In re Lieber* (Ref., Pa.), 3 Am. B. R. 217; *Collins v. McWalters*, 35 N. Y. Misc. 648, 6 Am. B. R. 593, 72 N. Y. Supp. 203; *Taylor v. Farmer*, 81 Ky. 458; *Sheldon v. Clews*, 13 Abb. N. C. (N. Y.) 40; *Classen v. Schoenemann*, 80 Ill. 304; *Gaddy v. Witt* (Civ. App., Tex.), 27 Am. B. R. 457, 142 S. W. 928; *Brandt v. Klement* (Ga. Ct. of App.), 40 Am. B. R. 161, 93 S. E. 256.

87. *Hargadine-McKittrich Dry Goods Co. v. Hudson* (C. C., Mo.), 6 Am. B. R. 657, 111 Fed. 361; *In re Bullis*, 68 N. Y. App. Div. 508, 7 Am. B. R. 338, 73 N. Y. Supp. 1047; *In re Arkell*, 65 N. Y. App. Div. 130, 6 Am. B. R. 650, 72 N. Y. Supp. 55. See also for interesting cases, *Barnes Mfg. Co. v. Norden* (Sup. Ct., N. J.), 67 N. J. Law 493, 7 Am. B. R. 553, 51 Atl. 454; *Berry v. Jackson* (Sup. Ct., Ga.), 115 Ga. 196, 8 Am. B. R. 485, 41 S. E. 686; *Stevens v. Meyers*, 72 N. Y. App. Div. 128, 8 Am. B. R. 496, 76 N. Y. Supp. 332; *Guindon v. Brusky* (Minn. Sup. Ct.), 43 Am. B. R. 263, 170 N. W. 918.

88. *Matter of Benoit*, 124 N. Y. App. Div. 142, 20 Am. B. R. 270, 108 N. Y. Supp. 889; *Drake v. Vernon* (Sup. Ct., So. Dak.), 26 So. Dak. 354, 26 Am. B. R. 69, 123 N. W. 317, quoting *Collier on Bankruptcy* (8th Ed.), p. 319; *Nichols v. Doak*, 48 Wash. 457, 22 Am. B. R. 737, 93 Pac. 919, holding that a

Fraudulent liabilities *per se* should be sharply distinguished from fiduciary liabilities, discussed later; though the latter class of liabilities always involves fraud. Under the former law, it was held that the fraud must exist at the inception of the debt.⁸⁹ Though the words there were "created by the fraud," the same doctrine is probably applicable now, provided the liability is within subdivision 2. Proving such a claim in the bankruptcy proceeding does not amount to a waiver of the exception.⁹⁰ Vested liens on property fraudulently kept from creditors in the bankruptcy proceedings are not discharged or abrogated.⁹¹ The burden of proof is upon the creditor who claims that his duly scheduled debt is excepted from the operation of the discharge in bankruptcy because of fraud.^{91a}

(4) PROPERTY OBTAINED BY FALSE PRETENSES OR FALSE REPRESENTATIONS.—Where a bankrupt has committed fraud consisting of obtaining property by "false pretenses or false representations," his discharge is barred. "Property" as here used has the meaning usually accorded to the word in similar statutes; it means something of substance;⁹² it includes money;⁹³ it does not

judgment against a bankrupt which recites that the recovery was because of his fraud in obtaining certain goods is not discharged.

Fraud gist of action.—The New York Court of Appeals, in discussing the question of fraud, said: "As we interpret subdivision 2 of section 17 of the Bankruptcy Law, it does not limit the exception to common-law actions of fraud or deceit. The gist and gravamen of the action must have been the positive and intentional fraud of the bankrupt. The record presented must clearly show that such misconduct was the pith of the action, and it may not be dependent upon oral proof or other evidence outside of the record." *O'Beirne v. Allegheny & Kinzua R. Co.*, 151 N. Y. 384, 43 N. E. 873.

Conclusiveness of judgment.—It should distinctly appear that the verdict upon which the judgment was based was the result of evidence showing the fraudulent transaction as alleged in the petition; and where there is no evidence in the record of fraudulent representations, and there has been a trial by jury, upon evidence and instructions presenting issues that did not necessarily involve fraud, it can not be presumed that the judgment was obtained in an action for fraud. *Louisville & Nashville R. Co. v. Bryant* (Ky. Ct. of App.), 149 Ky. 359, 28 Am. B. R. 867, 149 S. W. 830.

Deceit and fraud, in inducing the sale of a farm, for which a judgment was obtained in a State court, renders such judgment non-dischargeable. *Matter of Shepardson* (D. C., Vt.), 34 Am. B. R. 284, 220 Fed. 186; *Forsyth v. Vehmeyer*, 177 U. S. 177, 3 Am. B. R. 807, 44 L. Ed. 723.

⁸⁹ *United States v. The Rob Roy*, Fed. Cas. 16,179; *Brown v. Broach*, 52 Miss. 536.

⁹⁰ *Frey v. Torrey*, 70 N. Y. App. Div. 166, 8 Am. B. R. 196, affg. s. c., 36 N. Y. Misc. 216, 6 Am. B. R. 448, 73 N. Y. Supp. 201.

⁹¹ "The bankruptcy law is not designed to aid in a fraud or to prevent equitable relief to creditors against fraudulent acts of a debtor; and where the creditors, seeking such equitable relief by reason of previously acquired equit-

able liens, do not purposely ignore or violate the terms or the spirit of the bankruptcy law, and no unlawful preference among creditors is sought by those asking such equitable relief, it may be afforded in appropriate proceedings." *Robinson v. Tischler*, 69 Fla. 77, 34 Am. B. R. 187, 67 So. 566.

^{91a} Burden of proof.—When under the pleadings and charge the creditor's judgment might be based upon contract or upon fraud, or upon both, and there is nothing but the pleading and charge from which to determine the fact, the creditor does not sustain the burden. *Guindon v. Brusky* (Minn. Sup. Ct.), 43 Am. B. R. 263, 170 N. W. 918.

⁹² See definition of "Property," under § 1, *ante*, p. 20.

Property includes things of substance and not services.—In the case of *Gleason v. Thaw* (C. C. A., 3d Cir.), 25 Am. B. R. 782, 185 Fed. 345, the court said: "The language used in the seventeenth section of the Bankruptcy Act, to which we have already referred, by which liabilities for obtaining property by false pretenses are exempted from the provable debts discharged in bankruptcy, are the usual and most general words for describing a specific crime. Their use in this connection dates back as far as the Statute of 30 George II, c. 34 (1757), and they have since then, so far as they define the crime, remained unchanged. 19 Cyc. 387. The same language, in substance, has been used in the statutes in this country, and where departed from, it is only by way of enumeration of certain kinds of property that may be included under the general designation. These enumerations all refer to substantive things—to a res—and in no case to which our attention has been called is anything included in the enumeration which approaches, in its description or definition, services rendered. Certainly under no proper and strict administration of the criminal law could any one be indicted under the general language of obtaining property under false pretenses, on the ground that services, whose performance has been induced by a false pretense, are property, within the meaning of the Act." The decision of the court in this case was followed by the second circuit in considering a case between the same parties involving the same facts. *Gleason v. Thaw* (C. C. A., 2d Cir.), 28 Am. B. R. 473, 196 Fed. 359, affd. 236 U. S. 558, 34 Am. B. R. 177, 59 L. Ed. 717.

The acceptance and discount of a note of a defendant, even if induced by false representations, is not an obtaining of property, within the meaning of section 17. *Carville v. Lane* (Me. Sup. Ct.), 40 Am. B. R. 344, 101 Atl. 963.

⁹³ *Hallagan v. Dowell* (Sup. Ct., Ia.), 31 Am. B. R. 848, 139 N. W. 883; *Forsyth v.*

include professional services.⁹⁴ It has been held that obtaining an indemnity bond by false statements or representations, is obtaining "credit" within the meaning of the rule, and a debt is created which is not dischargeable.⁹⁵ This provision includes positive fraud, or fraud in fact, as in other cases, involving moral turpitude or intentional wrong; implied fraud, or fraud in law which may exist without the imputation of bad faith or immorality is insufficient.⁹⁶ This bar will usually be available where the sale of goods on credit is brought about by false statements,⁹⁷ and cases arising under the new objection to discharge, based on the giving of materially false statements in writing, will be found valuable.⁹⁸ It must appear, however, that such representations were knowingly and fraudulently made,⁹⁹ and that they were relied on by the other party. It need not be shown that the false representations were made in writing.¹⁰⁰ A debt contracted under such circumstances as to render the bank-

Vehmeyer, 177 U. S. 177, 3 Am. B. R. 807, 44 L. Ed. 723, holding that a representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong, and is not dischargeable in bankruptcy.

94. The exceptions to the operation of a discharge should be confined to those plainly expressed; and while much might be said in favor of extending these to liabilities incurred for services obtained by fraud, the language of the bankruptcy act does not go so far. *Gleason v. Thaw*, 236 U. S. 558, 34 Am. B. R. 177, 59 L. Ed. 717, affg. 28 Am. B. R. 473, 196 Fed. 359.

95. *In re Dunfee* (D. C., N. Y.), 30 Am. B. R. 721, 729, 206 Fed. 745.

96. *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586; *Ames v. Moir*, 138 U. S. 306, 34 L. Ed. 951; *Gregory v. Pierce* (1a. Sup. Ct.), 44 Am. B. R. 86, 172 N. E. 288; *Bowman v. Provident Realty, etc., Co.* (Cal. Dist. Ct. of App.), 43 Am. B. R. 454, 189 Pac. 18; *Roth v. Pechin* (Pa. Sup. Ct.), 41 Am. B. R. 845, 103 Atl. 894. In *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. Ed., 723, the court held that "a representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of fraud involving moral turpitude and intentional wrong."

Implied fraud insufficient.—In order that a debt may not be released by a discharge because of fraud, it must be actually founded on the fraud. The mere fact that incidentally to the collection of a debt a sale of property is set aside as fraudulent, does not make the debt one created by fraud, nor prevent its being released by a discharge in bankruptcy. In *re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 133 Fed. 845, revg. 1 Am. B. R. 627.

97. *Ames v. Moir*, 138 U. S. 306, 34 L. Ed. 951; In *re Alsberg*, Fed. Cas. 261; *Broadnax v. Bradford*, 50 Ala. 270; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. Ed. 723, holding that a representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong; *Standard Sewing Mach. Co. v. Kat-*

tell, 132 N. Y. App. Div. 539, 22 Am. B. R. 376, 117 N. Y. Supp. 32; *Orr Shoe Co. v. Upshaw & Powledge* (Ga. Ct. of App.), 13 Ga. App. 501, 30 Am. B. R. 534, 79 S. E. 362.

The mere fact that the defendant procured credit and promised to pay for ordinary current purchases of goods and subsequently failed to meet his obligation prior to the time he voluntarily went into bankruptcy will not bar a discharge. *Brooks v. Pitts* (Ga. Ct. of App.), 44 Am. B. R. 437, 100 S. E. 776.

Purchase of goods without intention to pay.—A false representation may consist in the purchasing of goods with no present purpose of paying for them, and in contemplation of a fraudulent insolvency. To buy goods without a present intention to pay is a false representation of one's intention. Therefore to buy goods without a present intention to pay will avoid a discharge. *Atlanta Skirt Co. v. Jacobs* (Ct. of App., Ga.), 8 Ga. App. 299, 25 Am. B. R. 895, 68 S. E. 1077. Where the sale of a flock of sheep is induced by the false and fraudulent representation of the buyer that he would receive a check by mail that day, which he would deliver to the seller, but did not, and never paid for the sheep which he converts to his own use, his discharge in bankruptcy does not release him from the debt. *Rowell v. Eicker* (Sup. Ct., Vt.), 79 Vt. 552, 18 Am. B. R. 651, 66 N. E. 569.

The making by a bankrupt of a materially false statement in writing to any person for the purpose of obtaining property on credit, and upon such statement property is so obtained prevents the granting of a discharge; and the objections may be interposed by any party in interest. In *re Miller* (D. C., Iowa), 27 Am. B. R. 606, 192 Fed. 730, citing *Gilpin v. National Bank* (C. C. A., 3d Cir.), 21 Am. B. R. 429, 165 Fed. 607-612, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023; *Talcott v. Friend* (C. C. A., 7th Cir.), 24 Am. B. R. 708, 179 Fed. 676-681, 103 C. C. A. 80; In *re Harr* (D. C., Mo.), 16 Am. B. R. 213, 143 Fed. 421-423; In *re Brenner* (D. C., N. Y.), 20 Am. B. R. 644, 166 Fed. 930; In *re Augspurger* (D. C., Ohio), 25 Am. B. R. 83, 181 Fed. 174.

98. See *ante*.

99. *Allen v. Hickling*, 11 Ill. App. 549.

100. *Katzenstein v. Reid, Murdock & Co.* (Tex. Civ. App.), 41 Tex. Civ. App. 106, 16 Am. B. R. 740, 91 S. W. 360; *Talcott v. Friend* (C. C. A., 7th Cir.), 24 Am. B. R. 708, 179 Fed. 676, holding that section 17-a of the bankruptcy act, providing that a discharge shall release a bankrupt from all of

rupt liable to arrest upon the charge of obtaining money by false statements of facts will not be discharged.¹⁰¹ If suit is brought to recover on a contract, and an answer is interposed setting up a discharge, a reply alleging that the contract was based on "false pretenses and false representations," is inconsistent with the complaint and will not affect the discharge.¹⁰² A fraudulent representation by one partner will by law be imputed to the others, and the debt as to them will not, therefore, be discharged.¹⁰³ Where a liability against a bankrupt has been prosecuted to judgment, the record is decisive as to the character of the claim upon which the judgment is founded, and cannot be affected by oral evidence except in case of ambiguity.¹⁰⁴

(5) **WILFUL AND MALICIOUS INJURIES TO THE PERSON OR PROPERTY OF ANOTHER.**—(I) *In general.*—Here subdivision 2 stopped, prior to the amendatory act of 1903. Under it, much doubt arose as to whether certain judgments founded on moral delinquencies were dischargeable. The former conflict concerning the effect of a judgment for breach of promise of marriage accompanied by seduction is an instance.¹⁰⁵ Unaccompanied by seduction such a judgment is dischargeable.¹⁰⁶

(II) *Wilful and malicious.*—This provision contemplates something more restricted than malice in the broadest sense, and covers all cases in which the facts of intent and malice are judicially ascertained, however the act may be characterized by the allegations.¹⁰⁷ An injury to person or property is a malicious injury within this provision if it was intentional, wrongful and without just cause or excuse, even in the absence of hatred, spite or ill will.¹⁰⁸ The word "wilful" as here used means nothing more than inten-

his provable debts except such as are "liabilities for obtaining property by false pretenses or false representations," is not affected by section 14-b(3), which makes the obtaining of property by means of a materially false statement in writing a ground for refusing a discharge. *Affid. sub. nom. Friend v. Talcott*, 228 U. S. 27, 30 Am. B. R. 31, 57 L. Ed. 718.

101. *In re Lewis* (D. C., N. Y.), 20 Am. B. R. 711, 163 Fed. 137.

102. *Strauch v. Flynn* (Sup. Ct., Minn.), 108 Minn. 313, 22 Am. B. R. 246, 122 N. W. 320, holding that if plaintiff had sued on the fraud—that is, to recover damages for deceit—a plea of discharge by the decree in bankruptcy would not have availed defendant.

103. A false representation by one partner, by means of which property was obtained by the partnership, will in law be imputed to the other partners to the extent of holding them civilly liable for the debt and their discharge in bankruptcy will not discharge their liability as to such debt. *Frank v. Michigan Paper Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 261, 179 Fed. 776, citing *Collier on Bankruptcy* (6th Ed.), p. 225; *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 248; *Shroeder v. Frey*, 60 Hun (N. Y.) 58, 14 N. Y. Supp. 71; *affd.*, 131 N. Y. 562. Consult also *Gee v. Gee*, 84 Minn. 384, 7 Am. B. R. 500, 87 N. W. 1116.

104. *Chambers v. Kirk* (Sup. Ct., Okla.), 41 Okla. 696, 32 Am. B. R. 175, 139 Pac. 986.

105. See p. 430, cases cited under II, c. (3), *ante*. Under the amendment of 1917, approved March 2, liability for breach of promise

of marriage accompanied by seduction is not dischargeable.

106. *Bond v. Milliken*, 134 Iowa, 447, 100 N. W. 774.

107. *Flanders v. Mullin*, 80 Vt. 124, 18 Am. B. R. 708, 66 Atl. 789, holding that where, in an action for injuries sustained by the plaintiff while undergoing surgical treatment at the hands of the defendant, the plaintiff obtains judgment and the findings of the court determine the willful and malicious character of the acts complained of in the declaration, the judgment is not released by the defendant's discharge in bankruptcy.

The form of the action is immaterial. The court may resort to the entire record to determine the wrongful character of the act. *Barbery v. Cohen* (N. Y. App. Div.), 42 Am. B. R. 226, 183 App. Div. (N. Y.), 424.

108. *In re Munro* (D. C., N. Y.), 28 Am. B. R. 369, 195 Fed. 817, citing *Tinker v. Colwell*, 193 U. S. 473, 11 Am. B. R. 568, 24 Sup. Ct. 505, 48 L. Ed. 754. See Am. Bankr. Dig. §§ 1098, 1103.

Judgment by default for negligence.—Judgments by default entered upon a declaration in trespass charging that the defendant assaulted the plaintiff's wife by recklessly, carelessly and negligently running into her and knocking her down without alleging that the act was intentional, willful or malicious, are barred by the defendant's discharge in bankruptcy. *Matter of Grout* (Sup. Ct., Vt.), 13 Vt. 318, 33 Am. B. R. 789, 92 Atl. 646.

Liability for fraudulently receiving payment of note.—A claim by the payee of a note to whom the maker had transferred another note as security, based upon the fact that the maker of the first note failed to notify the maker of the collateral note of

tional, while the malice here intended is nothing more than that disregard of duty which is involved in the intentional doing of a wilful act to the injury of another.¹⁰⁹ A wrongful act, done intentionally, without just cause or excuse is malicious, although actual malice involving ill-will or hatred of the person injured was not apparent.¹¹⁰ Thus the disposal of another's property without his knowledge or consent, done intentionally, in disregard of what one knows to be his duty, to the other's injury, is a wilful and malicious injury within the meaning of the subdivision.^{110a} It must be shown that the injury was wrongful and intentional.¹¹¹ Under this subdivision, as it now stands, it has been held that a court of bankruptcy may not determine for itself whether the injuries complained of were wilful and malicious, but is estopped by the judgment of another court on this question.¹¹²

the transfer thereof, but falsely represented that he still held it and received the payment thereof, is not one for obtaining property by false pretenses, and it cannot be said that the liability arose from wilful and malicious injuries to the property of the payee, within the meaning of section 17 of the bankruptcy act. *First National Bank v. Bamforth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600.

109. "Wilful and malicious injury," in the bankruptcy act and everywhere in the law, does not necessarily involve hatred or ill will as a state of mind, but arises from "a wrongful act, done intentionally, without just cause or excuse." "In order to come within that meaning as a judgment for a wilful and malicious injury to person or property it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained." *Tinker v. Colwell*, 193 U. S. 473, 485, 11 Am. B. R. 568, 48 L. Ed. 754; *McChristal v. Clisbee*, 190 Mass. 120, 16 Am. B. R. 338, 76 N. E. 511, holding that a judgment for assault and battery, false imprisonment and malicious prosecution is not released by bankrupt's discharge. See *In re Lorde* (D. C., N. Y.), 16 Am. B. R. 201, 144 Fed. 320, where the court held that a judgment against a landlord for injuries from the bite of a tenant's dog, over which the landlord had no control, was released by the landlord's discharge in bankruptcy; *In re Munro* (D. C., N. Y.), 28 Am. B. R. 369, 195 Fed. 817, quoting text; *Ex p. Cote* (Vt. Sup. Ct.), 44 Am. B. R. 43, 106 Atl. 519.

Conversion of stocks.—Where brokers hold stocks bought for a customer, as security for a balance due on the purchase price, and from time to time sell them to third persons without the knowledge of the owner, and continue to do so after they have realized enough to pay the balance due and apply the avails to their own purposes so that their acts constitute larceny, a claim for such conversion is not released by the broker's discharge in bankruptcy. *Kavanaugh v. McIntyre*, 128 App. Div. 722, 21 Am. B. R. 827, 112 N. Y. Supp. 987, quoting *Collier on Bankruptcy* (6th Ed.), p. 225. See also opinion of Justice J. A. Kellogg at trial term in N. Y. Sup. Court, *Kavanaugh v. McIntyre*, 27 Am. B. R. 279.

110. *Peters v. United States ex rel. Kelly* (C. C. A., 7th Cir.), 24 Am. B. R. 208, 177 Fed. 885, revg. 22 Am. B. R. 177, 166 Fed. 613; *Matter of Halper* (N. Y. City Ct.), 82 N. Y. Misc. 205, 31 Am. B. R. 238, 143 N. Y. Supp. 1005.

110a. *McIntyre v. Kavanaugh*, 242 U. S. 138, 38 Am. B. R. 165, 37 Sup. Ct. 38, 61 L. Ed. 205, affg. 210 N. Y. 175, 31 Am. B. R. 712, 104 N. E. 135; *Matter of Arnao* (D. C., N. Y.), 32 Am. B. R. 83, 210 Fed. 395; *Matter of Keeler* (D. C., N. Y.), 40 Am. B. R. 231, 243 Fed. 770; *Covington v. Rosenbush* (Ga. Sup. Ct.), 42 Am. B. R. 400, 97 S. E. 73, affg. 42 Am. B. R. 492, 97 S. E. 462; *Mason v. Sault* (Vt. Sup. Ct.), 44 Am. B. R. 504, 108 Atl. 267. See also discussion *ante*, under this section, II, c. (2) *Liabilities for conversion*, p. 423.

The wrongful repledge of stock by a broker in violation of the New York Penal Law constitutes a wilful and malicious injury to property within the meaning of this subdivision. *Heaphy v. Kerr* (N. Y. App. Div.), 45 Am. B. R. 53, 190 App. Div. (N. Y.) 810.

111. *Jefferson Transfer Co. v. Hull* (Wis. Sup. Ct.), 40 Am. B. R. 844, 166 N. W. 1; *Matter of Cunningham* (D. C., N. Y.), 42 Am. B. R. 560, 253 Fed. 663; *Tompkins, as Admr., v. Williams*, 137 N. Y. App. Div. 521, 23 Am. B. R. 886, 122 N. Y. Supp. 152, holding that the administration of chloral to an intoxicated guest by a saloon keeper is not necessarily a malicious or intentional injury; *Matter of Halper* (N. Y. City Ct.), 82 N. Y. Misc. 205, 31 Am. B. R. 238, 143 N. Y. Supp. 1005, holding that "wilful and malicious" do not necessarily involve hatred or ill-will as a state of mind, but arise from a wrongful act done intentionally without just cause or excuse. The wrong which is excluded from the effect of the discharge must be both intentional and malicious. *Matter of Levitan* (D. C., N. Y.), 34 Am. B. R. 789, 224 Fed. 241.

112. *Peters v. United States ex rel. Kelly* (C. C. A., 7th Cir.), 24 Am. B. R. 206, 177 Fed. 885, revg. 22 Am. B. R. 177, 166 Fed. 613, holding that, where a judgment for damages for overstepping her authority as a teacher in administering corporal punishment was rendered against bankrupt under a declaration containing a count for trespass *vi et armis*, in a State where such a judgment cannot lawfully be rendered except upon proof of a wilful and malicious injury, the constitutional requirement that such judgment receive full faith and credit impels the conclusion that the jury, under proper instructions, based their verdict on sufficient evidence, and therefore the judgment must be considered one for wilful and malicious injury not affected by a discharge in bankruptcy. Compare *Ex p. Cote* (Vt. Sup. Ct.), 44 Am. B. R. 43, 106 Atl. 519.

113. *Leicester v. Hoadley* (Sup. Ct., Kan.), 66 Kan. 172, 9 Am. B. R. 318, 71 Pac. 318, so held, where such alienation had been accomplished by schemes and devices of the judgment debtor, and resulted in the loss of support and impairment of health to the wife.

114. *Flanders v. Mullin*, 80 Vt. 124, 18 Am. B. R. 708, 66 Atl. 789.

(III) *Judgments for personal injuries.*—A judgment obtained for the alienation of a husband's affections is for a wilful and malicious injury to the person and property of another, and is not dischargeable;¹¹³ nor is a judgment in an action for negligent treatment by a surgeon;¹¹⁴ nor a judgment for slander;¹¹⁵ nor a judgment for a libel;¹¹⁶ nor a judgment for an assault and battery.¹¹⁷ A judgment in favor of the plaintiff in an action for false imprisonment is not a "liability for wilful and malicious injury to the person," where the complaint contains no allegation of malice on the part of the defendant.¹¹⁸ A judgment entered upon a recognizance given by the bankrupt upon taking a poor debtor's oath after being arrested upon a judgment against him for assault is not released by his discharge in bankruptcy;¹¹⁹ nor is a judgment for costs awarded the defendant in an action for slander.¹²⁰ A judgment against a bankrupt for damages based on the value of an unexpired term of a lease to premises, the possession of which was retained by the bankrupt, the owner being wrongfully deprived of possession by force, threats and fear inspired thereby, is a liability for a "wilful and malicious injury to property," and is not dischargeable.¹²¹ A judgment for damages arising out of an automobile accident is dischargeable,^{121a} unless it is shown that it was caused by the wilful and intentional act of the defendant in reckless disregard of the rights of the plaintiff.^{121b}

(6) *ALIMONY DUE OR TO BECOME DUE.*—A discharge in bankruptcy does not release a bankrupt from liability for the payment of "alimony due or to become due."¹²² There were many cases prior to the amendment of 1903. Some held that alimony due or to grow due was dischargeable;¹²³ others that alimony due before the bankruptcy was barred by the discharge;¹²⁴ some implied that alimony to accrue was not; while the majority of cases held to the broader view that alimony, whether due or not, was not a debt at all, but a duty, liquidated in terms of money for convenience only, and, therefore, neither provable nor dischargeable.¹²⁵ In its ultimate analysis, the question

113. *Drake v. Vernon* (Sup. Ct., So. Dak.), 26 So. Dak. 354, 25 Am. B. R. 69, 128 N. W. 317.

116. *McDonald v. Brown* (Sup. Ct., R. I.), 23 R. I. 646, 10 Am. B. R. 53, 51 Atl. 213; *National Surety Co. v. Medlock* (Sup. Ct., Ga.), 19 Am. B. R. 554; *Thompson v. Judy* (C. C. A., 6th Cir.), 22 Am. B. R. 154, 169 Fed. 553.

117. *McChristal v. Clisbee*, 190 Mass. 120, 16 Am. B. R. 838, 76 N. E. 511.

118. *Johnston v. Bruckheimer*, 133 N. Y. App. Div. 649, 22 Am. B. R. 242, 118 N. Y. Supp. 189.

119. *In re Colala* (D. C., Mass.), 13 Am. B. R. 292, 133 Fed. 255.

120. *Drake v. Vernon* (Sup. Ct., So. Dak.), 26 So. Dak. 354, 25 Am. B. R. 69, 128 N. W. 317.

121. *In re Munro* (D. C., N. Y.), 28 Am. B. R. 664, 197 Fed. 450.

121a. *Jefferson Transfer Co. v. Hull* (Wis. Sup. Ct.), 40 Am. B. R. 844, 166 N. W. 1; *Basemore v. Stephenson* (Ga. Ct. of App.), 44 Am. B. R. 215, 100 S. E. 234, citing *Collier on Bankruptcy* (11th Ed.), 441; *Matter of Grout* (Vt. Sup. Ct.), 13 Vt. 318, 33 Am. B. R. 789, 92 Atl. 646; *Hiteshul v. Jones* (Pa. Ct. of Com. Pl.), 60 Pa. L. J. 645, 28 Am. B. R. 854.

121b. *Ex p. Cote* (Vt. Sup. Ct.), 44 Am. B. R. 48, 106 Atl. 519.

122. *Bankr. Act*, § 17-a (2); *Matter of Pyatt* (D. C., Nev.), 42 Am. B. R. 462, 267 Fed. 302, citing *Collier on Bankruptcy* (11th Ed.) 438.

What is alimony?—A decree of divorce awarding a wife \$50 per month, as alimony, payable monthly, or *en masse*, at the option of the husband, in the sum of \$5,000, is an allowance for alimony and a claim therefor is not barred by the husband's discharge. *Egbers v. Northern Pacific Ry. Co.* (Wash. Sup. Ct.), 40 Am. B. R. 380, 167 Pac. 1073.

Effect of prior contention by wife that award was not alimony.—The fact that a wife, in a proceeding to modify a decree awarding her alimony, took the position that the award was not alimony but was a part of a property settlement, and was a fixed award or judgment, does not estop her from subsequently contending that it was not discharged in bankruptcy. *Egbers v. Northern Pacific Ry. Co.* (Wash. Sup. Ct.), 40 Am. B. R. 380, 167 Pac. 1073.

123. *In Kentucky alimony due and unpaid before adjudication in bankruptcy was held to be a provable and dischargeable debt.* *Fite v. Fite*, 22 Ky. L. Rep. 1638, 5 Am. B. R. 461, 61 S. W. 26; *In re Houston* (D. C., Ky.), 3 Am. B. R. 107, 94 Fed. 119.

124. *In re Challoner* (D. C., Ill.), 3 Am. B. R. 442, 98 Fed. 82; *Turner v. Turner* (D. C., Ind.), 6 Am. B. R. 289, 108 Fed. 785; *In re Van Orden* (D. C., N. J.), 2 Am. B. R. 801, 96 Fed. 86.

In New York alimony in arrears and unpaid before the filing of a petition was not covered by the discharge. *Malsner v. Malsner*, 62 N. Y. App. Div. 296, 6 Am. B. R. 295, 70 N. Y. Supp. 1107. But a judgment recovered in this State for alimony due under a decree of divorce granted in another State, is simply a money judgment, and was held a provable and dischargeable debt. *In re Williams' Estate* (Surr. Ct., N. Y.), 23 Am. B. R. 394, 118 N. Y. Supp. 562.

125. *Young v. Young*, 35 N. Y. Misc. 335, 7 Am. B. R. 171, 71 N. Y. Supp. 944; *Barclay v. Barclay*, 184 Ill. 375, 56 N. E. 636; *Deen v. Bloomer*, 191 Ill. 416, 61 N. E. 131; *Welty v. Welty*, 195 Ill. 335, 63 N. E.

turned on what alimony is, a debt or a duty, and reference was usually had to the decision of the State granting the decree. Thus, it was thought, prior to the amendment of 1903, the Kentucky rule, which declared alimony both past and future merely a debt,¹²⁶ was not affected by *Audubon v. Shufeldt*,¹²⁷ wherein the Supreme Court held a judgment of the local courts of the District of Columbia awarding alimony not affected by the defendant's discharge.¹²⁸ Indeed, the national scope of this opinion was questioned, both the court below and the Supreme Court being, it was thought, without jurisdiction to determine the effect of the discharge in the proceeding in which it was granted.

(7) **MAINTENANCE OR SUPPORT OF WIFE OR CHILD.**—The broad principle that obligations to the sovereign are not discharged seems to exempt support or bastardy orders from the general rule that all provable disabilities are discharged. A husband's obligation to support his divorced wife under an agreement to pay her an annuity, "during her life, or until she remarries," is not a provable debt against the husband's estate in bankruptcy, and is not released by his discharge.¹²⁹ This clause refers only to the involuntary liability under the common law for support of wife and children, and to any one who relieves their want. It does not refer to liabilities for goods purchased by a husband or parent and used by wife or child;¹³⁰ nor does it apply to medical attendance furnished upon the express or implied contract of the husband or parent to pay therefor, provided there is no breach of duty on the part of the husband or parent.¹³¹ The reported cases are few,¹³² but the

161; *In re Shepard* (D. C., N. Y.), 5 Am. B. R. 857, 97 Fed. 187; *In re Smith* (Ref., N. Y.), 3 Am. B. R. 67, and cases cited; *People v. Grell*, 65 N. Y. Supp. 522; *In re Nowell* (D. C., Mass.), 3 Am. B. R. 837, 99 Fed. 931. Compare also *Audubon v. Shufeldt*, 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1009; *In re Lachemeyer*, Fed. Cas. 7,966; *Wetmore v. Markoe*, 196 U. S. 68, 13 Am. B. R. 1, 49 L. Ed. 390.

A judgment for alimony included in his schedules is not discharged by a husband's discharge in bankruptcy, and the wife is not precluded from objecting to the cancellation of such judgment, upon the ground that a discharge has been granted, merely because she may have other remedies which she may pursue in the State court upon the order awarding alimony. *Maier v. Maier* (N. Y. Sup. Ct.), 77 N. Y. Misc. 145, 28 Am. B. R. 856, 135 N. Y. Supp. 1038.

126. *In re Houston* (D. C., Ky.), 2 Am. B. R. 107, 94 Fed. 119; *Fite v. Fite*, 22 Ky. L. Rep. 1,638, 5 Am. B. R. 461, 61 S. W. 26.

127. 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1009. Compare also for remedies, *Wagner v. Houston* (C. C. A., 6th Cir.), 4 Am. B. R. 596, 104 Fed. 133.

128. *In North Carolina*, in the case of *Arrington v. Arrington* (Sup. Ct., N. Car.), 131 N. Car. 143, 10 Am. B. R. 103, 42 S. E. 554, the court distinguished the case of *Audubon v. Shufeldt*, 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1009, and held that a final judgment for alimony entered in another State upon a decree for an absolute divorce is a provable and dischargeable debt. It was

contended that the United States Supreme Court based its decision upon the fact that a decree for alimony is not a final judgment or decree; but a decree for alimony entered in a court in another State, being held final by the courts of North Carolina, the reasoning of the United States Supreme Court is not conclusive in that State. *In Wetmore v. Wetmore*, 196 U. S. 68, 13 Am. B. R. 1, 49 L. Ed. 390, the Supreme Court in effect held that the amendment of 1903, excepting alimony from a discharge in bankruptcy, is merely declaratory of the law as it previously existed.

129. *Dunbar v. Dunbar*, 190 U. S. 340, 10 Am. B. R. 139, 47 L. Ed. 1084, affg. 180 Mass. 179, 62 N. E. 248. See *McKittrick v. Cahoon*, 89 Minn. 383, 10 Am. B. R. 139, 95 N. W. 223; *Matter of Vadner* (D. C., Nev.), 42 Am. B. R. 465, 259 Fed. 614, citing *Collier on Bankruptcy* (11th Ed.) 430.

130. *Schellenberg v. Mullaney*, 112 N. Y. App. Div. 384, 16 Am. B. R. 542, 98 N. Y. Supp. 432, citing *Collier on Bankruptcy* (4th Ed.) 190.

131. *In re Ostrander* (D. C., N. Y.), 15 Am. B. R. 96, 139 Fed. 592, holding that the provision has probable application to cases where the person applying for discharge from his debts had so betrayed his moral and legal duty as a husband or parent that another was justified in providing the maintenance and support denied by the one upon whom the law places the primary duty.

132. *In re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 954; *In re Hubbard* (D. C., Ill.), 3 Am. B. R. 528, 98 Fed. 710; *In re Cotton*, Fed. Cas. 3,269; *Hawkes v. Cooksey*, 13 Ohio St. 242. See also p. —, *ante*.

efficacy of the principle is not to be doubted, even without the affirmative declaration of the amendatory act of 1903. Since then, such obligations are not affected by a discharge in bankruptcy.

(8) **SEDUCTION OF AN UNMARRIED FEMALE.**—There was sharp conflict of authority under the law as it existed prior to the amendment of 1903 in respect to whether in such a case a judgment was barred. It seemed to turn on whether, under the laws of the State, the gravamen of the suit was loss of services or wilful wrong.¹³³ Thus, in New York, the father is the suitor, and the injury can hardly be termed wilful and malicious as to him.¹³⁴ In other States, the daughter may sue, and, though it is always doubtful whether that which is consented to can be wilful and malicious, the weight of authority was against discharging liabilities to her of this character.¹³⁵ Were there nothing in the statute that seemed to refer to this class of wrongs, the broad principle that mere liabilities resting entirely in tort are not affected by bankruptcy would probably save them from the effect of a discharge, though the same question seems to have arisen under the English act of 1883, which was silent on the point.¹³⁶ Each country has been forced to remedial legislation. Our amendatory law of 1903, like the English act of 1890,¹³⁷ has now settled the question. Such liabilities, whether to father or to daughter, are hereafter excepted from the effect of a discharge.¹³⁸ But liabilities of this character need not be reduced to judgment to be within this exception, as in England.

(9) **CRIMINAL CONVERSATION.**—Here the same difficulty existed. It is only by a stretch of meaning that a judgment of this character can be held "an injury to the person or property" of the husband, however heinous be the wrong.¹³⁹ However, the law was settled in New York in favor of the non-dischargeability of such a judgment, and by the court of last resort.¹⁴⁰ On principle, this conclusion is eminently right; as an interpretation of mere words, it may be doubted. The question has, however, been determined, the country over, by the amendatory act of 1903. Liabilities of this character are not barred by a discharge. As the law now stands no liability growing out of breach of moral duty, whether in connection with the domestic relations or otherwise, save breach of promise of marriage, is affected by the judgment debtor's discharge.

(10) **OTHER WILFUL AND MALICIOUS INJURIES.**—It is well settled that, aside from the liabilities excepted by the amendatory act of 1903, obligations

133. Compare *In re Sullivan* (Ref., N. Y.), 2 Am. B. R. 30, with *In re Maples* (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 919.

134. *In re McCauley* (D. C., N. Y.), 4 Am. B. R. 122, 101 Fed. 223; *Dialer v. McCauley*, 7 Am. B. R. 138, 73 N. Y. Supp. 270, 66 N. Y. App. Div. 42, revg. s. c., 6 Am. B. R. 491; *In re Sullivan* (Ref., N. Y.), 2 Am. B. R. 30.

135. *In re Maples* (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 919. And compare, as disagreeing with the New York rule, *In re Freche* (D. C., N. J.), 6 Am. B. R. 470, 109 Fed. 620.

136. See Eng. Act of 1883, § 30 (1).

137. See Eng. Act of 1890, § 10.

138. Judgment in action for breach of promise where seduction is alleged.—In the absence of a showing to the contrary, a

judgment in an action in form for breach of promise to marry, wherein seduction is proven, will be presumed to have been awarded for the seduction, and hence is not dischargeable under the amendment of 1903 to section 17a (2) of the Bankruptcy Act, excepting from a bankrupt's discharge liability for the seduction of an unmarried female. *In re Warth* (C. C. A., 2d Cir.), 29 Am. B. R. 210, 200 Fed. 408, revg. 28 Am. B. R. 41.

139. Compare *In re Tinker* (D. C., N. Y.), 3 Am. B. R. 580, 99 Fed. 79.

140. *Colwell v. Tinker*, 169 N. Y. 531, 7 Am. B. R. 334, 62 N. E. 668, 58 L. R. A. 765, affg. s. c., 6 Am. B. R. 434. This case was affirmed by the United States Supreme Court in 193 U. S. 473, 11 Am. B. R. 563, 48 L. Ed. 754.

claimed to be within this subdivision must be (a) both wilful and malicious injuries and (b) to the person or property of another.¹⁴¹ Such, it is thought, would be a slander or a libel, and probably a malicious prosecution or an assault, and the cases *contra* under former laws are no longer controlling;¹⁴² but a liability for trespass or for arrest due to negligence, even if after liquidation, is not. Each case will depend on its own facts. However, as this subdivision tends to impair the bankrupt's remedy, the statute being highly remedial, these exceptions should be so construed as to affect that remedy only so far as is necessarily required by its express terms.

c. *Debts not scheduled.*—(1) *IN GENERAL.*—There is a notable departure in the provisions of subdivision 3 of this section from the weight of authority under the former law. Jurisdiction of the creditor now depends, not on the petition and the adjudication,¹⁴³ but on the facts, either that the debt was "duly scheduled in time for proof and allowance,"¹⁴⁴ or, if not, that the "creditor had notice or actual knowledge of the proceedings in bankruptcy." The cases thus far are uniform in interpreting the words of this subdivision to mean what they say.¹⁴⁵ The Supreme Court has also impliedly sustained the constitutionality of these provisions.¹⁴⁶

(2) *NAME AND ADDRESS OF CREDITOR.*—Extreme exactness must be used in describing the creditor by name, or he will not be "duly scheduled;"¹⁴⁷ the

141. Compare *In re Tinker* (D. C., N. Y.), 3 Am. B. R. 580, 99 Fed. 79; *In re Sullivan* (Ref., N. Y.), 2 Am. B. R. 30.

142. For instance, *In re Simpson*, Fed. Cas. 12,879. See cases, p. —, *ante*.

143. *Black v. Blazo*, 117 Mass. 17; *Platt v. Parker*, 6 T. & C. 377; *Lamb v. Brown*, Fed. Cas. 8,011.

144. *Time for proof and allowance.*—Where a debtor in filing his schedules in bankruptcy omitted therefrom any reference to plaintiff's claim and failed to schedule such debt at all until within four days of the expiration of the year for proving claims, so that the plaintiff did not have time to have his debt proved and allowed, such debt was not duly scheduled "in time for proof and allowance" and therefore was not discharged. *McCreery & Co. v. Brown* (Pa. Ct. of Com. Pl.), 61 Pa. L. J. 80, 29 Am. B. R. 238.

145. *Fider v. Mannheim*, 81 N. W. 2; *Collins v. McWalters*, 35 N. Y. Misc. 648, 6 Am. B. R. 593, 73 N. Y. Supp. 203; *Tyrrel v. Hammerstein*, 33 N. Y. Misc. 505, 6 Am. B. R. 430, 67 N. Y. Supp. 717; *In re Beerman* (D. C., Ga.), 7 Am. B. R. 431, 112 Fed. 662; *Hayer v. Comstock* (Sup. Ct., Iowa), 115 Iowa 187, 7 Am. B. R. 493, 88 N. W. 351; *In re Monroe* (D. C., Wash.), 7 Am. B. R. 706, 114 Fed. 393; *Zimmerman v. Ketchum* (Sup. Ct., Kan.), 66 Kan. 98, 11 Am. B. R. 190, 71 Pac. 264; *Broadway Trust Co. v. Mannheim*, 47 N. Y. Misc. 415, 14 Am. B. R. 122, 95 N. Y. Supp. 93; *Custard v. Wigerson* (Sup. Ct., Wis.), 130 Wis. 412, 17 Am. B. R. 337, 110 N. W. 263; *Finnell v. Armoura* (Sup. Ct., Utah), 39 Utah 316, 26 Am. B. R. 802, 806, 117 Pac. 49; *Davis v. Findlay* (Ala. Sup. Ct.), 41 Am. B. R. 692, 78 So. 869.

Judgment note waiving exemptions.—Where a creditor of a bankrupt, holding a

judgment note with a waiver of exemption, does not present it in bankruptcy proceedings, although he has knowledge of such proceedings, he cannot thereafter enforce judgment on the note. *Claster v. Soble*, 22 Pa. Super. Ct. 631, 10 Am. B. R. 446.

The purpose of this subdivision was to remedy a defect in the previous bankruptcy act by which a debt was discharged, even though the name of the creditor was omitted from the schedules, provided such omission was not willful nor fraudulent, even though the creditor had no notice nor knowledge of the proceedings. *Broadway Trust Co. v. Mannheim*, 47 N. Y. Misc. 415, 14 Am. B. R. 122, 95 N. Y. Supp. 93; *Tyrrel v. Hammerstein*, 33 N. Y. Misc. 505, 6 Am. B. R. 430, 67 N. Y. Supp. 717.

More want of notice or knowledge will not prevent the discharge becoming operative if the debt was duly scheduled. *Travis v. Sama* (Ga. Ct. of App.), 43 Am. B. R. 557, 93 S. E. 239.

An indorser of a note not scheduled is subrogated to the rights of the payee after he pays the note. *Calmenson v. Moudry* (Sup. Ct. Minn.), 39 Am. B. R. 624, 162 N. W. 1078.

146. *Hanover Nat. Bank v. Moyses*, 186 U. S. 18, 8 Am. B. R. 1, 46 L. Ed. 1113.

147. See p. 280, *ante*.

What constitutes "duly scheduled."—The claim of a creditor named "Custard" is not duly scheduled under the name of "Castard," and is not affected by the bankrupt's discharge. *Custard v. Wigerson* (Sup. Ct., Wis.), 130 Wis. 412, 17 Am. B. R. 337, 110 N. W. 263. Where a creditor's address in the schedules was given "Leader Building, 5th avenue, Pittsburgh, Pa.," instead of "Maeder Building, 5th avenue, Pittsburgh, Pa.," which is his proper address, it was held to be insufficient. *Reed v. Dippell* (Ct. of Common Pleas, Pa.), 61 Pa. Dist. 126, 17 Am. B. R. 371. Where the schedule gives the address of creditors as "317 Main street, New York city," there is no presumption that notices so addressed reached them at "317 Main street, Cincinnati, Ohio." *Wertheimer v. Howard*, 47 N. Y. Misc. 145, 14 Am. B. R. 547, 98 N. Y. Supp. 518. Where a surviving partner

schedule of the residence of a creditor as "unknown," when it could have been ascertained by the exercise of reasonable diligence, would prevent a discharge of the debt.¹⁴⁸ A failure to use due efforts to learn the street number of a judgment creditor, will deprive the petitioner of the right to a discharge of such judgment.¹⁴⁹ The act itself does not require the street number to be inserted. The cases holding this essential were decided under bankruptcy rules in force in the district where the bankruptcy occurs. Both as to the use of initials and the omission of a street address the act must be given a general construction, as in the light of the fact that letters directed to persons by their initials are constantly, properly and promptly delivered in the largest cities of the country, even when the street number is not given.¹⁵⁰ It is clear also that where the failure to schedule the actual owner of the debt

is correctly described in the schedules as the creditor, and had actual notice, although his residence was incorrectly stated in the schedules, his debt will be discharged. *Kaufman v. Schreier*, 108 N. Y. App. Div. 298, 17 Am. B. R. 314, 95 N. Y. Supp. 729.

In *Liesum v. Krauss*, 35 N. Y. Misc. 376, 71 N. Y. Supp. 1022, the creditor's name was Liesum, but he was scheduled as Liesman, and his debt was held not discharged. See also *Columbia Bank v. Birkett*, 9 Am. B. R. 481, 174 N. Y. 112; *affd. sub nom Birkett v. Columbia Bank*, 195 U. S. 345, 12 Am. B. R. 691, in which case the bankrupts had scheduled a debt represented by their promissory note in the name of the payee, when they knew it was held by a discount bank, which had no notice or actual knowledge of the bankruptcy proceedings prior to the bankrupt's discharge; it was held that the bank was not bound thereby and could recover on the note against the bankrupts.

Where a bankrupt in his schedule of creditors, in scheduling a debt, gave as the name of a creditor, "C. Ferger," instead of "Charles Ferger," and his residence merely as "Indianapolis," and the proof showed that the information furnished in the schedules did not result in the creditor's receiving notice of the bankruptcy proceedings, the debt was not duly scheduled so as to be discharged. *Kreitlein v. Ferger* (Ind. App. Ct.), 52 Ind. App. 199, 28 Am. B. R. 908, 97 N. E. 819, 98 N. E. 1005, *revd.* in 238 U. S. 21, 34 Am. B. R. 862, 59 L. Ed. 1184, holding that the failure to give the street address was not fatal to the validity of the schedules.

As to failure to schedule name and residence of receiver of corporation appointed in action to enforce liability of stockholder, where names of creditors are scheduled, see *Longfield v. Minnesota Sav. Bank*, 95 Minn. 54, 14 Am. B. R. 413, 103 N. W. 706.

The use of ditto marks to indicate the residence of a creditor is ineffectual. *Haack v. Theise*, 51 N. Y. Misc. 3, 16 Am. B. R. 699, 99 N. Y. Supp. 905. The listing of the name of a creditor by an initial instead of the full Christian name is not such a defect as to deprive the bankrupt of a discharge of the debt. *Kreitlein v. Ferger*, 238

U. S. 31, 34 Am. B. R. 862, 59 L. Ed. 1184, *revd.* 52 Ind. App. 199, 28 Am. B. R. 908, 97 N. E. 819.

Failure to schedule equitable assignee.—A discharge in bankruptcy will bar an action on a judgment by an equitable assignee thereof, though said equitable assignee was not scheduled in the list of creditors, where it appears that the original judgment creditor was scheduled and received notice and that the assignee did not inform the debtor that he had acquired the judgment creditor's interest in the judgment. *Morency v. Landry* (N. H. Sup. Ct.), 45 Am. B. R. 43, 108 Atl. 853.

148. Schiller v. Weinstein, 47 N. Y. Misc. 622, 15 Am. B. R. 183, 94 N. Y. Supp. 763.

Failure to state that address was unknown.—A debt arising on a promissory note is not discharged where the schedules failed to state the name and address of the holder of the note or that the address was unknown and the addresses of the persons who were accommodated and the place where the debt was contracted and whether the liability was joint, several or individual. *Hazard Mfg. Co. v. Brown* (Ct. of Common Pleas, Pa.), 25 Am. B. R. 903.

Judgment creditor scheduled as unknown.—Where a bankrupt in scheduling a judgment set forth the residence and occupation of the judgment creditors as "Unknown—California," though he had actual knowledge of their residence and post-office address, and the judgment creditors did not learn of the bankruptcy proceedings until long after bankrupt's discharge, the judgment was not properly scheduled so as to come within the terms of bankrupt's discharge, and a motion to cancel said judgment because of the discharge should be denied. *Miller v. Guasti*, 226 U. S. 170, 29 Am. B. R. 201, 57 L. Ed. 173, *affg.* 203 N. Y. 269, 26 Am. B. R. 797, 96 N. E. 418.

149. Cagliostro v. Indelli, 53 N. Y. Misc. 44, 17 Am. B. R. 685, 102 N. Y. Supp. 918, holding that where a bankrupt schedules the residence of judgment creditor as "Mulberry street, New York City," and, owing to failure to give the street number, the creditor, who had resided in one house in said street for more than ten years last past, receives no notice of the bankruptcy proceedings, and denies any knowledge thereof, the claim will not be discharged.

150. Failure to give street and number.—The act itself does not require the street number of a creditor to be given, and an omission thereof is not in itself sufficient to withhold the privilege of discharge in respect to the creditor's debt. *Kreitlein v. Ferger*, 238 U. S. 31, 34 Am. B. R. 862, in which the court discusses the improper scheduling in debts as follows: "There are

was intentional, such debt will not be discharged,¹⁵¹ but not if there was actual notice.¹⁵²

(3) NOTICE OR KNOWLEDGE; PROOF.—A written notice need not be served upon the creditor, but actual knowledge is sufficient, and facts occurring before or after the commencement of the proceedings are competent to establish such knowledge.¹⁵³ "Actual knowledge of the proceedings" contemplated by this section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends;¹⁵⁴ and it has been held that actual knowledge of an attorney employed to collect a judgment against the bankrupt is sufficient.¹⁵⁵ Knowledge obtained from reading the newspapers and from verbal communication has been held to be sufficient.¹⁵⁶ Mere casual conversation with a disinterested party in which a mortgagee is informed that the mortgagor has gone into bankruptcy, does not constitute notice so as to relieve the mortgagor of his obligations under the mortgage, where it appears that the claim was not scheduled.¹⁵⁷ It has been held that the burden of proof is upon the bankrupt to establish the fact that the debt was duly scheduled or that the creditor had notice or actual knowledge of the proceedings.¹⁵⁸ But the Supreme Court in a recent case has stated

only a few instances, under the Bankruptcy Act, in which the courts have had occasion to deal with the subject, or to construe section 7(8),—requiring claims to be duly listed,—in connection with section 17, which provides that a discharge shall release the debtor from all provable debts 'except such as . . . (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy . . .'

"It has been held that a claim is not duly scheduled if the name of the creditor is improperly spelled, *Custard v. Wigderson*, 180 Wis. 416, 17 Am. B. R. 337, 110 N. W. 263, 10 Ann. Cas. 740; or if the street number is given, but the name of the city of his residence is omitted, *Troy v. Rudnick*, 198 Mass. 563, 85 N. E. 177; or if the creditor is listed as residing in one city when he actually lives in another, *Marshall v. English-American Loan & T. Co.*, 127 Ga. 376, 56 S. E. 449; or if the creditor's name is given, but the schedule falsely recites 'Residence unknown,' *Birkett v. Columbia Bank*, 195 U. S. 345, 12 Am. B. R. 691, 49 L. Ed. 231; *Miller v. Guasti*, 226 U. S. 170, 29 Am. B. R. 201, 57 L. Ed. 173; *Parker v. Murphy*, 215 Mass. 72, 31 Am. B. R. 646, 102 N. E. 86. These decisions, however, were based on extrinsic proof and on a finding that, as a matter of fact, the name was misspelled, or the creditor's residence was improperly listed, or that the bankrupt knew the creditor's address and falsely stated that the residence was 'unknown.' None of them holds that, as a matter of law, the discharge was rendered inoperative merely because the street number was not given in the schedule."

151. *Columbia Bank v. Birkett*, 9 Am. B. R. 481, 174 N. Y. 112; *and. sub nom. Birkett v. Columbia Bank*, 195 U. S. 345, 12 Am. B. R. 69, 49 L. Ed. 231, holding that where bankrupts schedule a debt, represented by their promissory note, in the name of their payee, when they know it is held by a discount bank, and in this matter deprive the bank of notice of their proceeding in bankruptcy, the bank may subsequently recover on the note.

152. *Zimmerman v. Ketchum*, 76 Kan. 98, 11 Am. B. R. 190, 71 Pac. 264.

153. *Knapp v. Harold*, 11 Am. B. R. 190 note, 25 Ohio C. C. Rep. 213; *New England Advertising Co. v. Lebson* (Pa. Ct. Com. Pleas), 29 Am. B. R. 62, holding that notice of bankruptcy proceedings to an agent of the creditor who sought to collect the claim against the bankrupt constitutes sufficient knowledge; *Bank of Wrightsville v. Four Seasons* (Ga. Ct. of App.), 40 Am. B. R. 764, 94 S. E. 649; *Brooks v. Pitts* (Ga. Ct. of App.), 44 Am. B. R. 437, 100 S. E. 776.

Service of process or personal notice is not essential to the binding force of a discharge. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1, 46 L. Ed. 1113.

154. *Birkett v. Columbia Bank*, 195 U. S. 345, 12 Am. B. R. 691, 49 L. Ed. 231.

155. *Keefeauver v. Hevenor*, 163 N. Y. App. Div. 531, 32 Am. B. R. 590, 148 N. Y. Supp. 434. Compare *Lynch v. McKee* (Tex. Ct. of Civ. App.), 44 Am. B. R. 132, 214 S. W. 484.

156. *Kaufman v. Scheeler*, 108 N. Y. App. Div. 298, 17 Am. B. R. 314, 95 N. Y. Supp. 729; *Morrison v. Vaughan*, 119 N. Y. App. Div. 184, 18 Am. B. R. 704, 104 N. Y. Supp. 169.

157. *Wheeler v. Newton*, 168 N. Y. App. Div. 782, 35 Am. B. R. 25, 154 N. Y. Supp. 451.

158. *Weidenfeld v. Tillinghast*, 54 Misc. 90, 18 Am. B. R. 531, 104 N. Y. Supp. 712; *Calmenon v. Moudry* (Minn. Sup. Ct.), 39 Am. B. R. 624, 161 N. W. 1076. See Am. Bankr. Dig., § 1116.

Burden of proof.—A bankrupt has the burden of proving a debt was duly scheduled and that the creditor had either statutory or other actual notice of the bankruptcy proceedings, and if there is no evidence of scheduling the debt, and the creditor had no actual notice of the bankruptcy proceedings, the bankrupt is not discharged. *Bogart v. Cowboy State Bank* (Tex. Civ. App.), 37 Am. B. R. 387, 152 S. W. 678.

159. See Official Form No. 59, *post*.

160. *Kreitlein v. Ferger*, 238 U. S. 21, 34 Am. B. R. 862, 50 L. Ed. 1184. It may be doubted whether the court in this case intended to lay down the rule that where a schedule omitted the creditor's name, the burden rests upon the plaintiff to show that he had no notice, for the

that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order of discharge, containing a recital that the bankrupt has been discharged from all provable debts, "excepting such as are by law excepted from the operation of a discharge in bankruptcy,"¹⁵⁹ makes out a *prima facie* defense, the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge.¹⁶⁰

d. **Fiduciary debts.**—(1) **IN GENERAL.**—The language of the present bankruptcy acts as to debts created while acting in a "fiduciary capacity" is not materially different from that of the act of 1867, and the same rules of construction should be applied.¹⁶¹ Manifestly the words "were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity" refer to such technical trusts as were included in the phrase "fiduciary debts" so frequently used in cases under the former law,¹⁶² and not trusts which the law implies from the contract.¹⁶³ Fraud of officers or of persons in a fiduciary capacity is what is here meant, and not the ordinary fraud of an ordinary debtor in so disposing of his property as to hinder, delay or defraud his creditors.¹⁶⁴ The distinction between

court says: "The authorities, however, differ as to whether, under section 17 (3), the burden is on the plaintiff to show that he had no notice, or on the bankrupt to show that the creditor had notice in time to have proved his claim and had it allowed. *Steele v. Thalheimer*, 74 Ark. 518, 86 S. W. 306; *Van Norman v. Young*, 228 Ill. 430, 81 N. E. 1060; *Alling v. Straka*, 118 Ill. App. 184; *Hallagan v. Dowell*, 139 N. W. 883; *Parker v. Murphy*, 215 Miss. 72, 102 N. E. 85; *Wineman v. Fisher*, 135 Mich. 608, 98 N. W. 404; *Laffoon v. Kerner*, 138 N. C. 285, 50 S. E. 654; *Fields v. Rust*, 36 Tex. Civ. App. 351, 82 S. W. 331; *Bailey v. Gleason*, 76 Vt. 117, 118, 5 Atl. 537; *Custard v. Wigderson*, 130 Wis. 414, 17 Am. B. R. 337, 110 N. W. 263, 10 Ann. Cas. 740. In view of the scope of his testimony that he did not know of the bankruptcy, it is not necessary in this case to discuss that mooted point, unless it must be held that, because of the failure to set out the number of *Ferger's* house in Indianapolis, his claim was not duly scheduled." See also *Morency v. Laundry* (N. H. Sup. Ct.), 45 Am. B. R. 43, 108 Atl. 855. Compare *Smith v. Hill* (Mass. Sup. Ct.), 43 Am. B. R. 186, 122 N. E. 310, wherein the court said: "A discharge in bankruptcy under the terms of section 17 of the Bankruptcy Act is a bar to debts because creditors have had an opportunity to be heard in the bankruptcy courts upon the various matters there in litigation, have had the privilege of proving their claims and of sharing in the distribution of the assets of their debtors. Their claims thus have become *res judicata*. This result ensues from the basic proposition that the bankruptcy court acquired jurisdiction of the creditor, who thus has had his day in court. But if the creditor, through no fault of his own, but wholly through the fault of the debtor upon whom is cast that duty by the law, has no notice or knowledge of the opportunity afforded him to appear in the bankruptcy court, there appears to be no natural justice in holding him bound by its adjudications. He is a stranger to the proceedings. Ordinarily one who asserts the binding force of a judgment by any court must show jurisdiction by that court over the person sought to be charged with the force of the judgment. He assumes the burden of proof on this point.

Since the discharge is for the benefit of the debtor and not of the creditor, there would seem to be a defect in the law if the burden of proving negative consequences arising from the default of the debtor should be borne by the creditor, and not by the debtor. We think a correct construction of the law does not lead to such a result.

There is nothing in *Kreitlein v. Ferger*, 238 U. S. 21, 34 Am. B. R. 862, 35 Sup. Ct. 635, 59 L. Ed. 1184, as we understand it, at all inconsistent with this conclusion."

161. *Leslie v. Shaw*, 122 N. Y. App. Div. 90, 19 Am. B. R. 866, 106 N. Y. Supp. 1,012.

162. *Bracken v. Miller* (C. C., Me.), 5 Am. B. R. 23, 104 Fed. 522; *First Nat. Bank v. Bamforth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600.

The words "fraud," "embezzlement" and "misappropriation" have been held not to refer to the individual debtor referred to in subdivision (2) of this section. In *re Bullis*, 68 N. Y. App. Div. 508, 7 Am. B. R. 238, 73 N. Y. Supp. 1047.

163. *Bracken v. Milner* (C. C., Mo.), 5 Am. B. R. 23, 104 Fed. 522.

164. *Morse v. Kaufman* (Sup. Ct., Va.), 4 Va. Sup. Ct. 172, 7 Am. B. R. 549; *Reeves v. McCracken* (N. J. Eq.), 69 N. J. Eq. 203, 13 Am. B. R. 680, 60 Atl. 332, where it was held only technical trusts were within the section, and it had no application to an alleged fraudulent transfer; *Barrett v. Prince* (C. C. A., 7th Cir.), 16 Am. B. R. 64, 143 Fed. 302, holding that where it is alleged that the bankrupt had embezzled and fraudulently converted to his own use certain goods and chattels, but set forth no facts constituting fiduciary relationship or disclosing fraud, embezzlement, misappropriation or defalcation, the bankrupt is entitled to a discharge; *Matter of Adler* (C. C. A., 2d Cir.), 16 Am. B. R. 414, 144 Fed. 695; *Matter of Floyd* (Ref., D. C., N. Y.), 15 Am. B. R. 277.

Setting aside sale as fraudulent.—The mere fact that incidentally to the collection of a debt a sale of property is set aside as fraudulent does not make the debt one created by fraud, nor prevent its being released by a discharge. In *re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 123 Fed. 845, revg. 1 Am. B. R. 627.

mere frauds in fact and wrongs committed by private or public trustees was not so clearly indicated in the former law. Subdivision 2, with the limitations already indicated, now has to do with the one; subdivision 4 with the other. The words used in the act of 1841, "debts contracted in consequence of a defalcation as a public officer or executor, administrator, guardian or trustee, or while acting in any fiduciary capacity" are very similar to and illuminate those in the present law.

(2) CONSTRUCTION OF WORDS "WHILE ACTING AS AN OFFICER OR IN ANY FIDUCIARY CAPACITY."—Some difficulty formerly existed as to the construction of the qualifying words "while acting as an officer or in any fiduciary capacity." It was held in a number of cases that such words only applied to a "defalcation," and did not limit "fraud," so that under this subdivision any debt created by fraud could not be discharged.¹⁶⁵ But the Supreme Court in the case of *Crawford v. Burke*,¹⁶⁶ has established a contrary doctrine, and the true interpretation is that such words qualify and limit each of the words "fraud," "embezzlement" and "misappropriation," as well as the word "defalcation."¹⁶⁷

(3) WHO ARE FIDUCIARY DEBTORS.—Manifestly only public officers and trustees; and not, as we have already seen, agents, factors, commissionmen, and the like.¹⁶⁸ A naked bailee of money under an express agreement to

¹⁶⁵. *In re Butts* (D. C., N. Y.), 10 Am. B. R. 16, 120 Fed. 960; *In re Wollock* (D. C., Ill.), 9 Am. B. R. 685, 120 Fed. 516; *Frey v. Torrey*, 70 N. Y. App. Div. 166, 8 Am. B. R. 196, 75 N. Y. Supp. 40, *affd.* 175 N. Y. 501.

¹⁶⁶. 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147.

¹⁶⁷. The limitation of the application of this subdivision to fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in any fiduciary capacity is not according to the decision in some jurisdictions. For instance, in the case of *Crawford v. Burke*, 201 Ill. 581, 11 Am. B. R. 15, 66 N. E. 833, it was held that the exception contained in the fourth subdivision applied to debts fraudulently created where no judgment had been obtained, or to those created by the embezzlement of the bankrupt regardless of the fact that he was not acting as an officer or in a fiduciary capacity. This case has been reversed by the Supreme Court of the United States, reported 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147. In the case of *Watertown Carriage Co. v. Hall*, 176 N. Y. 313, 11 Am. B. R. 15, it was held that a complaint alleging that the defendant wrongfully and fraudulently embezzled and misappropriated the plaintiff's money stated a cause of action to which the discharge of the defendant in bankruptcy was no defense; the court cited in support of its contention the case of *Crawford v. Burke*, 201 Ill. 581, 11 Am. B. R. 15, 66 N. E. 833. In the case of *Frey v. Torrey*, 79 N. Y. App. Div. 166, 8 Am. B. R. 196, 75 N. Y. Supp. 40; *affd.* on opinion below, 175 N. Y. 501, it was held that the words "While acting as an officer or in any fiduciary capacity," do not qualify the words "fraud,"

"embezzlement," and "misappropriation," but only the word "defalcation." This case was in effect overruled by *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147, which held that such words qualified "fraud," "embezzlement" and "misappropriation," as well as "defalcation." *Tindle v. Birkett*, 183 N. Y. 267, 15 Am. B. R. 179, *affd.* 205 U. S. 183, 18 Am. B. R. 121, 51 L. Ed. 762; *First Nat. Bank v. Bamforth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600.

The words "embezzlement" or "misappropriation" may not be construed independently of "in a fiduciary capacity." *In re Ennis & Stoppani* (D. C., N. Y.), 22 Am. B. R. 679, 171 Fed. 755.

The word "defalcation" is broader than "embezzlement" or "misappropriation," and neither class of debts so created should be construed out of the section. *In re Butts* (D. C., N. Y.), 10 Am. B. R. 16, 120 Fed. 960.

Fiduciary capacity.—An indebtedness of a bankrupt arising from the embezzlement or misappropriation of the funds of a national bank, while he was an officer thereof, is incurred in a "fiduciary capacity." *Harper v. Rankin* (C. C. A., 4th Cir.), 15 Am. B. R. 608, 141 Fed. 626, *affg.* 13 Am. B. R. 430, 133 Fed. 970. In *Hyde & Sons v. Lesser*, 95 N. Y. App. Div. 320, 12 Am. B. R. 659 (note), 87 N. Y. Supp. 878, it was held that a discharge is not a release from liability for fraud, though such fraud was not perpetrated while acting as an officer or in any fiduciary capacity.

¹⁶⁸. See p. 444, *ante*. And compare *Chapman v. Forsyth*, 2 How. 202; *Hennequin v. Clews*, 111 U. S. 676, 28 L. Ed. 565; *In re Brown*, Fed. Cas. 1,979; *In re Basch* (D. C.,

keep safely and pay over on request is not acting in a "fiduciary capacity."¹⁶⁹ But the refusal of a factor, upon grounds not legally tenable, to return unsold goods after demand, renders his liability therefor a debt created by his fraud, embezzlement or misappropriation while acting in a fiduciary capacity.¹⁷⁰ Although it may not be entirely free from doubt, the term "officer" has been held to mean officers of private corporations and to be of broader application than the words "public officer" as used in the act of 1867.¹⁷¹ An officer of a corporation is an "officer" within the meaning of this provision,¹⁷² but the managing partner of a firm of two members is not.¹⁷³ It is thought, the word "misappropriation" means little more than its companion word "embezzlement." The term "fraud . . . in any fiduciary capacity"

N. Y.), 3 Am. B. R. 235, 97 Fed. 761; In re Bullis, 68 N. Y. App. Div. 508, 7 Am. B. R. 238, 73 N. Y. Supp. 1047.

"A factor or agent who sells the goods of his principal and fails to pay over the money collected is not guilty of misappropriation, while acting in a fiduciary capacity, within the meaning of the Bankruptcy Act." In re Adler (C. C. A., 2d Cir.), 18 Am. B. R. 240, 152 Fed. 422; In re Ennis & Stoppani (D. C., N. Y.), 22 Am. B. R. 679, 171 Fed. 755; Keefauver v. Hevenor, 163 N. Y. App. Div. 531, 32 Am. B. R. 580, 148 N. Y. Supp. 434 (citing text); New England Milk Producers' Ass'n v. Wing (Me. Sup. Jud. Ct.), 45 Am. B. R. 205, 109 Atl. 375.

The term "fiduciary" has been held by the United States Supreme Court, as well as other courts, to apply to what may be understood as technical or express, rather than implied, trusts, and as excluding from such interpretation frauds by commissionmen, brokers, agents, etc. *Gee v. Gee*, 84 Minn. 384, 7 Am. B. R. 500, 87 N. W. 1116.

Failure to pay over proceeds of sale.—

Where bankrupts pledged as security for loans certain accounts for merchandise sold, under an agreement to hold in trust for the pledgees any returned merchandise or to deliver the same to the pledgees who were to be considered as having sole title thereto, unless bankrupts should pay the pledgees for the goods or resell them and pay over the proceeds, a claim based upon the failure of bankrupts to pay over the proceeds of the sale of certain returned merchandise is dischargeable under section 17, the liability not being one created while acting in a "fiduciary capacity" nor constituting a willful injury to property within the meaning of said section. In re Toklas Bros. (D. C., N. Y.), 29 Am. B. R. 709, 201 Fed. 377.

169. *Lewis v. Shaw*, 122 N. Y. App. Div. 966, 19 Am. B. R. 866, 106 N. Y. Supp. 1012.

Deposit of check for purchase of stock.—

Where one deposited a check for a sum of money with bankers and brokers with an order to purchase certain stock, but countermanded the order before the stock was bought and demanded the return of the money, which was not returned, the bankers and brokers did not contract with the defendant while acting in a "fiduciary capacity," within the meaning of section 17 of the bankruptcy act. *Clarke v. Milliken* (App. Term, N. Y.), 70

N. Y. Misc. 492, 25 Am. B. R. 680, 127 N. Y. Supp. 339.

170. *Mathieu v. Goldberg* (C. C., N. Y.), 19 Am. B. R. 191, 156 Fed. 541.

171. *Harper v. Rankin* (C. C. A., 4th Cir.), 15 Am. B. R. 608, 141 Fed. 626, 72 C. C. A. 320, followed in *In re Gulick* (D. C., N. Y.), 26 Am. B. R. 362, 190 Fed. 52. See *Matter of Wenman* (D. C., N. Y.), 16 Am. B. R. 690, 153 Fed. 910, holding that there may be some doubt as to whether the term "officer" applies to any officer, including an officer of a corporation.

Meaning of word "officer."—In the case of *In re Harper* (D. C., Va.), 13 Am. B. R. 430, 133 Fed. 970, the court said: "While the question has not, so far as I am advised, been decided, it seems to me that the change in phraseology from 'public officer' to 'officer' shows an intent to change the meaning of the law in this respect. For authority in supporting this view, we need go no further back than to the language so recently used by the Supreme Court in the case of *Crawford v. Burke*: Our own view, however, is that a change in phraseology creates a presumption of a change in intent, and the Congress would not have used such different language in section 17 from that used in section 33 of the Act of March 2, 1867, c. 14, Stat. 533, without thereby intending a change of meaning. The substitution of the word 'officer' for the phrase 'public officer' cannot properly be considered unintentional. The exact phraseology of such legislation is of too great importance to justify such a presumption. The change of language, therefore, evidenced some change of meaning, and I have been unable to ascribe to it any other change of meaning than to include officers of private corporations. The word 'officer' is clearly of broader meaning than the words 'public officer.' That a director and vice-president of a private corporation, such as a national banking association, is an 'officer' of such corporation not only in popular language, but in the language of almost countless judicial decisions and law text books, and the acts of Congress will not be disputed."

172. In re *Gulick* (D. C., N. Y.), 26 Am. B. R. 362, 190 Fed. 52; *Boyd v. Applewhite* (Miss. Sup. Ct.), 45 Am. B. R. 325.

173. *Martin v. Starrett*, 97 Nebr. 653, 34 Am. B. R. 220, 151 N. W. 154.

clearly refers to wrongs committed by such private trustees as attorneys,¹⁷⁴ executors and administrators,¹⁷⁵ guardians,¹⁷⁶ and trustees in general.¹⁷⁷ The debt, however, should be due from the trustee, executor, administrator, or guardian in his official capacity.¹⁷⁸ It has been held that the "fiduciary capacity" here referred to relates to that of a trustee of an express trust.¹⁷⁹ It relates to a technical trust, only, and has no reference to an implied trust.¹⁸⁰ In order to bring a debt within this exception the fiduciary relation must have existed previously to or independently of the particular transaction from which the debt arises;¹⁸¹ it does not embrace debts arising out of a particular transaction conducted by an agent.¹⁸² When a partnership is dissolved by the death of one of the partners the survivor becomes a trustee and holds the partnership moneys in a "fiduciary capacity" for the representatives of the deceased.¹⁸³ But it is well settled that the sureties on the bonds of such

174. *Flanagan v. Pearson*, 42 Tex. 1; *Hefner v. Jayne*, 39 Ind. 463; *White v. Platt*, 5 Den. (N. Y.), 274. *Contra*: *Wolcott v. Hodge*, 81 Mass. 547.

175. *Crisfield v. State*, 55 Md. 192; *Laramore v. McKenzie*, 60 Ga. 532; *Arnold v. Smith* (Minn. Sup. Ct.), 40 Am. B. R. 27, 163 N. E. 672. And compare *Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312; *Brown v. Hannagan* (Sup. Jud. Ct., Mass.), 210 Mass. 246, 27 Am. B. R. 294, 96 N. E. 714.

176. *Carlin v. Carlin*, 8 Bush (Ky.) 141; *Halliburton v. Carter*, 55 Mo. 435; *Simpson v. Simpson*, 80 N. C. 332; *In re Maybin*, Fed. Cas. 9,337.

177. *Flagg v. Ely*, 1 Edm. Sel. Cas. 206; *Pinkston v. Brewster*, 14 Ala. 315; *Kingsland v. Spalding*, 3 Barb. Ch. (N. Y.) 341.

178. *Coleman v. Davis*, 45 Ga. 489; *Madison v. Dunkle*, 114 Ind. 262, 16 N. E. 593; *Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312.

179. *Matter of Wenman* (D. C., N. Y.), 16 Am. B. R. 690, 163 Fed. 910, in which Holt, District Judge, says: "The authorities establish that the phrase 'while acting as an officer or in any fiduciary capacity' qualify all the preceding words 'fraud, embezzlement, misappropriation or defalcation,' and do not simply refer to the last word 'defalcation,' and that the 'fiduciary capacity' referred to in this section relates to that of a trustee of an express trust."

Agent to collect funds.—A discharge in bankruptcy does not release an agent from liability to account for moneys collected upon certain notes and mortgages entrusted to him in a fiduciary capacity for collection. *Williams v. Virginia-Carolina Chemical Co.* (Ala. Sup. Ct.), 182 Ala. 413, 31 Am. B. R. 64, 62 So. 755.

But see *American Agri. Chemical Co. v. Berry* (Me. Sup. Ct.), 110 Me. 528, 31 Am. B. R. 142, 87 Atl. 218, holding that where a bankrupt has failed to pay or account for fertilizer shipped to him for sale under a contract providing that he would hold the proceeds of sales and goods remaining unsold "in trust" and separate for the settlement of his account, his liability is not created "in a fiduciary capacity" so as to be excepted from his discharge.

180. *First National Bank v. Bamforth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600.

The term "fiduciary capacity," as used in the bankruptcy act, applies to technical trusts, and not to those arising by implication of law from the contract of parties. *Martin v. Starrett*, 97 Nebr. 653, 34 Am. B. R. 220, 151 N. W. 154.

181. *First Nat. Bank v. Branforth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600, citing *Cronan v. Cotting*, 104 Mass. 245, 6 Am. Rep. 232; *Bryant v. Kinyon*, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801; *Henniquin v. Clews*, 77 N. Y. 427, 33 Am. Rep. 641; *Goodman v. Herman*, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885; *Bracken v. Milner* (C. C., Mo.), 5 Am. B. R. 23, 104 Fed. 522; *American Agri. Chemical Co. v. Berry*, 110 Me. 528, 31 Am. B. R. 142, 87 Atl. 218, 45 L. R. A. (N. S.) 1106, Ann. Cas. 1915A, 1293; *Hammond & Burt v. Noble*, 57 Vt. 193; *Upshur v. Briscoe*, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931.

182. **Mere agency insufficient to show fiduciary relation.**—An agent intrusted by his principal with beer to deliver to laborers under his supervision, and, after deducting the purchase price thereof from their wages, to turn the same over to such principal, does not act in a "fiduciary capacity" so as to except from his discharge in bankruptcy a claim for money so collected by him and converted to his own use. *In re Camelo* (D. C., N. Y.), 28 Am. B. R. 353, 195 Fed. 632; *Knott v. Putnam* (D. C., Vt.), 6 Am. B. R. 80, 107 Fed. 907; *Bryant v. Kenyon*, 127 Mich. 152, 6 Am. B. R. 237, 86 N. W. 531, 53 L. R. A. 801. "In all cases of agency there is trust and confidence reposed, as indeed there is in all sales on credit; but the bankruptcy law refers to those technical trusts such as grow out of the relation of executor, administrator, guardian, trustee and the like." Judge Ray in *In re Camelo* (D. C., N. Y.), 28 Am. B. R. 353, 195 Fed. 632. See opinion in *Upshur v. Briscoe*, 138 U. S. 375, 376, 11 Sup. Ct. 313, 34 L. Ed. 931.

183. *Haggerty v. Badkin* (C. Ch., N. J.), 72 N. J. Eq. 473, 18 Am. B. R. 302, 66 Atl.

trustees are not bound to a fiduciary obligation, and a discharge of the surety will be an available bar.¹⁸⁴ On the other hand, partners¹⁸⁵ and bankers,¹⁸⁶ like agents, factors,¹⁸⁷ and commissionmen, do not usually act in a fiduciary capacity. After a discharge in bankruptcy the burden of proving that the debt was created by fraud, or by one acting in a fiduciary capacity, is on the plaintiff.¹⁸⁸

IV. PLEADING DISCHARGE.

a. In general.—This subject is discussed elsewhere.¹⁸⁹ A discharge being only available in bar, it must be regularly pleaded.¹⁹⁰ Under the former law, the method was prescribed.¹⁹¹ Now, though there is no certificate, any form of plea corresponding to the practice of the court in which it is entered will be sufficient. A certified copy of the order of discharge or confirming the composition, with brief allegations identifying it and fixing the time, is the usual method.¹⁹² A reply or replication to an answer setting up a discharge, as that the debt sued on is for fraud, is not necessary in the code States; proof of that fact may be made without such a plea.¹⁹³ It must appear that the liability pleaded against existed at the time of the bankruptcy. A discharge can only be pleaded by the bankrupt or his privies in title.¹⁹⁴

b. As dependent on time.—If the suit is pending at the time of bankruptcy, it may be stayed until the discharge is granted.¹⁹⁵ If not stayed and a judgment is entered before discharge, the discharge may be availed of as a bar to further remedies on the judgment.¹⁹⁶ The same is true if the action is begun

42, holding that, where complainant's intestate, immediately after having deposited with defendant the sum of \$500, as and for his share of the capital of a proposed partnership between them, was taken ill and died within a few days, and pending his sickness defendant deposited the money to his own credit in the bank and, after the death of the intestate, converted the money to his own use, the defendant held the money in a "fiduciary capacity."

184. *Ex parte Taylor*, Fed. Cas. 13,773; *U. S. v. Throckmorton*, Fed. Cas. 16,516; *Steele v. Graves*, 68 Ala. 21; *Reitz v. People*, 72 Ill. 435; *Fowler v. Kendall*, 44 Mo. 448; *McMinn v. Allen*, 67 N. C. 131.

185. *Pierce v. Shippee*, 90 Ill. 371; *Hill v. Sheibley*, 68 Ga. 556.

The implied trust relation existing between partners, under which their liabilities to each other must be determined, does not bring their affairs within the definition of the excepted term "fiduciary." *Gee v. Gee*, 84 Minn. 384, 7 Am. B. R. 500. The words "fiduciary capacity" as used in this subdivision refer to technical or express trusts, and exclude the relationship of agents, brokers and partners to funds held generally by them in such capacities. *Karger v. Orth* (Sup. Ct. Minn.), 116 Minn. 124, 27 Am. B. R. 212, 133 N. W. 471.

186. *Shaw v. Vaughan*, 52 Mich. 405; *Maxwell v. Evans*, 90 Ind. 596.

187. *In re Butts* (D. C., N. Y.), 10 Am. B. R. 16, 120 Fed. 966; *Harrington & Goodman v. Herman* (Mo. Sup.), 172 Mo. 344, 72 S. W. 548.

188. *Sherwood v. Mitchell*, 4 Den. 435.

189. See discussion under section fourteen, *ante*.

190. For general remedies under a discharge under present law, see *Bank of Commerce v. Elliott* (Sup. Ct., Wis.), 109 Wis. 643, 6 Am. B. R. 409, 85 N. W. 417, and compare *Collins v. McWalters*, 35 N. Y. Misc. 643, 6 Am. B. R. 553, 72 N. Y. Supp. 203 (citing *Collier on Bankruptcy* [3d Ed.], p. 198). See also *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. Ed. 994; *Horner v. Spellman*, 78 Ill. 206, 410; *In re Wesson*, 88 Fed. 855; *First Nat'l Bank v. Cootes* (Sup. Ct., W. Va.), 74 W. Va. 112, 32 Am. B. R. 361, 81 S. E. 844, citing *Collier on Bankruptcy* (8th Ed.), 294; *Matter of Boardway* (D. C., N. Y.), 41 Am. B. R. 478, 248 Fed. 364; *Matter of Weisberg* (D. C., Mich.), 42 Am. B. R. 616, 263 Fed. 833.

191. See Act of 1867, § 34, R. S., § 5,119.

192. *Bryant v. Kingston*, 86 N. W. 531; *Morse v. Cloyes*, 11 Barb. (N. Y.) 100; *Stoll v. Wilson*, 38 N. J. 198. For effect of order as evidence, see § 21-f, *post*.

193. *Argall v. Jacobs*, 87 N. Y. 110; but is otherwise in the common-law States, *Cutter v. Folsom*, 17 N. H. 139.

A replication by a plaintiff to a plea of a discharge claiming that he had acquired a claim more than four months prior to bankruptcy, is defective where he fails to allege the facts. *Davis v. Findley* (Ala. Sup. Ct.), 41 Am. B. R. 692, 78 So. 869.

194. *Upshur v. Briscoe*, 138 U. S. 365, 34 L. Ed. 931; *Fleitas v. Richardson*, 147 U. S. 559, 37 L. Ed. 276; *Alabama Great Southern Ry. v. Crawley* (Miss. Sup. Ct.), 42 Am. B. R. 62, 79 So. 94. See also *Baer v. Grell* (Mun. Ct., N. Y.), 6 Am. B. R. 423.

195. See p. 239, *ante*.

196. *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309; *Hill v. Harding*, 130 U. S. 690, 32 L. Ed. 1083; *Morris v. Pickens* (Ga. Sup. Ct.), 42 Am. B. R. 521, 97 S. E. 526.

Stay of further proceedings under judgment.—A judgment recovered against a bankrupt after proceedings in bankruptcy and before his discharge is annulled thereby.

after the bankruptcy. If the suit is commenced after the discharge, a stay cannot be granted, and the discharge itself must be pleaded.¹⁹⁷ Where, however, the cause is on appeal when the discharge becomes available, it usually will not act as a bar, though this depends on the practice and law of each State.¹⁹⁸ The usual method of pleading where the discharge was not available in time is by motion to open default and for leave to interpose a plea in bar by answer original or supplemental.¹⁹⁹ Such an application is addressed to the discretion of the court and may be denied, if there has been a long delay in making it,²⁰⁰ or on jurisdictional grounds. It will not be granted where the judgment antedates the bankruptcy and then resulted in a vested lien.²⁰¹

V. REVIVAL OF DISCHARGED DEBT BY NEW PROMISE.

This is the converse of failure to assert a discharge in bar. A debt discharged is not a debt paid. The moral obligation remains, and is a sufficient consideration for a new promise to pay,²⁰² but such promise must have been made after the discharge in bankruptcy and not in conformity to a prior and secret agreement.^{202a} An oral promise will be sufficient, unless a written promise is required by local statute.²⁰³ Whether oral or in writing, it must be definite, express, distinct, and unambiguous.²⁰⁴ It would not be sufficient to make a

and he has the absolute right, if not guilty of laches, to have further proceedings thereon perpetually enjoined, for he had no opportunity to plead in bar a discharge which had not then been granted. On the other hand, where the judgment is recovered after the discharge has been granted, no matter when the action was begun, it is valid and enforceable, for the bankrupt has had his opportunity to plead in bar his discharge. *Crocker v. Bergh*, 118 Minn. 316, 34 Am. B. R. 190, 136 N. W. 737.

A discharged bankrupt may be relieved of a judgment rendered against him prior to his discharge: (1), by motion in the court rendering the judgment for a perpetual stay of execution; (2), by motion to quash any process issued thereon. Therefore, the bankrupt has the right to reasonably move to quash a writ of garnishment, but the garnishee has not. *Alabama Great Southern Ry. v. Crawley* (Miss. Sup. Ct.), 43 Am. B. R. 62, 79 So. 94.

197. *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. Ed. 994.

198. *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309; *Cornell v. Dakin*, 38 N. Y. 253; *Bank v. Onion*, 16 Vt. 470; *Haggerty v. Morrison*, 59 Mo. 324.

199. *Boynton v. Ball*, 121 U. S. 457, 30 L. Ed. 985; *Holyoke v. Adams*, 59 N. Y. 233; *Richards v. Nixon*, 20 Pa. St. 19; *Fellows v. Hall*, Fed. Cas. 4,722; *Shaub v. Shaub* (Pa. Com. Pl.), 43 Am. B. R. 702, 67 Pittsb. Leg. J. 525.

200. *Medbury v. Swan*, 46 N. Y. 200.

201. *Barstow v. Hansen*, 3 Hun (N. Y.), 333.

202. *Mutual Reserve, etc., v. Beatty* (C. C. A., 9th Cir.), 2 Am. B. R. 244, 93 Fed. 747; *Dusenberry v. Hoyt*, 53 N. Y. 521; *Marshall v. Tracy*, 74 Ill. 379; *Maxim v. Morse*, 6 Mass. 127; *In re Merriman*, 44 Conn. 587; *Herrington v. Davitt* (Ct. of App., N. Y.), 39 Am. B. R. 93, 220 N. Y. 162; *Brashears v. Combs* (Ky. Ct. of App.), 39 Am. B. R. 98, 192 S. W. 482; *Butler Cotton Oil Co. v. Collins* (Ala. Sup. Ct.), 40 Am. B. R. 200, 75 So. 975; *Ferguson-McKinney Dry Goods Co. v. Beuckman* (Mo. Ct. of App.), 40 Am. B. R. 602, 198 S. W. 504; *Nalbach v. Nalbach* (Pa. Com. Pl.), 45 Am. B. R. 208.

A misunderstanding as to the effect of the new promise is not a defense. *Brashears v. Combs* (Ky. Ct. of App.), 39 Am. B. R. 98, 192 S. W. 482.

Fraud of plaintiff.—It is a good defense to show that the new promise was induced by fraud on the part of the plaintiff. *Brashears v. Combs* (Ct. of App. Ky.), 39 Am. B. R. 98, 192 S. W. 482.

New promise to pay; consideration.—Although the moral obligation of a bankrupt to pay a discharged debt is a sufficient consideration for a promise to pay, a cause of action rests upon the new promise, and not upon the old debt; the statute of limitations against joint obligors is not affected by a new promise of the bankrupt, because they are only liable on the old debt. *Polk v. Stephens* (Ark. Sup. Ct.), 118 Ark. 438, 35 Am. B. R. 186, 176 S. W. 689.

An executory contract of employment, having as one of its stipulations that the agent shall apply a part of his commissions in payment of a pre-existing debt due to the

conditional offer of payment which was not accepted by the creditor.²⁰⁵ A promise to pay a provable debt, notwithstanding a discharge, is as effectual when made after the filing of the petition and before the discharge, as if made after the discharge.²⁰⁶ Payment of a dividend by a trustee in bankruptcy does not take the debt out of the statute of limitations.^{206a} Cases under the former law were numerous and will prove as valuable under this.²⁰⁷

principal, does not remain in effect after the agent's discharge in bankruptcy from such previous indebtedness, so that its continued compliance could be thereafter enforced; but so long as the parties, by subsequent acquiescence in its terms and performance of its conditions, elect to treat the contract as still subsisting, they are bound by its provisions. *Fairmount Creamery Co. v. Collier* (Ga. Ct. of App.), 40 Am. B. R. 453, 94 S. E. 56.

202a. *Ferguson, etc. Goods Co. v. Beuckman* (Mo. Ct. of App.), 40 Am. B. R. 602, 198 S. W. 504.

203. *Smith v. Stanchfield* (Sup. Ct., Minn.), 84 Minn. 343, 7 Am. B. R. 493, 87 N. W. 917; *Henly v. Lanier*, 75 N. C. 172; *Apperson v. Stewart*, 27 Ark. 619; *Mandell v. Levy* (N. Y. App. T.), 47 Misc. 147, 14 Am. B. R. 549, 93 N. Y. Supp. 545; *Holt v. Akarman* (Ct. of Errors and App., N. J.), 84 N. J. L. 371, 32 Am. B. R. 673, 86 Atl. 408; *Bank of Elberton v. Vickery* (Ga. Ct. of App.), 39 Am. B. R. 631, 92 S. E. 547; *Goldman v. Fargo Iron & Metal Co.* (N. Dak. Sup. Ct.), 44 Am. B. R. 566, 175 N. W. 728.

Oral promise to pay under Arkansas statute.—Under section 3665 of Kirby's Arkansas Digest providing that no promise to pay a debt or obligation which has been discharged in bankruptcy shall be valid unless such promise is in writing, the payment of one dollar on a note and an oral promise to pay the balance does not revive the debt after a discharge in bankruptcy. *Polk v. Stephens* (Ark. Sup. Ct.), 118 Ark. 438, 35 Am. B. R. 186, 176 S. W. 689.

204. *In re Lorillard* (C. C. A., 2d Cir.), 5 Am. B. R. 602, 107 Fed. 677; *Tompkins v. Hazen*, 5 Am. B. R. 62, 165 N. Y. 18, 58 N. E. 762; *Smith v. Stanchfield* (Sup. Ct., Minn.), 84 Minn. 343, 7 Am. B. R. 493, 87 N. W. 917; *In re Collier*, 93 Fed. 191; *Allen v. Ferguson*, 18 Wall. 1; *Church v. Winkley*, 73 Mass. 460; *Thornton v. Nichols and Lemon* (Sup. Ct. Ga.), 11 Am. B. R. 304, 45 S. E. 785. As to effect of absolute promise to pay debt, between adjudication and date of discharge, see *Old Town Nat. Bank v. Parker* (Md. Ct. of App.), 121 Md. 61, 30 Am. B. R. 602, 87 Atl. 1107; *Holt v. Akarman* (Ct. of Errors and App., N. J.), 84 N. J. L. 371, 32 Am. B. R. 673, 86 Atl. 408; *Caledonian Coal Co. v. Young*, 40 Am. B. R. 191, 167 Pac. 274; *Dantzler v. Scheuer* (Ala. Sup. Ct.), 43 Am. B. R. 677, 82 So. 103. See Am. Bankr. Dig. § 1156.

Evidence of oral promise.—Where in an

action to recover on a note, for premiums paid on a life insurance policy assigned to plaintiff, to foreclose a lien on said policy, and upon stock deposited by defendant with plaintiff as collateral, the defendant set up a discharge in bankruptcy and the plaintiff claimed a new promise to pay, testimony by the president of the plaintiff bank, as to the facts and circumstances under which the indebtedness on the note and for the life insurance premiums was incurred and the interviews and correspondence between the parties relating thereto before the bankruptcy, was admissible as relating to the fact whether there had been a subsequent promise to pay. *Underwood v. First National Bank of Galveston* (Tex. Civ. App.), 37 Am. B. R. 198, 185 S. W. 395.

Effect of allowance of claim.—Where it does not appear that a bankrupt examined a claim, the allowance thereof, although sufficient and controlling as a judgment for the purpose of the bankruptcy proceeding, does not affect the running of the statute of limitations. *American Woolen Co. v. Samuelsohn* (N. Y. Ct. of App.), 43 Am. B. R. 530, 123 N. E. 154.

205. *International Harvester Co. v. Lyman* (Sup. Ct., Minn.), 90 Minn. 275, 10 Am. B. R. 450, 96 N. W. 87. Compare *Brashears v. Combs* (Ky. Ct. of App.), 39 Am. B. R. 98, 192 S. W. 482.

206. *Zavelo v. Reeves*, 227 U. S. 625, 29 Am. B. R. 493, 57 L. Ed. 676; *Bank of Elberton v. Vickery* (Ga. Ct. of App.), 39 Am. B. R. 631, 92 S. E. 547; *Traders' Nat. Bank v. Hermer* (Mo. Ct. of App.), 45 Am. B. R. 133, 218 S. W. 937.

Under the New Jersey statute for the prevention of frauds and perjuries it has been ruled that a promise to pay made by a bankrupt after his adjudication but before his discharge is ineffectual to revive a debt released by his discharge. *Holt v. Akarman* (Ct. of Errors and App., N. J.), 84 N. J. L. 371, 32 Am. B. R. 673, 86 Atl. 408.

206a. *American Woolen Co. v. Samuelsohn* (N. Y. Ct. of App.), 43 Am. B. R. 530, 123 N. E. 154.

207. See *Jersey City Ice Co. v. Archer*, 122 N. Y. 376; *Otis v. Garlin*, 31 Me. 567; *Wheeler v. Wheeler*, 28 Ill. App. 385; *Willis v. Cushman*, 115 Ind. 100, 17 N. E. 168; *Craig v. Selts*, 63 Mich. 727, 30 N. W. 347; *Cambridge Institution v. Littlefield*, 60 Mass. 210; *Dusenberry v. Hoyt*, 53 N. Y. 521; *Badger v. Gilmore*, 33 N. H. 361; *Murphy v. Crawford*, 114 Pa. St. 496, 7 Atl. 142; *Shuman v. Strauss*, 52 N. H. 404. See also article in the *National Bankruptcy News and Reports* for February 15, 1900.

SECTION EIGHTEEN.

PROCESS, PLEADINGS, AND ADJUDICATIONS.

§ 18. **Process, Pleadings, and Adjudications.**—*a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits¹ *to enforce a legal or equitable lien** in courts of the United States, *except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.**

b The bankrupt, or any creditor, may appear and plead to the petition within† *five* days after the return day, or within such further time as the court may allow.

c All pleadings setting up matters of fact shall be verified under oath.

d If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition.

e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed

1. Here the words "in equity" were stricken out by the amendatory act of 1903, and the words in italics substituted.

* Amendments of 1903 in italics.

† Here the word "five" was substituted for the word "ten" by such amendatory act.

by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Analogous provisions: In U. S.: As to service of process, Act of 1867, § 40, R. S., § 5025 (as amended by Act of June 22, 1874); Act of 1841, § 1; Act of 1800, § 3; As to appearances, pleading, trial and adjudication, Act of 1867, §§ 41, 42, R. S., §§ 5026 (as amended by the Act of June 22, 1874), 5028, 5029, 5030, 5031; Act of 1841, § 1; Act of 1800, § 3.

In Eng.: Act of 1883, § 7(1). General Rules 153, 154, 155, 156, 156-A; As to appearances, pleading, and trial, § 7(2) (3) (4) (5), General Rules 157-169; As to receiving order, § 8(1), General Rules 176, 177; As to adjudication, § 20(1), General Rules 190, 192, 192-A, 193.

In Can.: Act of 1919, §§ 4, 9, 68.

Cross-references: To the law: Definitions of "adjudication," "bankrupt," "creditor," "oath," "petition," § 1 (2) (4) (9) (17) (20).

Jurisdiction to adjudge person a bankrupt, § 2(1).

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See also Supplementary Forms; Hagar and Alexander's Forms in Bankruptcy (2d Ed.), Part I, Petition and Adjudication, Forms Nos. 1-41.

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The practice under the present law differs so much from that under the law of 1867, that any extended reference to the latter would but confuse. Practice in bankruptcy is regulated largely by the General Orders and Forms,² supplemented by local rules and sometimes additional forms, and,

² See cross-reference to General Orders and Forms, just before the schedule. See also General Order XXXVIII, providing that the forms annexed to the General Orders shall be observed and used with such altera-

tions as may be necessary to suit the circumstances of any particular case. See also Supplementary Forms, *post*, and Hagar and Alexander's Bankruptcy Forms (2d Ed.), Part I.

where none of these apply, by the equity practice in the United States courts.³ The equity practice of the Federal courts is independent of, and unaffected by State laws as to procedure in State courts.⁴ Throughout this work, an effort is made to explain the practice suggested by each section of the law and the paragraphs on "practice" found elsewhere should always be consulted. It may be suggested, however, to practitioners in the code States, that the technical observance of rules and formulas, there made so much of by both the bar and the bench, will generally not be necessary in bankruptcy practice. A clear understanding of the remedy desired and a common sense method of seeking it will usually be sufficient, even though there be modal slips or omissions. Numerous forms supplementing the official forms will be found in "Supplemental Forms," *post*.

II. SCOPE AND LIMITATION OF SECTION.

a. Scope.—This section has only to do with such practice as is incident to a proceeding in bankruptcy from the moment a petition is duly filed to the moment that the petition is either dismissed or results in an adjudication coupled with a reference to the referee. In voluntary cases this time is inappreciable. In voluntary cases it may extend through months. Further, though thus limited, § 18 is silent as to certain procedure usually availed of in involuntary cases, as that on stays and seizure of assets; and the succeeding section is controlling on jury trials.

b. Limitation of section.—For convenience of reference the limitations of § 18 are here set forth.

It does *not* have to do with:

1. *Who may and who may not file a voluntary petition*; for that, see §§ 4-a, 59-a; or

2. *Who may and who may not file an involuntary petition*; for that, see § 59-b; or

3. *Against whom and when an involuntary petition may be filed*; for that, see §§ 3-b, 4-b; or

4. *In what court a petition must be filed*; for that, see § 2 (1); or

5. *Whether and, if so, how petitions may be filed by or against partners or corporations*; for that, see §§ 4-b, 5-a; or

6. *The jurisdictional allegations in voluntary petitions*; for that, see §§ 2 (1), 4-a, 5-a, and, for the schedules to accompany the same, § 7 (8); or

7. *The jurisdictional allegations in involuntary petitions*; for that, see §§ 2 (1), 3-a-b, 4-b, 5-a, 59-b; or

3. Equity rules.—In proceedings in equity to carry into effect provisions of bankruptcy act, or to enforce rights and remedies given by it, rules of equity practice are to be followed as near as may be. See Gen. Order, XXXVII; Equity Rules, *post*.

Bankruptcy proceedings are purely equitable in their character and within the limits prescribed by the bankruptcy acts and the special rules of practice prescribed by the Supreme Court are to be administered in accordance with the general principles and practice of equity. *Westall v. Avery* (C. C. A., 4th Cir.), 22 Am. B. R. 673, 171 Fed. 626. A proceeding in bankruptcy is a pro-

ceeding in equity, and the taking of evidence and the review by appeals of hearings therein are governed by the practice in suits in equity, except where otherwise specified. *First Nat. Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 852.

4. *Westall v. Avery* (C. C. A., 4th Cir.), 22 Am. B. R. 673, 171 Fed. 626.

The rules prescribed by the State codes of practice cannot be applied in equity cases in the United States courts, although such codes are largely applied in common law cases. *Matter of Brown* (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

8. *The office for filing and the number of copies to be filed*; for that, see § 59-a in voluntary cases, and § 59-c in involuntary cases, and, for schedules, § 7 (8); or

9. *The answer and procedure thereon when less than three creditors petition*; for that, see § 59-d-e; or

10. *The intervention of creditors other than the petitioning creditors*; for that, see § 59-f; or

11. *The dismissal of petitions other than on the merits*; for that, see § 59-g; or

12. *The (a) interference with the alleged bankrupt's property pending adjudication; or (b) stays other than against suits; or (c) stays against suits*; for these, see §§ 2 (7) (15), 11; or

13. *The appointment of receivers or the custody of the bankrupt's property before adjudication*; for that, see §§ 2 (3) (15), 3-e, 69.

III. PETITIONS.

a. *In general.*—The allegations in and the manner of drawing petitions are further discussed under sections three, four, five and fifty-nine of this work. The specific allegations to be made to meet the requirements of such sections are there more fully considered. Petitioning and intervening creditors should be bound by the allegations of their petition.⁵ It will only be necessary at this place to consider those rules which are of general application.

b. *Framing petitions.*—General Order V provides that "all petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation except such abbreviation or interlineation may be for the purpose of reference."

c. *Forms to be used.*—The official forms should, where possible, be used; in some districts it is the practice to refuse to consider petitions unless they are on the prescribed printed forms.⁶ The simple forms of bankruptcy practice found in the general orders and forms prescribed by the Supreme Court should be followed without unnecessary departure therefrom.⁷ The caption should properly refer to the proceeding, but if the body of the petition is sufficient a defect in the caption is not material.⁸ Blanks printed without ruling and of such size as to permit use in typewriting machines will be found most convenient. Forms Nos. 1, 2, and 3 are suggestive of the petitions by individuals, by partners, and in involuntary cases. That in partnership cases is not entirely reliable;⁹ and that for involuntary cases is less so.¹⁰

5. *Harris v. Tapp* (D. C., Ga.), 37 Am. B. R. 564, 235 Fed. 918.

6. *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278. Compare *In re White* (D. C., Penn.), 14 Am. B. R. 241, 135 Fed. 199.

7. *Gage & Co. v. Bell* (D. C., Tenn.), 10 Am. B. R. 696, 124 Fed. 371; *Sabin v. Blake-McFall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501, holding that the provisions of the bankrupt act and the procedure promulgated thereby should be closely followed in the preparation of petitions and all other papers.

An answer which does not admit or un-
easively deny upon oath the material facts
of the petition may be stricken from the files
for non-compliance with the Supreme Court

orders prescribing the form for answers.
Bradley Timber Co. v. White (C. C. A., 5th
Cir.), 10 Am. B. R. 329, 121 Fed. 779.

8. *Matter of Gorman* (D. C., Hawaii), 2
U. S., D. C. Hawaii 439, 15 Am. B. R. 587,
holding that the caption of a petition in the
matter of the bankruptcy of a firm and of a
member thereof does not necessarily render
the petition insufficient where such caption
contains only the name of the individual.

9. See criticisms and suggestions under
Section Five, *ante*. See also "Supplement-
ary Forms," *post*. For additional forms, see
Hagar and Alexander's Bankruptcy Forms
(2nd Ed.) Nos. 1-9, inclusive.

10. Consult Section Three, *ante*, for alle-
gations as to acts of bankruptcy; Section
Four, *ante*, for allegations as to the excepted

If a partner does not join in a petition for involuntary bankruptcy, that fact should be stated, his address given, and the prayer of the petition ask for a subpoena to him as though he were an alleged involuntary bankrupt.¹¹

d. Facts alleged.—(1) **JURISDICTIONAL FACTS.**—All facts essential to the exercise of jurisdiction should be alleged with definiteness and certainty, as in the case of other pleadings in law or equity.¹² The purpose of a pleading is to advise the opposing parties and the court of the facts constituting the cause of action; all these facts should be set forth plainly and without equivocation.¹³ A disjunctive statement states neither one fact nor the other and, if one or the other fact is jurisdictional, the petition is insufficient.¹⁴ The necessary allegations in both voluntary and involuntary petitions are discussed at length in other places.¹⁵

(2) **ACTS OF BANKRUPTCY.**—General averments as to acts of bankruptcy are insufficient.¹⁶ The allegations should not be made in the language of the statute, without details in respect to the particular act relied upon.¹⁷ The

classes; Section Fifty-nine, *post*, for allegations as to number of petitioning creditors, the amount of their claims, etc.

11. *In re Russell* (D. C., Iowa), 3 Am. B. R. 91, 97 Fed. 32; *In re Murray* (D. C., Iowa), 3 Am. B. R. 90; *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278.

Adjudications of firm.—A petition to adjudge a partnership a voluntary bankrupt which is made by some of the partners without giving notice of the filing of the petition to the non-joining partners is irregular and will not warrant the adjudication of the firm as bankrupts. *In re Altman* (D. C., N. Y.), 2 Am. B. R. 407, 95 Fed. 263.

12. *Clarke v. Hehne & Meyer* (C. C. A., 5th Cir.), 11 Am. B. R. 583, 594, 127 Fed. 288; *In re Plotke* (C. C. A., 7th Cir.), 5 Am. B. R. 171, 175, 104 Fed. 964, where the court said: "The essential facts must appear affirmatively and distinctly, and it is not sufficient that jurisdiction may be inferred argumentatively." *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442.

The existence of provable claims to the requisite amount is jurisdictional in an involuntary proceeding. *Doty v. Mason* (D. C., Fla.), 40 Am. B. R. 53, 244 Fed. 557.

Where a petition alleges that the bankrupt "owes debts" this allegation must be taken as making a *prima facie* case, entitling the prisoner to be adjudged a bankrupt. *Matter of Hargadine-McKittrick, etc., Co.* (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 155.

13. *In re First Nat. Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 270, 128 Fed. 630.

14. *In re Laskaris* (Ref., N. Y.), 1 Am. B. R. 480, holding that a voluntary petition in bankruptcy which states disjunctively that the petitioner has had his principal place of business, or has resided, or has had his domicile for the greater portion of six months next immediately preceding the filing of the petition, in a place stated, is insufficient upon its face to confer jurisdiction.

15. See under §§ 2, 3, 4, 5, and 59. For forms suggested as substitutes for Forms Nos. 2 and 3, see "Supplementary Forms," *post*.

16. *Matter of Mason-Seaman Transportation Co.* (D. C., N. Y.), 37 Am. B. R. 677, 235 Fed. 974; *Matter of Herlihy Co.* (D. C., N. Y.), 41 Am. B. R. 171, 247 Fed. 369; *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442. See Am. Bankr. Dig., §§ 215, *et seq.*

17. *In re Cliffe* (D. C., Penn.), 2 Am. B. R. 317, 94 Fed. 354; *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 69; *In re Stone* (D. C., Pa.), 30 Am. B. R. 392; *Matter of McGraw*

(D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442. See cases cited under section three.

Language of statute.—Acts of bankruptcy should not be charged in the language of the statute. *In re Deer Creek Water & Power Co.* (D. C., Pa.), 29 Am. B. R. 358, 205 Fed. 205. General averments that the alleged bankrupts within the four months' period, while insolvent, committed an act of bankruptcy by transferring "a certain portion of their property to one or more of their creditors with intent to prefer," and that they have transferred and concealed large sums of money and valuable securities with intent to hinder, delay and defraud creditors, which concealment was and is continuous, are insufficient to sustain the petition. *In re Rosenblatt & Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 401, 193 Fed. 638.

Insufficient allegations.—*In re Cliffe* (D. C., Penn.), 2 Am. B. R. 317, 94 Fed. 354, a petition averred that the defendant was insolvent and charged an act of bankruptcy that he "on the 27th day of January, 1899, suffered, while insolvent, other creditors to obtain a preference through legal proceedings, and not having at least five days before sale or final disposition of his property affected by such preference vacated such preference." There were no further details of the preference alleged. The petition was deemed insufficient.

In re Nelson (D. C., Wis.), 1 Am. B. R. 63, 98 Fed. 76, the petition alleged that the defendant had within four months next prior to the filing of it "transferred, while insolvent, large amounts and value of his property to one or more of his creditors, with an intent to prefer said creditors over his other creditors." This was held insufficient.

A petition, alleging that execution had been issued and levy made, and that the judgment creditor threatens to sell, and that the judgments were obtained more than five days before the filing of the petition, is insufficient, in the absence of an allegation that a sale had been authorized or fixed for any time or proposed for a day not five days distant, or for any time. *Matter of Herlihy Co.* (D. C., N. Y.), 41 Am. B. R. 171, 247 Fed. 369.

Sufficient allegation.—An averment in a petition in involuntary bankruptcy that the defendant at a certain time received a specified sum of money from a specified source, which sum "he has ever since concealed and secreted with intent to hinder, delay or defraud his creditors," is not defective for want

petition in involuntary proceedings may set forth several and distinct acts of bankruptcy.¹⁸

(3) **NATURE OF CLAIMS.**—The petition should set forth the nature of the claims of the petitioning creditors,¹⁹ but it has been held that where the petition shows on its face, and there is established on the trial, a sufficient petitioning creditor, the absence of a statement of the amount of his claim may be disregarded.²⁰ No specific method of setting forth a claim is provided by the Bankruptcy Act, the only requirement necessary is that the language used be of sufficient definiteness to identify the claim in the mind of the alleged bankrupt.²¹ If filed by an agent the authority to act should be set forth.²² Legal conclusions, as an allegation that the petitioner has a provable claim, will not suffice.²³ Where the claim of a petitioning creditor is based upon an assignment it is not necessary to annex a copy of the assignment to the petition.^{23a}

(4) **DUPLICATE PETITIONS.**—The schedules, and presumably the petition in voluntary cases, must be drawn and verified in triplicate.²⁴ In involuntary cases, in duplicate.²⁵ The failure to file duplicate petitions is waived by answer without presenting the objection.²⁶

e. **Petition to be filed.**—A petition should not be sent directly to a judge but should be filed with the clerk of the court.²⁷ Where a petition is delivered to the clerk outside of his office and not during office hours and he takes the same and marks it filed, it will be deemed duly filed.²⁸ It must be accompanied by the fees of the officers, or, in lieu thereof, by a pauper affidavit.²⁹

f. **Petition confers jurisdiction.**—(1) **IN GENERAL.**—The moment the petition is filed, jurisdiction begins. This is the commencement of the proceeding, even though the subpoena does not immediately issue,³⁰ or, if issued, is not served

of particularity; the manner and details of the concealment being matters of evidence, and not of averment. *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 69. Allegation as to suffering or permitting preference held sufficient although failing to allege that debtor failed to vacate within five days prior to "final disposition." *Ravenna Nat. Bank v. Curtiss* (D. C., Ohio), 30 Am. B. R. 818.

18. *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, affg. 9 Am. B. R. 441.

19. *In re White* (D. C., Penn.), 14 Am. B. R. 241, 135 Fed. 199, holding that an involuntary petition defective in failing to state the nature of the claims of the petitioners is amendable.

Requisite amount of claims.—Since the existence of provable debts due to each of the petitioning creditors, or at least to the number required by the bankruptcy act, is necessary to give the bankruptcy court jurisdiction of an involuntary proceeding the existence of such debts or claims and their nature should be alleged with such particularity and definiteness as will enable the court to find from the petition the essential jurisdictional fact. *In re Farthing* (D. C., N. Car.), 29 Am. B. R. 732, 202 Fed. 557.

Definiteness of allegations as to amount.—An allegation in an involuntary petition in bankruptcy that a claim of one of the petitioning creditors is for a certain sum due on open account from the alleged bankrupt, upon a stated account rendered on a certain date, is sufficient. *Sabin v. Blake-McFall*

Co. (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501.

20. *In re Pangborn* (D. C., Mich.), 26 Am. B. R. 40, 135 Fed. 673.

21. *Sabin v. Blake-McFall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501. See also *Doty v. Mason* (D. C., Fla.), 40 Am. B. R. 53, 244 Fed. 587.

22. *Matter of Levington* (D. C., Hawaii), 2 U. S., D. C., Hawaii 254, 13 Am. B. R. 357.

23. *Hoffschlager Co. v. Young Nap* (D. C., Hawaii), 2 U. S., D. C., Hawaii 96, 12 Am. B. R. 515, 517; *In re Nelson* (D. C., Wis.), 1 Am. B. R. 63, 96 Fed. 76, holding that issuable facts and not conclusions should be alleged.

23a. *Matter of Page Motor Car Co.* (D. C., Mass.), 41 Am. B. R. 546, 251 Fed. 313.

24. Bankr. Act, § 7 (8).

25. Bankr. Act, § 59-c. And see *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 321, 116 Fed. 69, holding that though termed copies they are duplicate originals; *In re Stevenson* (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 110.

26. *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000.

27. See General Order II. Compare *In re Sykes* (D. C., Tenn.), 6 Am. B. R. 264, 103 Fed. 669.

28. *In re Wolf* (D. C., N. J.), 2 Am. B. R. 322.

29. Bankr. Act, § 51-a (2).

30. Bankr. Act, § 1 (10); *Shute v. Patterson* (C. C. A., 8th Cir.), 17 Am. B. R. 99, 147 Fed. 509; *In re Appel* (D. C., Neb.), 4 Am. B. R. 722, 103 Fed. 931; *In re Stein* (C. C. A., 2d Cir.), 5 Am. B. R. 286, 105 Fed. 749; *In re Lewis* (D. C., N. Y.), 1 Am. B. R. 458, 91 Fed. 632.

within the time limited.³¹ The filing of a petition in bankruptcy is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate.³²

(2) FILING OF PETITION AS NOTICE.—As has been stated in a recent case:³³ "Indeed, the condition at the time of the filing of the petition measures the extent of the estate, and the rights of all creditors of the bankrupt and all parties interested in the property throughout all the provisions of the law." So far as the jurisdiction of the court is concerned the filing of the petition operates as a *lis pendens* and is notice to all the world; this is in recognition of the often repeated maxim that "the filing of the petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction."³⁴ How-

31. In re Frischberg (Ref., N. Y.), 8 Am. B. R. 607.

32. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 306, 27 Am. B. R. 262, 56 L. Ed. 208; West v. Empire Life Ins. Co. (D. C., Mich.), 40 Am. B. R. 93, 242 Fed. 605. And see discussion of Referee Olmstead in Matter of Wellmade Gas Mantle Co. (Ref., Mass.), 36 Am. B. R. 62.

33. Board of County Commissioners v. Hurley (C. C. A., 8th Cir.), 22 Am. B. R. 209, 212, 169 Fed. 92. And see Corbet v. Riddle (C. C. A., 4th Cir.), 31 Am. B. R. 330, 209 Fed. 811.

34. Filing of petition as caveat.—In re Billing (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395; Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405; Clay v. Waters (C. C. A., 8th Cir.), 24 Am. B. R. 293, 178 Fed. 385; State Bank of Chicago v. Cox (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91; In re Granite City Bank (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818; In re Kolln (C. C. A., 7th Cir.), 13 Am. B. R. 531, 134 Fed. 557; In re Smith & Shuck (D. C., Iowa), 13 Am. B. R. 103, 132 Fed. 301; In re Mertens (D. C., N. Y.), 12 Am. B. R. 609, 131 Fed. 507; In re Tweed (D. C., Iowa), 12 Am. B. R. 648, 131 Fed. 355; In re Reynolds (D. C., Mont.), 11 Am. B. R. 758, 760, 127 Fed. 760; In re Chesapeake Shoe Co. (C. C. A., 4th Cir.), 10 Am. B. R. 466, 122 Fed. 593; In re Breslau (D. C., N. Y.), 10 Am. B. R. 33, 121 Fed. 910; In re Frazier (D. C., Mo.), 9 Am. B. R. 21, 117 Fed. 746; In re Gutman & Wenk (D. C., N. Y.), 8 Am. B. R. 262, 114 Fed. 1009; In re Pekin Plow Co. (C. C. A., 8th Cir.), 7 Am. B. R. 369, 112 Fed. 306; In re Krinsky Bros. (D. C., N. Y.), 7 Am. B. R. 535, 112 Fed. 972; Tube City Mining and Milling Co. v. Otterson (Aris. Sup. Ct.), 16 Aris. 305, 35 Am. B. R. 500, 146 Pac. 203; Cohen v. Nixon & Wright (D. C., Ga.), 37 Am. B. R. 646; Matter of Wellmade Gas Mantle Co. (Ref., Mass.), 36 Am. B. R. 62; Pugh v. Loesel (C. C. A., 5th Cir.), 33 Am. B. R. 590, 219 Fed. 417; Matter of Schou (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514; Miles Paint Mfg. Co. (D. C., Pa.), 32 Am. B. R. 793; Gavilan v. Lugo (D. C., Porto Rico), 39 Am. B. R. 328, 9 P. R. Fed. 344; Matter of Capital City Cap Co. (D. C., N. J.), 41 Am. B. R. 604, 251 Fed. 664; Charak v. Durphee (D. C., Mass.), 42 Am. B. R. 110, 252 Fed. 885; Matter of Reisswig (D. C., N. Dak.), 42 Am. B. R. 161, 253 Fed. 390; Matthews & Sons v. Webre Co. (D. C., La.), 32 Am. B. R. 180, 213 Fed. 896, holding that an order of sale in foreclosure, granted by a state court in a proceeding commenced after the filing of the petition in bankruptcy, but prior to the adjudication, is necessarily void; see Am. Bankr. Dig., § 236.

Notice to creditors.—Thus the filing of a petition in involuntary proceedings is notice thereof to all the creditors of the alleged bankrupt. In re Billing (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

Property in another district.—It is immaterial that the property affected by the filing of the petition is in another district. In re Granite City Bank (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818; In re Dempster (C. C. A., 8th Cir.), 23 Am. B. R. 751, 173 Fed. 353; Board of Road Comrs. v. Keil (Q. C. A., 6th Cir.), 44 Am. B. R. 259, 259 Fed. 76.

Lis pendens.—In Matter of Zotti (Ref., N. Y.), 23 Am. B. R. 60, affd. 23 Am. B. R. 812, 178 Fed. 304, the court said: "The filing of a bill in equity in the United States court is considered the same as the filing of a *lis pendens* in a state which requires such filing. * * * The filing of the petition was a command to all having possession of property which the bankrupt at that moment owned, to hold the same subject to the orders of the court. The 'rem' was reached by the filing of the petition, no matter where it was."

Effect on property in possession of bankrupt.—The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. Bailey v. Baker Ice Machine Co. (U. S. Sup. Ct.), 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275; Matter of Continental Coal Corp. (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113; State of Missouri v. Angle (C. C. A., 8th Cir.), 38 Am. B. R. 394, 236 Fed. 644; Lake View State Bank v. Jones (C. C. A., 7th Cir.), 40 Am. B. R. 148, 242 Fed. 821; Matter of Diamond's Estate (C. C. A., 6th Cir.), 44 Am. B. R. 268, 259 Fed. 70.

The filing of an involuntary petition in bankruptcy brings into *custodia legis* all property then in the possession of the bankrupt or its common law assignee, although a replevin suit by a vendor against the assignee is pending. Matter of Wellmade Gas Mantle Co. (C. C. A., 1st Cir.), 37 Am. B. R. 7, 233 Fed. 250.

ever, according to several recent cases, the application of this maxim is limited.³⁵ Its effect upon the jurisdiction of a court of bankruptcy in respect to the bankrupt's property, as dependent upon possession, is considered under § 23, *post*.

g. Amendments of petitions.—(1) **IN GENERAL.**—The amendment of a petition in bankruptcy is permissible as in the case of pleadings in other actions and proceedings. The general rules of pleadings and practice relative to amendments apply to petitions in bankruptcy.^{36a} The amendment of a petition³⁶ is a matter of discretion.³⁷ This general power of amendment is not abrogated or

Caveat and injunction.—The filing of the petition in bankruptcy and the adjudication themselves constitute a caveat and an injunction by the court against any interference with the property of the bankrupt by all persons who have no liens upon, title, or debatable claims to it at the time the petition is filed, and the taking and disposition of it by any of them violates that injunction. *Darrough v. First National Bank of Claremore* (Okla. Sup. Ct.), 37 Am. B. R. 75, 156 Pac. 191.

Effect of filing petition in involuntary proceeding as staying sale by sheriff.—The filing of a petition in bankruptcy is sufficient notice to a sheriff, if brought to his attention, to prevent the sale of the bankrupt's property, advertised to take place soon after filing the petition. *Matter of Miles Paint Mfg. Co.* (D. C., Pa.), 32 Am. B. R. 793.

Effect of levy after petition filed.—The court cannot be ousted of its jurisdiction by any officer seeking to make a levy upon the bankrupt's property by virtue of process issued out of a state court. *Matter of Schou* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 614.

A bank cannot lawfully pay a note, after a petition in bankruptcy has been filed against the maker. *Matter of Midland Motor Co.* (C. C. A., 7th Cir.) 37 Am. B. R. 364, 244 Fed. 368.

Bankrupt as trustee for creditors.—The filing of a petition in bankruptcy, while not divesting the bankrupt of title to his property, constitutes him in effect a trustee for the benefit of his creditors from that time until adjudication. *Matter of Sternberg* (D. C., Mass.), 41 Am. B. R. 476, 249 Fed. 980.

35. Limitation of application of doctrine.—This maxim was stated in *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224. Subsequently the Supreme Court said: "The remark made in *Mueller v. Nugent* that the filing of the petition [in bankruptcy] is a caveat to all the world and in fact an attachment and injunction was made in regard to the particular facts in that case." *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 638, 50 L. Ed. 782. And in *Matter of Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 362, 369, 144 Fed. 518, the court said: "While the filing of a petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent the lenders or pledgees from enforcing their contracts." In *re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 261, 183 Fed. 913, the court, speaking of this maxim, said: "The later decisions of the Supreme Court adjudge that this statement applies only to parties who have no substantial claim of a lien upon or a title to the property of the bankrupt, and that against those who have such claims of exist-

ing liens or titles when the petition in bankruptcy is filed, that filing is neither a caveat nor an attachment, that it creates no lien and that until the bankruptcy court by some act of one of its officers takes actual possession of the property, or makes such claimants parties to the proceeding by some order or process, or notice of the proceeding comes to them, their liens, titles and remedies are unaffected thereby and they are strangers to the proceeding." But in the case of *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 27 Am. B. R. 262, 58 L. Ed. 208, the Supreme Court reaffirmed the doctrine of *Mueller v. Nugent*, *supra*, and stated that "The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as *in custodia legis* from the filing of the petition." See also *Matter of Zotti* (C. C. A., 2d Cir.), 28 Am. B. R. 234, 186 Fed. 84, affg. 23 Am. B. R. 812, 178 Fed. 304; *Christopherson v. Harrington* (Minn. Sup. Ct.), 118 Minn. 42, 32 Am. B. R. 842, 136 N. W. 289; *Tube City Mining & Milling Co. v. Otterson* (Aris. Sup. Ct.), 16 Ariz. 305, 35 Am. B. R. 500, 146 Pac. 203; *Coppard v. Gardner* (Tex. Civ. App.), 40 Am. B. R. 777, 199 S. W. 650; *Houston v. Shear* (Tex. Ct. of Civ. App.), 43 Am. B. R. 462, 210 S. W. 976.

Sufficiency of notice to sheriff of filing.—The orders of a State court cannot be nullified or countermanded by a private individual notifying a sheriff, an officer of the court, that he intends to file a petition in bankruptcy. Notice of such filing must come through official channels and can be of no effect when issued by a citizen clothed with no authority. *Coppard v. Gardner* (Tex. Civ. App.), 40 Am. B. R. 777, 199 S. W. 650.

The mere filing of a petition in involuntary bankruptcy does not give jurisdiction, nor establish facts upon which jurisdiction may depend. *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

35a. Matter of Havens (C. C. A., 2d Cir.), 42 Am. B. R. 734, 255 Fed. 478.

36. Consult Bankr. Act, § 7, for amendments of schedules. For amendment of petitions generally, see Am. B. R. Dig., § 231.

37. Discretion to amend.—In the case of *Armstrong v. Fernandez*, 208 U. S. 324, 19 Am. B. R. 746, the court said: "The power of a court of bankruptcy over amendments is undoubted and rests in the sound discretion of the court." *Wilder v. Watts* (D. C., S. C.), 15 Am. B. R. 57, 138 Fed. 428, to the effect that the amendments are usually allowed if the acts of justice will be promoted, but as they are not matters of right the court must exercise its discretion in permitting them. The privilege of amending a petition in involuntary bankruptcy is a matter resting in the discretion of the court, not to be reviewed, except when such discretion has been abused. In *re Rosenblatt & Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 401, 193 Fed. 638; *Sabin v. Blake-McCall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501, confirming its amendment of an involuntary petition filed after expiration of time fixed for that purpose; *Matter of Frank* (C. C. A., 3d Cir.), 38 Am. B. R. 674; *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442.

The exercise of jurisdiction to amend an involuntary petition is within the sound discretion of the court, having in mind the in-

restricted in any sense by the provisions of General Order XI which relates to the amendment of petitions and schedules.³⁸ A petition may be amended to bring it within the terms of an amendatory act.³⁹ The permitting or refusal of an amendment, being within the discretion of the court, will not be interfered with unless there is an abuse of such discretion. An amendment will not be allowed unless it clearly appear that the ends of justice will be promoted thereby.⁴⁰ It will be denied if the application is made after an unreasonable delay⁴¹ or when the allegation in effect will become the basis of a new and independent proceeding.⁴²

(2) WHEN ALLOWED.—(I) *To conform to evidence.*—If evidence is adduced without objection, the petition, if deemed insufficient, may be amended to conform thereto, and when so amended it relates to and takes effect as of the date of the filing of the original petition.⁴³ An amendment for the purpose of conforming the pleadings to the facts proven is frequently permitted, even on the coming in of a special master's report.⁴⁴ There must be in the record as it stands, the substance of that which is to be supplied by amendment.⁴⁵ An amendment of an original petition may be allowed before proceeding to a new trial where it is necessary because of evidence adduced upon a former trial.⁴⁶

(II) *Correction of mistakes or defects.*—It will usually be granted to cure an error due to mistake of counsel,⁴⁷ or one purely clerical.⁴⁸ Where the defect does not pertain to the jurisdiction of the court, either in respect to the parties or the subject-matter, an amendment will usually be permitted.⁴⁹ But if the defect goes to the jurisdiction of the court, the right thereto is not so clear.⁵⁰

terests of creditors. *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

38. *Gleason v. Smith* (C. C. A., 3d Cir.), 16 Am. B. R. 602, 145 Fed. 895; *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 69.

39. *In re Scammon*, Fed. Cas. 12,427; *In re Scull*, Fed. Cas. 12,568.

40. *Wilder v. Watts* (D. C., S. C.), 15 Am. B. R. 57, 138 Fed. 426; *Woolford v. Diamond State Steel Co.* (D. C., Del.), 15 Am. B. R. 31, 138 Fed. 582. See *In re Farthing* (D. C., No. Car.), 29 Am. B. R. 732, 202 Fed. 557.

41. *In re Freudenfels*, Fed. Cas. 5,112-a.

42. *In re Hyde & Co.* (D. C., N. Y.), 4 Am. B. R. 602, 103 Fed. 617; *In re Mercur* (D. C., Penn.), 8 Am. B. R. 275, 116 Fed. 655, *affd.* (C. C. A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384, where it was held that the right to amend can go no further than to bring forward and make effective that which is in some form already in the record.

43. *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R., 804, 141 Fed. 518, holding that, where the petition in an involuntary proceeding, though alleging specific acts of bankruptcy, charges generally the giving of a preference to unknown creditors, and some of the testimony taken before the referee, without objection, related to alleged preferences not specified in the petition, and testimony relating thereto is also received on behalf of the alleged bankrupt, the findings of the referee that such transfers constitute acts of bankruptcy are justified, and the court may per-

mit the petition to be amended as of the date of its filing so as to charge such transfers as acts of bankruptcy.

44. *In re Lange* (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 196; *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764; *In re Bininger*, Fed. Cas. 1,420; *In re Galfinger*, Fed. Cas. 5,202; *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 804, 141 Fed. 518, 72 C. C. A. 576; *Hark v. Allen Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 3, 146 Fed. 665.

45. *In re Mercur* (C. C. A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384. In the case of *Matter of Frank* (C. C. A., 3d Cir.), 38 Am. B. R. 674, it was held that an amended petition should not be permitted in which petitioners swear to positive averments of facts, where they had testified that they had no such knowledge as would justify the averments.

46. *Matter of Hark Bros.* (D. C., Penn.), 15 Am. B. R. 460, 142 Fed. 179, *affd. sub nom.* *Hark v. Allen Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 3, 146 Fed. 665.

47. *In re Hill*, Fed. Cas. 6,485. See also *In re Freund* (Ref., N. Y.), 1 Am. B. R. 25.

48. *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 49; *Gleason v. Smith* (C. C. A., 3d Cir.), 16 Am. B. R. 602, 145 Fed. 895.

49. *In re Shoesmith* (C. C. A., 7th Cir.), 13 Am. B. R. 645, 135 Fed. 684.

50. *In re Rosenfelds*, Fed. Cas. 12,061. See also *Woolford v. Diamond State Steel Co.* (D. C., Del.), 15 Am. B. R. 31, 138 Fed. 582.

Thus, where an involuntary petition shows upon its face that the claims of the petitioners in the aggregate are less than \$500, the petition is fatally defective and may not be amended by joining others as creditors.⁵¹ But Federal courts have the power to permit amendments of pleadings by the insertion or correction of jurisdictional as well as other averments.⁵² Thus, a petition may be amended to cure defects, such as those which pertain to the averments of the residence or place of business of a bankrupt,⁵³ especially where rights of creditors have accrued which would be affected by its dismissal.⁵⁴ An involuntary petition may be amended so as to show that the alleged bankrupt is subject to the act.⁵⁵

(III) *As to number of creditors and amount of claims.*—An amendment is permissible by the insertion of an averment that all the bankrupt's creditors are less than twelve.⁵⁶ An insufficiency in the allegations of the petition as to the number of the creditors⁵⁷ or the nature and amounts of their claims⁵⁸ is not to be regarded as an incurable jurisdictional defect, and may be supplied by amendment.

(IV) *As to status of bankrupt.*—The petition may be amended so as to aver that the alleged bankrupt is not a wage-earner or a person engaged chiefly in farming or the tillage of the soil.⁵⁹ If there is an error in the name of the alleged bankrupt the petition may be amended so as to correct it.⁶⁰

51. In re Stein (D. C., Penn.), 12 Am. B. R. 364, 130 Fed. 377.

But the rule is different if the amount set forth in the petition exceeds \$500, and thereafter it develops that the provable claims of the original petitioners are less than \$500; in such a case an amendment may be permitted prior to the adjudication and other creditors permitted to join in the petition. In re Ryan (D. C., Penn.), 7 Am. B. R. 562, 114 Fed. 373; In re Mackay (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355; In re Mammoth Pine Lumber Co. (D. C., Ark.), 6 Am. B. R. 84, 109 Fed. 308.

52. In re Plymouth Cordage Co. (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000.

53. In re Weinmann, 2 N. B. N. & R. 51.

54. In re Hammond (D. C., N. Y.), 20 Am. B. R. 776, 163 Fed. 548.

55. International Silver Co. v. New York Jewelry Co. (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

56. In re Plymouth Cordage Co. (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000; Matter of Haff (C. C. A., 2d Cir.), 13 Am. B. R. 362, 136 Fed. 78.

57. In re Mackey (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355; In re Bellah (D. C., Del.), 8 Am. B. R. 310, 110 Fed. 69; Ryan v. Hendricks (C. C. A., 7th Cir.), 21 Am. B. R. 570, 166 Fed. 94, holding that if a petition fails to clearly set forth the number of creditors, the amount of their claims and the occupation of the debtor, it may be amended.

58. Conway v. German (C. C. A., 4th Cir.), 21 Am. B. R. 577, 166 Fed. 67; In re White (D. C., Penn.), 14 Am. B. R. 241, 135 Am. 199.

A secured creditor who has filed a petition in bankruptcy may thereafter amend the same and thereby waive his right to security. Morrison v. Rieinan (C. C. A., 7th Cir.), 41 Am. B. R. 325, 240 Fed. 97.

59. Beach v. Macon Grocery Co. (C. C. A.,

5th Cir.), 9 Am. B. R. 762, 120 Fed. 736; In re Brett (D. C., N. J.), 12 Am. B. R. 492, 130 Fed. 981; In re White (D. C., Penn.), 14 Am. B. R. 241, 135 Fed. 199; In re Plymouth Cordage Co. (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000.

It is no abuse of discretion to permit an involuntary petition to be amended so as to aver that the alleged bankrupt is not "a wage-earner nor a person engaged chiefly in farming or tillage of the soil." *Armstrong v. Fernandez*, 208 U. S. 324, 19 Am. B. R. 746, 52 L. Ed. 514; In re Crenshaw (D. C., Ala.), 19 Am. B. R. 502, 155 Fed. 271; In re Mero (D. C., Conn.), 12 Am. B. R. 171, 128 Fed. 633; In re Pilger (D. C., Wis.), 9 Am. B. R. 244, 118 Fed. 206.

Error to deny amendment.—In *Conway v. German* (C. C. A., 4th Cir.), 21 Am. B. R. 577, 166 Fed. 67, it was held error to deny a motion for an amendment in this respect. The court said: "Such an averment so far as this case is concerned, is a mere negative one, and not of a jurisdictional character. There is no contention made here by the defendants that they belong to the inhibited class, and hence cannot be adjudicated bankrupts, and as a matter of fact they do belong to that class. Were they seeking to come within the inhibited class, it would be essential for them to make proof of their averment, but they are not, and while technically speaking it should have been stated in the petition, that they were not persons coming within that class, still it was not essential so to do, and in no sense affected the merits of the case, and the amendments desired should have been permitted."

60. Gleason v. Smith (C. C. A., 3d Cir.), 16 Am. B. R. 602, 145 Fed. 895.

(V) *As to existence of partnership.*—Where one member of a firm has not made the other members parties to a petition in a voluntary proceeding he may amend his petition so as to bring in such partners.⁶¹ And a petition against two persons alleging that a partnership existed may be amended by striking out all reference to one of them when it appeared that such partnership did not exist.⁶²

(VI) *Defective verification.*—A defective verification to an involuntary petition may be amended.⁶³ But an involuntary petition, which has not been verified in compliance with section 18-c of the act, may not be amended by filing *nunc pro tunc* another petition reciting the same facts and properly verified.⁶⁴

(VII) *Insertion of new act of bankruptcy.*—As a general rule an involuntary petition cannot be amended by setting out therein an act of bankruptcy not referred to in the original petition and occurring more than four months before application for the order allowing the amendment.⁶⁵ But such an amendment may be permitted if clearly in furtherance of justice, and if its omission from the original petition is properly excused.⁶⁶ Even if the court has power to allow an amendment to a petition setting up a new, separate, and independent act of bankruptcy which occurred more than four months before the application to insert it in the petition, it ought not to do so, except upon a showing that the petitioner was duly diligent and that the interests of justice require such action.⁶⁷ The tendency of the decisions is toward a more liberal practice in granting amendments and in some of the later decisions it has been held that it is discretionary with the court to permit the petitioner to insert by amendment additional acts of bankruptcy.⁶⁸ Where the amendment offered shows

61. In re Freund (Ref., N. Y.), 1 Am. B. R. 25.

62. In re Richardson (D. C., Mass.), 27 Am. B. R. 590, 192 Fed. 50.

63. Armstrong v. Fernandez, 208 U. S. 324, 19 Am. B. R. 746, 52 L. Ed. 514; International Silver Co. v. New York Jewelry Co. (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

64. Matter of Frank (D. C., Pa.), 37 Am. B. R. 19, 234 Fed. 665.

65. In re Perlhefter (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299; In re Pure Milk Co. (D. C., Ala.), 18 Am. B. R. 735, 154 Fed. 459; In re Hafl (C. C. A., 2d Cir.), 13 Am. B. R. 362, 135 Fed. 742, 68 C. C. A., 380; Wilder v. Watts (D. C., S. Car.), 15 Am. B. R. 57, 138 Fed. 426. See also Matter of Riggs Restaurant Co. (C. C. A., 2d Cir.), 11 Am. B. R. 508, 130 Fed. 691; Reed v. Cowley, Fed. Cas. 11,644; In re Morse, Fed. Cas. 9,851; In re Leonard, Fed. Cas. 8,255.

Later act of bankruptcy.—A petition in involuntary bankruptcy may not be amended by the insertion of a further and later act of bankruptcy than the one set up originally. In re Sears (C. C. A., 2d Cir.), 8 Am. B. R. 713, 117 Fed. 294; In re Cleary (D. C., Pa.), 24 Am. B. R. 742, 179 Fed. 990. But see to the contrary In re Hamrick (D. C., Ga.), 23 Am. B. R. 721, 175 Fed. 279.

No act of bankruptcy originally alleged.—Where the original petition in an involuntary proceeding fails to allege an act of bankruptcy, it will not be amended so as to allege an act committed more than four months before the application for the amendment. In re Pure

Milk Co. (D. C., Ala.), 18 Am. B. R. 735, 154 Fed. 459; Armour & Co. v. Miller (C. C. A., 5th Cir.), 31 Am. B. R. 356, 200 Fed. 784.

Continuing act of bankruptcy.—An act of bankruptcy occurring more than four months prior to an amendment of a petition cannot be thereby introduced into the pending proceedings. But where it is the intent of the pleader to allege a continuing concealment not discovered within four months of the amendment it should be allowed. Matter of Havens (C. C. A., 2d Cir.), 42 Am. B. R. 734, 255 Fed. 478.

66. Hark v. Allen Co. (C. C. A., 3d Cir.), 17 Am. B. R. 3, 146 Fed. 665; White v. Bradley Timber Co. (D. C., Ala.), 8 Am. B. R. 671, 116 Fed. 768, quoting this proposition from Collier on Bankruptcy; Wilder v. Watts (D. C., S. Car.), 15 Am. B. R. 57, 138 Fed. 423, holding that where the proposed amendment is not served upon the alleged bankrupt, and no excuse is made for its omission from the original petition, though known to the petitioner, the application for leave to amend is not in furtherance of justice and will be denied; Matter of Bartleson (D. C., Fla.), 42 Am. B. R. 1, 253 Fed. 296.

67. Matter of Forbes (D. C., Mass.), 37 Am. B. R. 511, 235 Fed. 316; Matter of Lewis Shoe Co. (D. C., Mass.), 38 Am. B. R. 134, 235 Fed. 1017; Matter of Blomberg (D. C., Mass.), 42 Am. B. R. 115, 253 Fed. 94.

68. Pittsburgh Laundry Supply Co. v. Imperial Laundry Co. (C. C. A., 3d Cir.), 18 Am. B. R. 756, 154 Fed. 662; Hark v. C. M. Allen Co. (C. C. A., 3d Cir.), 17 Am. B. R. 3, 146 Fed. 665; In re Nusbaum (D. C., N. Y.), 18 Am. B. R. 598, 152 Fed. 836; In re Hamrick (D. C., Ga.), 23 Am. B. R. 721, 175 Fed. 279; Matter of Bartleson (D. C., Fla.), 42 Am. B. R. 1, 253 Fed. 296.

A liberal policy in regard to the allowance of amendments to pleadings, both at common law and in equity is to be encouraged, where the amendments proposed tend to prevent a failure of justice through

acts of bankruptcy of like character as the one attempted to be shown in the original petition, the amendment should be allowed.⁶⁹ Thus, where an involuntary petition alleges the giving of a preference as an act of bankruptcy, an amendment will be allowed so as to permit the petitioner to set up the giving of another preference.⁷⁰

(VIII) *Amended petition filed after four months.*—An amended petition may be filed after four months have elapsed since the commission of the act of bankruptcy charged, especially where the same act is relied on, and it is alleged in substantially the same words; the amended petition relates back to the date of the original petition.⁷¹ But the doctrine of relation back is not applicable where the amendment sets up a new cause of action, or where to cause it to relate back would have the effect of depriving an adverse party of a substantial right on which no attack was made in the original pleading.⁷²

(2) *PRACTICE.*—General Order XI provides that "amendments shall be printed or written, signed and verified, like original petitions and schedules. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed." This provision is not exclusive of the power to permit amendments inherent in the court.⁷³ Failure to verify an

technicalities, and where their allowance does not affect injuriously any just right of the opposite party." *Hark v. Allen Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 3, 146 Fed. 666.

Insolvency when act was committed.—The court has power to amend a petition in involuntary bankruptcy, which alleges insolvency only at the date of filing the petition, so as to show insolvency at the date the act of bankruptcy alleged was committed, where the facts disclosed by the schedules filed show the existence for several years previous of all debts except one, the assertion of such other debt on that date, and also indicate that the statement of assets runs back over that period. In *re Pangborn* (D. C., Mich.), 26 Am. B. R. 40, 185 Fed. 673. See also *Matter of Rodriguez* (D. C., Porto Rico), 40 Am. B. R. 681, 685, 10 P. R. Fed. 162, 260.

69. *White v. Bradley Timber Co.* (D. C., Ala.), 8 Am. B. R. 671, 116 Fed. 768; *Matter of Herlehy Co.* (D. C., N. Y.), 41 Am. B. R. 171, 247 Fed. 369.

Where essential facts are alleged.—An insolvent who confesses judgment to his wife in an amount equal to the value of his only assets, and withholds execution, does not commit an act of bankruptcy within the meaning of section 3a (3) of the Bankruptcy Act; but an involuntary petition stating such facts may be amended so as to allege the acts of bankruptcy defined in clauses (1) and (2) of the same section. *Matter of Irish* (D. C., Pa.), 36 Am. B. R. 185, 228 Fed. 573.

70. In *re Lange* (D. C., N. Y.), 8 Am. B. R. 231, 97 Fed. 196; In *re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764. See also *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 804, 141 Fed. 518, 72 C. C. A. 576.

Where the alleged preferential payments relied on as acts of bankruptcy occurred more than four months prior to the filing of an amended petition which asserts them, and were charged for the first time in that petition, and are new and independent preferen-

tial acts charged by way of substitution for the acts alleged in the original petition, and not mere enlargements and amendments to the alleged acts of bankruptcy set out in petitions filed within the proper four months' period, then and in that case the transactions have not arisen within the four months' period immediately preceding the filing of the petition and cannot be relied on as acts of bankruptcy. Where in an original petition in involuntary proceedings it was alleged that certain preferential payments were made to a bank within four months, an amended petition, which shows that said payment to the bank was in fact a payment made to creditors through the medium of the bank, is a mere explanation of the first act of bankruptcy charged and not substituted or new items. *Matter of Brown Commercial Car Co.* (C. C. A., 7th Cir.), 36 Am. B. R. 45, 227 Fed. 887.

71. *Millan v. Exchange Bank* (C. C. A., 4th Cir.), 24 Am. B. R. 889, 183 Fed. 753; *Ryan v. Hendricks* (C. C. A., 7th Cir.), 21 Am. B. R. 570, 166 Fed. 94; *First State Bank of Corinth v. Haswell* (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209; *Matter of McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 Fed. 442.

A bankruptcy court has jurisdiction to permit an amendment of an involuntary petition more than four months after the alleged preferential transfer, where the original petition was filed within four months, and omitted only the information necessary to enable the bankrupt to meet the charge. *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945. But see *Matter of Lewis Shoe Co.* (D. C., Mass.), 38 Am. B. R. 134, 235 Fed. 1017.

72. *Armour & Co. v. Miller* (C. C. A., 5th Cir.), 31 Am. B. R. 356, 209 Fed. 784.

73. In *re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 49.

amended petition as required by such general order may be corrected subsequently.⁷⁴ Amendments before adjudication can, it is thought, be granted only by the judge, and not by a referee sitting as a special master, though there is authority for the opposite view.⁷⁵ The practice varies. The application to amend may take the form of an oral motion on the trial.⁷⁶ The application to amend is not absolutely required to be in writing, although it is better practice to submit a written application. Notice of the application to amend may be waived by an express written consent to the amendment.⁷⁷ Usually it is made on a petition or affidavits, accompanied by a copy of or including the proposed amendments,⁷⁸ on due notice to the other parties. If granted, it relates back to the time the petition was filed and has the same effect as if included in the original petition.⁷⁹ The amendment does not advance the date of filing the petition so as to affect the four months' period as to preferences.⁸⁰ In conformity with this General Order a petition or application for leave to amend should show why the allegation proposed to be set forth by the amendment was not included in the original petition.⁸¹ An amendment which introduces new matter should be met by an answer, or it will be taken as admitted.⁸² It is thought that Equity Rules XXVIII to XXX suggest a good practice where amendment of an involuntary petition is desired. General Order VI has been held to imply a limitation on amendment.⁸³

IV. PROCESS AND SERVICE.

a. In general.—There is no need of process in voluntary cases; an adjudication usually follows and a reference is forthwith made to the referee. On the filing of an involuntary petition, the clerk must at once issue a subpoena. The failure to make timely service of a subpoena does not terminate the proceeding.⁸⁴

b. When returnable.—Subsection a provides that the process "shall be returnable within fifteen days, unless the judge shall for cause fix a longer

74. *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945; *Matter of Bartleson Co.* (D. C., Fla.), 42 Am. B. R. 1, 253 Fed. 293.

75. *In re Strait* (Ref., N. Y.), 2 Am. B. R. 308.

76. Compare *In re Waite*, Fed. Cas. 17,044. But there must be a formal application to amend, otherwise the question is not properly before the court. *In re Pressed Steel Wagon Goods Co.* (D. C., Mich.), 27 Am. B. R. 44, 193 Fed. 811.

77. *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

78. See "Supplementary Forms," *post*, for forms for amendment of schedules, which may be adapted to cases where petitions only are to be amended. For form of petition to amend, see *Hagar & Alexander's Bankruptcy Forms*, (2d Ed.) No. 46.

79. *In re Beerman* (D. C., Ga.), 7 Am. B. R. 431, 112 Fed. 662; *In re Williams*, Fed. Cas. 17,700; *Bank v. Sherman*, 101 U. S. 403, affg. Fed. Cas. 12,765; *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 804, 141 Fed. 518, 72 C. C. A. 576; *Ryan v. Hendricks* (C. C. A., 7th Cir.), 21 Am. B. R. 570, 166 Fed. 94; *First State Bank of Corinth v.*

Haswell (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209.

80. *First State Bank of Corinth v. Haswell* (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209.

81. *In re Pure Milk Co.* (D. C., Ala.), 18 Am. B. R. 735, 154 Fed. 682, citing *Collier on Bankruptcy* on this proposition; *In re Portner* (D. C., Pa.), 18 Am. B. R. 89, 149 Fed. 799, holding that in the absence of information as to why the omission occurred in the original petition, the petitioner will be given time to secure such information and insert it in his petition for amendment. *In White v. Bradley Timber Co.* (D. C., Ala.), 8 Am. B. R. 671, 116 Fed. 768, where it was held that in the absence of showing why the acts of bankruptcy, set up in a proposed amended petition, were omitted from the original petition, a motion for leave to amend will be denied.

82. *In re Bininger*, Fed. Cas. 1,420.

83. *In re Sears* (C. C. A., 2d Cir.), 8 Am. B. R. 713, 117 Fed. 294. But see to the contrary *In re Hamrick* (D. C., Ga.), 23 Am. B. R. 721, 175 Fed. 279.

84. *Gleason v. Smith* (C. C. A., 3d Cir.), 46 Am. B. R. 602, 145 Fed. 895.

time."⁸⁵ Intervening Sundays should be counted.⁸⁶ This time is shorter than in the equity practice. An effort was made by the framers of the Ray amendatory bill to reduce the period to ten days. The Senate thought otherwise, and the law, therefore, remains as originally passed, viz.: "within fifteen days."

c. *Form of subpoena*.—Forms in Bankruptcy, No. 5, is that ordinarily used as a subpoena to the alleged bankrupt. Form No. 4, being an order requiring the alleged bankrupt to show cause why the prayer of the petition should not be granted, is clearly an inadvertent inheritance from the practice under the former law, and, to say the least, confusingly superfluous. Under the present law, the subpoena has taken its place; the order to show cause is no longer required, and should be ignored as contrary to the law. Equity Rule XII requires a memorandum to be placed at the bottom of the subpoena, that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day at which the writ is returnable. It has been held, however, that this memorandum is not essential.⁸⁷ A power of attorney to appear in response to a creditors' petition is not necessary. The duties of the clerk on the entry of appearances and pleas are prescribed in the General Orders. General Order III requires the subpoena to issue out of the court, under the seal thereof, and be tested by the clerk. A defect in this regard will be waived by an appearance without objection.⁸⁸

d. *Service of process*.—(1) *IN GENERAL*.—Service of the petition and writ of subpoena is to be made in the same manner that service of similar process is had upon the commencement of a suit of equity in the courts of the United States. This reference to the equity practice seems in effect to have enacted Equity Rule XIII into the law.⁸⁹ In case service cannot be made upon the bankrupt, it may be made under this rule by leaving the papers with an adult member of his family at his home.⁹⁰ Under the act as amended it has been held that service of a copy of an involuntary petition with a subpoena upon the clerk of the hotel of which the alleged bankrupt was proprietor and where he usually resided, is valid without publication.⁹¹ Personal service out of the district is unavailing.⁹²

(2) *SERVICE BY PUBLICATION*.—Where personal service, or service as authorized by Equity Rule XIII may not be made, notice must be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States. The section should be read in connection with section 8 of act of Congress of March 3, 1875 (now § 57 of Judicial Code), to the effect that when the alleged bankrupt is not an inhabitant of nor found within the district, and shall not voluntarily appear, it shall be lawful for the court to make an order directing such alleged bankrupt to appear to answer the petition

⁸⁵ The words "return day," as used in this section, refer to the day fixed as the latest limit for the marshal's or other serving officer's return of the writ of subpoena into court. In *re McDonald* (D. C., Hawaii), 30 Am. B. R. 120.

⁸⁶ In *re Francis Levy Outfitting Co., Ltd.* (D. C., Hawaii), 29 Am. B. R. 13.

⁸⁷ *Matter of Wing Yick Co.* (D. C., Hawaii), 2 U. S., D. C., Hawaii 257, 13 Am. B. R. 360.

⁸⁸ *Matter of Abbey Press C. C. A.*, 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51.

⁸⁹ In *re Risteen* (D. C., Mass.), 10 Am. B. R. 494, 122 Fed. 732. See *Equity Rules, post*.

⁹⁰ In *re Norton* (D. C., N. Y.), 17 Am. B. R. 504, 148 Fed. 301.

⁹¹ In *re Risteen* (D. C., Mass.), 10 Am. B. R. 494, 122 Fed. 732.

⁹² Note *Jobbins v. Montague*, Fed. Cas. 7,329; *Herndon v. Ridgway*, 17 How. 424. But see *Hills v. McKinniss Co.* (D. C., Ohio), 26 Am. B. R. 333, 183 Fed. 1012.

by a day to be fixed, which order shall be served on such absent alleged bankrupt "if practicable, wherever found."⁹³ The amendatory act of 1903 added the exception that "unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."⁹⁴ The proper basis for service by publication is an affidavit showing that personal service of process upon the bankrupt is impracticable, because he is absent from the jurisdiction or cannot be found.⁹⁵ The order for service by publication should designate the day upon which the defendant is required to appear, and demur, answer or plead.⁹⁶

(3) **SERVICE ON CORPORATIONS, INFANTS, LUNATICS, ETC.**—The statute makes no special provision relative to service on such parties. In the absence of controlling Federal rules of practice, the method prescribed by the State law may be followed, but, it seems, service cannot usually be made within the district on the officer of a non-resident corporation, temporarily therein.⁹⁷ The better practice in all cases not covered by Federal rules, is to secure an order directing how service shall be made.

(4) **SERVICE ON NON-JOINING PARTNER.**—Where one of two or more partners does not join in a voluntary petition for the bankruptcy of the firm, the proceeding is voluntary as to the petitioning partners and involuntary as to the non-joining partner; before an adjudication can be had, a subpoena must issue, and, with a copy of the petition, be served on the latter; and he may defend as though an alleged involuntary bankrupt.⁹⁸ If the petition be against a partnership, one of whose members is an absentee, he must be brought in by publication as if the petition were against him solely.⁹⁹

(5) **SERVICE ON ABSENTEES.**—An absconding debtor may be proceeded against in bankruptcy; the present law does not deny him a discharge although most previous laws, here and elsewhere, have. Cases of abscondence are frequent, and the method of service in such cases, especially where the debtor has left the country, differs in different districts.¹⁰⁰ That such method might be uniform and existing doubt be cleared up, the amendatory act of 1903 has provided a summary means of serving such a debtor by publication. It may have been that the words "as provided by law for notice by publication in suits in equity," in the original statute referred to § 738 (now Judicial Code, § 57)¹⁰¹ of the Revised Statutes, a bankruptcy proceeding being in the nature of a creditor's bill to assert an equitable lien. Still, there was doubt. There can be none now. Thus, absentee bankrupts can, in fact must, be served hereafter in the way prescribed by the section of the Revised Statutes above referred to, save that, unless the judge shall otherwise direct, the publication shall be

⁹³. *Hills v. McKinniss Co.* (D. C., Ohio), 26 Am. B. R. 329, 188 Fed. 1012. See also *Bauman Diamond Co. v. Hart* (C. C. A., 5th Cir.), 27 Am. B. R. 632, 192 Fed. 498, holding that the order directing service by publication should be published.

⁹⁴. As to number and times of publication, see *In re McDonald* (D. C., Hawaii), 30 Am. B. R. 120.

⁹⁵. *Matter of Hoshida* (D. C., Hawaii), 32 Am. B. R. 451. Citing *Collier on Bankruptcy* (9th Ed.), 420.

⁹⁶. *Bauman Diamond Co. v. Hart* (C. C. A., 5th Cir.), 27 Am. B. R. 632, 192 Fed. 498.

⁹⁷. *Godley v. Morning News*, 150 U. S. 512.

Service on a director not legally elected is

of no force. *In re Plasmon Co.* (D. C., N. Y.), 14 Am. B. R. 487.

⁹⁸. General Order VIII.

Special partner.—In a voluntary proceeding in bankruptcy by general partners, a copy of the petition should be served with the usual subpoena upon a special partner, but a failure to serve said petition may be supplied after service of the subpoena. *Matter of Carrion & Co.* (D. C., Porto Rico), 41 Am. B. R. 304, 10 P. R. Fed. 332.

⁹⁹. *In re Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600.

¹⁰⁰. *In re Burka* (D. C., Tenn.), 5 Am. B. R. 843, 107 Fed. 674.

¹⁰¹. As modified concerning the time of publication by the act of March 3, 1875, now Judicial Code, § 57.

"not more than once a week for two consecutive weeks,¹⁰² and the return day shall be ten days after the last publication." In other words, service on absentees under the amendment, will take less than two weeks longer than personal service within the district.¹⁰³

(6) **EFFECT OF SERVICE ON JURISDICTION IN PERSONAM AND IN REM.**—It is not thought that that portion of § 738 (now Judicial Code, § 57) which, in cases of service by publication, limits the jurisdiction thus acquired to the property of the bankrupt within the district, is applicable to a proceeding in bankruptcy. The whole theory of that proceeding is against such a view. On adjudication, the trustee becomes vested with the bankrupt's property, wherever it is, and, subject to the orders of the court whose officer he is, may take possession of it and dispose of it as freely as the bankrupt could before the petition was filed.¹⁰⁴ Even should the opposite view prevail, ancillary proceedings in the other districts will supply the necessary jurisdiction.¹⁰⁵

(7) **MEANING OF AMENDMENTS OF 1903.**—The changes made by the amendatory act probably mean that (a) service must hereafter be either personal under the rules in equity¹⁰⁶ within the district or by publication, (b) that, in either event, the return day shall be, in the one case, not more than fifteen, and in the other case not more than ten days after the last publication, while (c) the jurisdiction, both in *personam* and *in rem*, at least remains as it was before the amendments.¹⁰⁷

(8) **EFFECT OF DELAY IN SERVICE.**—The provision of subsection *a* relative to the time within which a subpoena is returnable do not necessarily affect the time within which a subpoena must be served. The subsection should be deemed to be directory merely, and intended to secure system, uniformity and dispatch in the conduct of public business.¹⁰⁸ It therefore follows that the jurisdiction of the court is not affected by a failure to serve the subpoena within fifteen days subsequent to its issue.¹⁰⁹

(9) **DEFECTS IN SUBPOENA OR SERVICE.**—Any objection as to the sufficiency of the subpoena or the regularity of its service is waived by the appearance of the bankrupt.¹¹⁰ If such defects exist, the bankrupt should move either to quash the subpoena or to set aside the order of publication.¹¹¹

(10) **PROOF OF SERVICE.**—If the subpoena is served by the marshal or his deputy, return is made by the usual certificate duly indorsed. If served by some other designated person, by affidavit thereof.¹¹²

V. APPEARANCES AND PLEADINGS.

a. Who may appear and plead.—Subsection *b* provides that either the bankrupt or any creditor may appear and plead to the petition. The term "bank-

102. In re Bellamy, Fed. Cas. 1,266. See also In re Hall, Fed. Cas. 5,922; Hills v. McKinniss Co. (D. C., Ohio), 26 Am. B. R. 329, 188 Fed. 1012.

103. For form of order, see "Supplementary Forms," *post*; Hagar & Alexander's Bankruptcy Forms (2d Ed.), No. 45.

104. Compare Bankr. Act, § 70-a.

105. Compare Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414; Shainwald v. Lewis, 5 Fed. 513; Mason v. Hartford, 19 Fed. 53.

106. Compare In re Risteen (D. C., Mass.), 10 Am. B. R. 494, 122 Fed. 732.

107. For reasons for these changes, see Report of Ex. Com. of Referees in Bankruptcy, published March, 1900, p. 24.

108. In re Stein (C. C. A., 2d Cir.), 5 Am. B. R. 288, 105 Fed. 749.

109. Matter of Frischberg (Ref., N. Y.), 8 Am. B. R. 606 Gleason v. Smith (C. C. A., 2d Cir.), 16 Am. B. R. 602, 145 Fed. 895; In re Stein (C. C. A., 2d Cir.), 5 Am. B. R. 288, 105 Fed. 749.

110. In re Smith (D. C., Conn.), 9 Am. B. R. 98, 117 Fed. 961.

111. Romaine v. Union Ins. Co., 28 Fed. 625, at 634-635; Gregory v. Pike, 79 Fed. 520.

112. See Equity Rule XV.

Return of marshal prima facie evidence.—The return of a marshal showing that he has served an involuntary petition upon the president of an alleged bankrupt corporation, is prima facie evidence of service. Matter of Sutter Hotel Co. (C. C. A., 9th Cir.), 39 Am. B. R. 620, 241 Fed. 367.

rupt" here means the alleged bankrupt.¹¹³ The term "creditor" includes any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy.¹¹⁴ Under the former law, creditors, even if secured or preferred, and even attachment creditors, could resist an involuntary petition.¹¹⁵ Under the present law the right to resist is limited to a creditor who owns a demand or claim provable in bankruptcy. The authority thus conferred upon a creditor to plead to the petition is in recognition of the interest which he may have in permitting his debtor to continue a business where such debtor is not insolvent and if left alone may be able to meet his obligations.¹¹⁶ Some doubt has arisen as to whether an attachment creditor may plead to the petition. The definition of the term "creditor," it has been held, should not be so construed as to preclude a creditor from resisting an adjudication where the issues raised by his answer establish *per se*, not strictly a provable claim but rights as a creditor in fact which entitle him to the protection of the court.¹¹⁷ And in a carefully considered case it has been stated that from the fact that this section makes express provision for the exercise by the bankrupt or by any creditor of a right to appear and resist an adjudication of involuntary bankruptcy does not preclude the court from permitting participation in the proceedings by other parties shown to be interested in the result thereof, as, for instance, in the case of a judgment creditor who obtained a judgment for a personal injury, not "wilful and malicious," subsequent to filing the petition but before adjudication.¹¹⁸ It is held that an attaching creditor may be a party to a proceeding in involuntary proceedings.¹¹⁹ A

113. Bankr. Act, § 1(4).

114. Bankr. Act, § 1(9).

115. In re Hatje, Fed. Cas. 6,215; In re Bergerson, Fed. Cas. 1,342; In re Jack, Fed. Cas. 7,119. Consult also In re Frost, Fed. Cas. 5,134; In re Green Pond R. Co., Fed. Cas. 5,786; In re Williams, Fed. Cas. 17,703.

116. In re Billing (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

117. In re Moench & Sons (D. C., N. Y.), 10 Am. B. R. 590, 123 Fed. 965.

118. Others interested in proceedings.—In the case of Jackson v. Wauchula Mfg. & Timber Co. (C. C. A., 5th Cir.), 36 Am. B. R. 408, 230 Fed. 409, the court said: "Obviously, as the plaintiff is the owner of the judgment he had recovered, he was vitally concerned in the question of the estate of the judgment defendant—which was the thing brought under the sole control of the bankruptcy court by the filing of the involuntary petition—being subjected to the diminishing process of a bankruptcy administration, outcome to be expected being a lessening of the chance of his demand being satisfied out of the estate in existence, and a discharge of the judgment defendant, operating to release its liability under the judgment. From the fact that the Bankruptcy Act (§ 18b) makes express provision for the exercise by the bankrupt or by any creditor of a right to appear and plead to a petition for involuntary bankruptcy, it does not follow that it was a purpose of the Act to withhold from the court of bankruptcy the power of permitting participation in the proceedings by other parties shown to be interested in the

result of them. Nothing in the Act stands in the way of the conclusion that the court of bankruptcy has the power to permit an involuntary petition to be resisted by one other than the debtor or a creditor within the meaning of the Act, who shows that he has an interest in the estate in the court's charge which would be prejudicially affected by an adjudication of bankruptcy on that petition and the consequences which might be expected to follow from such adjudication. Blackstone v. Everybody's Store (C. C. A., 1st Cir.), 30 Am. B. R. 497, 207 Fed. 752; Altonwood Park Co. v. Gwynne (C. C. A., 2d Cir.), 20 Am. B. R. 31, 160 Fed. 448, 87 C. C. A. 409; In re Cooper Brothers (D. C., Pa.), 20 Am. B. R. 392, 159 Fed. 956; In re Simonson (D. C., Ky.), 1 Am. B. R. 197, 92 Fed. 904. When such an interest is shown by an applicant for leave to take up a valid defense which the alleged bankrupt made in due time, but subsequently unwarrantably abandoned, the application may not properly be denied upon the ground of a lack of power in the court to permit the applicant to participate in the proceeding."

119. In re Moench & Sons Co. (D. C., N. Y.), 10 Am. B. R. 590, 123 Fed. 965; In re Hornstein (D. C., N. Y.), 10 Am. B. R. 308, 113 Fed. 421; In re Schenkein (Spec. M., N. Y.), 7 Am. B. R. 162, 113 Fed. 421. See also In re Burlington Malting Co. (D. C., Wis.), 6 Am. B. R. 369, 109 Fed. 777; In re Rogers Milling Co. (D. C., Ark.), 4 Am. B. R. 540, 102 Fed. 687.

Where the attachment creditor is the petitioner he may be required to surrender his

preferred creditor or one who is secured and stands alone on his security should not be permitted to oppose an adjudication of involuntary bankruptcy.¹²⁰ This doctrine excludes resistance to involuntary proceedings by creditors who are secured in full. It has been held that a receiver of a corporation in possession of its property may contest the adjudication of the corporation as a bankrupt, on the ground that it is his right and duty to see that the jurisdiction of the court which appointed him is not improperly ousted.¹²¹

b. *Effect of voluntary appearance by bankrupt.*—A voluntary appearance by the bankrupt is equivalent to personal service, but only so far as to confer jurisdiction of the person.¹²²

c. *When to appear and plead.*—Subsection b provides that the appearance must be within five days after the return day or within such further time as the court may allow. The amendment of 1903 changed the time within which to appear and plead from ten to five days. The time does not expire until the last day limited.¹²³ As the creditors are entitled to resist the petition, an adjudication should not be made before the expiration of the full time, even though the bankrupt voluntarily appears and consents to the adjudication.¹²⁴ But the adjudication is not necessarily null because it is made before the expiration of the time for creditors to appear and contest it, and it will be sustained when not directly attacked by a creditor.¹²⁵ The provisions of § 59-f providing that

attachment lien before an order of adjudication will be made. In *re Hornstein* (D. C., N. Y.), 10 Am. B. R. 308, 122 Fed. 266.

120. *Creditors of bankrupt.*—In the case of *In re Columbia Real Estate Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 441, 112 Fed. 643, the court referred to the definition of the term "creditor" contained in §§ 1(9), and 59-b to the effect that petitioners for the adjudication shall be "creditors who have provable claims against" the alleged bankrupt, and said: "We are of the opinion from these provisions and their consistency with the general tenor of the act that the intention clearly appears that the only claimants who are entitled to hearing on the issue of involuntary bankruptcy, aside from the bankrupt, are the creditors of the bankrupt; that creditors having security or priority are excluded therefrom to the extent of their security or priority, and can be recognized only in that issue for unsecured or unpreferred amounts; that even as a creditor one who is secured and stands alone on his security can neither invoke nor oppose an adjudication of involuntary bankruptcy."

Compare *Matter of Carey* (C. C. A., 2d Cir.), 42 Am. B. R. 553, 254 Fed. 688, revg. 42 Am. B. R. 187, in which it was held that a judgment creditor who has procured execution but has not obtained satisfaction, is entitled to contest the propriety of an adjudication of the judgment debtor.

121. *Matter of Hudson River Electric Power Co.* (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934; *Blackstone v. Everybody's Store, Inc.* (C. C. A., 1st Cir.), 30 Am. B. R. 497, 207 Fed. 752; *Butler & Co. v. Pelmenberg* (C. C. A., 1st Cir.), 30 Am. B. R. 502, 516, 207 Fed. 705; *Cavagnaro v. Indian Tire Co.* (N. J. Ct. of Ch.), 44 Am. B. R. 137, 107 Atl. 643.

122. In *re Mason* (D. C., N. Car.), 3 Am. B. R. 599, 99 Fed. 256; In *re Altman* (Ref., N. Y.), 1 Am. B. R. 680; *Shutts v. Bank* (D. C., Ind.), 3 Am. B. R. 492, 98 Fed. 705; In *re Frischberg* (Ref., N. Y.), 8 Am. B. R. 607; In *re Western Investment Co.*

(D. C., Okl.), 21 Am. B. R. 367, 170 Fed. 677.

Objection to jurisdiction.—Entire want of jurisdiction over the subject-matter may be taken advantage of at any time. It is never too late to make such an objection, and the jurisdiction may be attacked collaterally. But where the objection goes merely to a want of jurisdiction of the person or the thing, there may be a waiver of the objection, or restriction as to the manner and time of making it. A creditor cannot prove his claim, participate in the election of the trustee and distribution of the assets, and then, upon the application for a discharge, object to the jurisdiction on account of the bankrupt's non-residence. In *re Mason* (D. C., N. Car.), 3 Am. B. R. 599, 99 Fed. 256.

Withdrawal of appearance.—If the alleged bankrupt appears generally, such appearance cannot be withdrawn so as to divest the court of jurisdiction. In *re Ulrich*, 3 Ben. 355.

123. *Day v. Beck, etc., Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 175, 114 Fed. 834.

124. In *re Humbert* (D. C., Iowa), 4 Am. B. R. 76, 100 Fed. 439. Compare *In re Columbia Real Estate* (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 965, where adjudication by consent on the day the petition was filed was, however, held not null and void. See also for far-reaching effect of an adjudication by default, *In re American Brewing Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 463, 112 Fed. 752; *Matter of Gibney Tire & Rubber Co.* (D. C., Pa.), 39 Am. B. R. 355, 241 Fed. 879.

125. In *re Western Investment Co.* (D. C., Okl.), 21 Am. B. R. 367, 170 Fed. 677; *Matter of Gibney Tire & Rubber Co.* (D. C., Pa.), 39 Am. B. R. 355, 241 Fed. 879; In *re Columbia Real Estate Co.* (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 965, wherein the court said: "There is nothing in section 18

creditors other than the original petitioners may at any time enter their appearance and file an answer was not intended to permit creditors to come in at any time, but such provisions are limited by and should be construed with subsection *b* of this section.¹²⁶ The absolute right of a creditor to answer or demur ceases upon the expiration of such time and an appearance or pleading thereafter is within the judicial discretion of the court.¹²⁷ Appearance or pleading, or both, may be permitted "within such further time as the court may allow," and a meritorious pleading filed late may be considered, if so ordered by the judge.¹²⁸ Where the answer or demurrer is not simply for the purpose of delay, the time to plead or answer may be extended in proper cases.¹²⁹ But the court will not usually grant long extensions, or those for which good reasons are not given.¹³⁰ A mere stipulation, not brought to the attention of the court or resulting in an order, is, in the absence of rules to the contrary, not sufficient.¹³¹

d. How appearances are made.—The statute does not prescribe the manner of making appearances. A practice is suggested in General Orders IV and XXXII, and Equity Rule XVII. There is no form prescribed, but those used in the equity practice may be followed.¹³² Appearances may be in person or by attorney; if the latter, the attorney must be one admitted to practice in the district court of the district.¹³³ But the proceedings will not be set aside upon the ground that the attorney appearing for a voluntary bankrupt has not been admitted to practice in the Federal courts.¹³⁴ The appearance in

of the bankruptcy act which precludes a waiver of process, a voluntary appearance of the bankrupt, and an answer admitting bankruptcy on the day the petition is filed. An adjudication on a voluntary appearance and an answer admitting the averments of the petition would certainly conclude the bankrupt who entered the appearance and filed the answer. It may be when an adjudication has been made without service of process, and before the expiration of 15 days that the creditors might, upon reasonable application, procure an order vacating the adjudication so far as to allow them to plead and be heard in opposition to the petition. But such right must be exercised with reasonable promptness after actual or constructive notice of the adjudication."

126. *In re Mutual Mercantile Agency* (D. C., N. Y.), 6 Am. B. R. 607, 111 Fed. 152; *Matter of Herlehy Co.* (D. C., N. Y.), 41 Am. B. R. 171, 247 Fed. 369. *Matter of Conn. Brass & Mfg. Co.* (D. C., Conn.), 43 Am. B. R. 376, 257 Fed. 445.

127. *In re First Nat'l Bank of Bella Fourche* (C. C. C., 8th Cir.), 18 Am. B. R. 265, 152 Fed. 64, holding that it was no abuse of discretion to deny an application for permission to answer where the application was not made until more than five weeks after the adjudication and the creditors were aware of the filing of the petition within forty-eight hours thereafter, and the administration of the estate had proceeded in the meantime without objection.

Revision of adjudication.—There is no time fixed in the bankruptcy act within which a

petition for revision of an adjudication in bankruptcy shall be presented, but as an appeal from adjudication is required to be taken within ten days, by analogy it would seem that a petition for revision ought to be taken within a similar time, unless there are circumstances excusing the delay; but courts have generally held that a petition for revision must be presented within six months. *Blanchard v. Ammons* (C. C. A., 9th Cir.), 25 Am. B. R. 590, 183 Fed. 556.

Appearance and pleading by creditors.—Where it is sought to put in default all persons who have a right to appear and plead to an involuntary petition, the usual subpoena limiting the time in which to appear to five days should be issued; otherwise the adjudication will not be binding on those who do not consent to it if they appear within a reasonable time and ask to plead. *B. R. Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co.* (C. C. A., 8th Cir.), 30 Am. B. R. 424, 306 Fed. 865.

Ex parte order.—The court should not grant an *ex parte* order permitting a creditor to file an answer to an involuntary petition after the five days have expired. *Matter of Herlehy Co.* (D. C., N. Y.), 41 Am. B. R. 171, 247 Fed. 369.

Motion to dismiss.—A court of bankruptcy is a court of equity, and in the equity court a motion to dismiss made in good faith and raising substantial questions vitally affecting the merits, may be entertained by the court within a reasonable time, and may be made even on its own motion. *Mat-*

court of an attorney-at-law licensed to practice there carries with it the presumption of authority to appear and act for his client in the proceeding in which he seeks to represent him. His mere appearance is *prima facie* evidence that he is duly authorized to represent and act for his client, and this presumption is conclusive in the absence of countervailing evidence.¹³⁵ The authority of an attorney to appear cannot be questioned by the answer of the defendant debtor.¹³⁶

e. Pleadings which may be entered.—(1) IN GENERAL.—The pleadings which may be entered in a bankruptcy proceeding are those fixed by the equity rules established by the Supreme Court.¹³⁷ Since the adoption of the new equity rules every defense in point of law arising upon the face of the bill, which might heretofore have been made by demurrer or plea, must be made by motion to dismiss or in the answer;¹³⁸ But the judge may modify these rules in "any particular case so as to facilitate a speedy hearing."¹³⁹ Cases arising before the changes in the equity rules are cited in the footnote.¹⁴⁰

(2) AMENDMENTS.—Amendments to all pleadings, other than the petition, and perhaps even amendments to involuntary petitions, should be made in accordance with the practice outlined in the equity rules.¹⁴¹ If a jury trial is desired, it should be applied for when the answer is entered, but in a separate paper.¹⁴² Where the creditor shows no proposed amended answer, no newly discovered facts, and no information as to what new defenses he desires to set up, he should not be permitted to amend.¹⁴³

(3) ANSWER AND REPLY.—The form of the answer is suggested by Form No. 6; but "the denial of bankruptcy" may also contain any available defense or counterclaim.¹⁴⁴ The form prescribed by the Supreme Court is not exclusive in its provisions.¹⁴⁵ If the answer is prolix and admixed with supposed grounds of demurrer, and does not admit or unequivocally deny the material facts of the petition, it may be stricken out.¹⁴⁶ If it requires argument to show that an answer is frivolous it may not be overruled on that ground.¹⁴⁷ When a petition does not show all the jurisdictional facts, as that the alleged bankrupt is not

ter of Conn. Brass & Mfg. Corp. (D. C., Conn.), 43 Am. B. R. 376, 257 Fed. 445.

128. General Order XXXII. Compare *In re Simonson* (D. C., Ky.), 1 Am. B. R. 197, 92 Fed. 904.

129. *In re Cooper Bros.* (D. C., Pa.), 20 Am. B. R. 392, 159 Fed. 956; *Blackstone v. Everybody's Store, Inc.* (C. C. A., 1st Cir.), 30 Am. B. R. 497, 207 Fed. 752, holding that the grant of an extension is discretionary and will not be disturbed on appeal.

130. *In re Heinsfurter* (D. C., Iowa), 3 Am. B. R. 109, 97 Fed. 198.

131. *In re Simonson* (D. C., Ky.), 1 Am. B. R. 197, 92 Fed. 904.

132. For forms see "Supplementary Forms," *post*; Hagar & Alexander's *Bankruptcy Forms* (2d Ed.), No. 12.

The casual presence of a litigant or attorney in the bankruptcy court cannot be construed into an appearance nor can the insistent endeavor of a litigant or attorney to have his views accepted be regarded as an appearance in the technical sense. *Matter of Ohio Copper Mining Co.* (D. C., N. Y.), 39 Am. B. R. 284, 241 Fed. 711.

133. General Order IV.

134. *In re Kindt* (D. C., Iowa), 3 Am. B. R. 546, 98 Fed. 867.

135. *In re Gasser* (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537, holding that an attorney admitted to practice in the district court, who enters his appearance and files objections to the discharge of a bankrupt, must be presumed to have authority to do so without any special written power of attorney to take such action.

136. *Gage Co. v. Bell* (D. C., Tenn.), 10 Am. B. R. 696, 124 Fed. 371.

137. General Order XXXVII. Compare for meaning of "proceedings in bankruptcy," *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175.

138. See Equity Rule XXIX. *Matter of Shaver Co.* (D. C., Fla.), 44 Am. B. R. 540.

139. General Order XXXVII.

140. *In re Stern* (C. C. A., 2d Cir.), 8 Am. B. R. 569, 116 Fed. 604; *In re Ewing* (C. C. A., 2d Cir.), 8 Am. B. R. 269, 115 Fed. 707; *In re Randall*, Fed. Cas. 11,551; *Orem v. Harley*, Fed. Cas. 10567; *Green River Dep.*

within the excepted classes, the proper plea is a motion to dismiss.¹⁴⁸ In such a case, however, as in all cases where the defense goes to the jurisdiction, the objection may be taken by answer,¹⁴⁹ or special defense to the jurisdiction of the court.¹⁵⁰ Where an involuntary petition charges as an act of bankruptcy a preferential transfer within the four months' period, a denial of the commission of the act of bankruptcy is sufficient as a denial of insolvency, where it is so regarded by the practitioners and the parties proceed to the taking of proof.¹⁵¹ Where the answer is multifarious and in response to a multifarious petition, leave will be granted to amend and file as of the day the original petition was filed.¹⁵² If no replication is filed to the answer, the latter is taken as true, and, if it alleges jurisdictional defects and no proofs are taken, a dismissal must result.¹⁵³ Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the answer.¹⁵⁴ Useful precedents will be found in the numerous cases on equity rules and practice in the Federal courts. Some of the cases under the former law will be found in the foot-note.¹⁵⁵

Bank v. Craig Bros. (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137; *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 383, 95 Fed. 637; *In re Cliffe* (D. C., Penn.), 2 Am. B. R. 317, 94 Fed. 354; *Pollack v. Meyer Brothers Drug Co.* (C. C. C., 8th Cir.), 36 Am. B. R. 835, 233 Fed. 861; *In re Cooper Bros.* (D. C., Pa.), 20 Am. B. R. 392, 159 Fed. 956; *In re Koplin* (D. C., Penn.), 24 Am. B. R. 534, 175 Fed. 1013; *Goldman v. Smith* (D. C., Ky.), 1 Am. B. R. 266, 98 Fed. 182, and cases there cited.

141. See Equity Rules XXVIII to XXX. Compare *In re Hyde & Gload Mfg. Co.* (D. C., N. Y.), 4 Am. B. R. 602, 103 Fed. 617. See also "Amendment of Petition," in this section, *ante*.

142. See under Section Nineteen of this work, and for forms, "Supplementary Forms," *post*; *Hagar & Alexander's Bankruptcy Forms* (2d Ed.), Nos. 22, 23, 24.

143. *Knapp & Spencer Co. v. Drew* (C. C. A., 8th Cir.), 20 Am. B. R. 355, 160 Fed. 413.

144. *In re Paige* (D. C., Ohio), 3 Am. B. R. 679, 99 Fed. 538. Compare *Hill v. Levy* (D. C., Va.), 3 Am. B. R. 374, 98 Fed. 94; *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 383, 95 Fed. 637; *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102. See cases digested. Am. B. R. Dig., §§ 260, 261. For forms of answers, see *Hagar & Alexander's Bankruptcy Forms* (2d Ed.), Nos. 19-21.

145. *In re Paige* (D. C., Ohio), 3 Am. B. R. 679, 99 Fed. 538.

146. *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, affg. 9 Am. B. R. 441.

147. *Consolidated Rubber Tire Co. v. Vehicle Equipment Co.*, 121 N. Y. App. Div. 64, 19 Am. B. R. 862, 106 N. Y. Supp. 599.

148. See Equity Rule XXIX.

149. *In re Taylor* (C. C. A., 7th Cir.), 4 Am. B. R. 515, 102 Fed. 728.

150. *Clark-Herren-Campbell Co. v. Claffin Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 414, 218 Fed. 429.

151. *Troy Wagon Works v. Vastbinder* (D. C., Penn.), 12 Am. B. R. 352, 130 Fed. 232.

Insufficient denial of insolvency.—Upon the petition of creditors for an adjudication of bankruptcy against their debtor, it being alleged that there had been a conveyance of a large amount of real estate in trust for the benefit of a creditor with intent to prefer such creditor, the alleged bankrupt answered denying "that within four months next preceding the date of filing of said petition . . . he transferred while insolvent a portion of his property . . . for the use of the Bank of Commerce and Trust Company," etc. Held, that the answer was not in proper form as it contained no express denial of insolvency, such denial being only by way of negative pregnant and would have been stricken out before issue joined, but that by replying to said answer and joining issue thereon, petitioning creditors lost their right to move to strike out the plea. *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507.

152. *Mather v. Coe* (D. C., Ohio), 1 Am. B. R. 504, 92 Fed. 333. See also *In re Ogles* (D. C., Tenn.), 1 Am. B. R. 671, 93 Fed. 426.

153. *In re Taylor* (C. C. A., 7th Cir.), 4 Am. B. R. 515, 102 Fed. 728.

154. See Equity Rule XXXI.

155. *In re Williams*, Fed. Cas. 17,703; *In re Skelley*, Fed. Cas. 12,921; *In re Cornwall*, Fed. Cas. 3,250; *In re Sheehan*, Fed. Cas. 12,738; *In re Derby*, Fed. Cas. 3,815; *In re Martin*, Fed. Cas. 9,150; *In re Cal. P. R. Co.*, Fed. Cas. 2,315.

VI. VERIFICATION OF PLEADINGS.

a. *In general.*—Subsection *c* provides that “all pleadings setting up matters of fact shall be verified under oath.” Such verification must be had before one of the officers designated in § 20. This requirement applies to specifications of objections to the discharge of a bankrupt, such specifications being deemed pleadings within the meaning of the word as used in this subsection.¹⁵⁴ But it does not require verification of a motion to dismiss a petition.^{155a} All pleadings setting up matters of fact must “be verified under oath.” By analogy to this requirement, district rules often also require petitions in a proceeding subsequent to the adjudication to be under oath. Under the former law, each of the petitioning creditors was obliged to verify the petition,¹⁵⁶ and this is probably so now; but, in case the petition is not verified by one of several petitioning creditors, a motion to dismiss for want of jurisdiction¹⁵⁶ will be overruled, and an opportunity given to supply the omission.¹⁵⁷ The defect of want of verification may be waived by failure to object.¹⁵⁸ A defect in the verification is not jurisdictional and answering on the merits waives it.¹⁵⁹ The filing of an answer without special objection to the failure of verification will constitute a waiver.¹⁶⁰ A verification made before a notary public is defective in the statement of the venue if it does not show the verification to have been taken within the jurisdiction of the notary.¹⁶¹ Where the petitioning creditor or pleader is a partnership, the oath should be by one of the partners; where a corporation, by an officer, in each case acquainted with the facts.¹⁶² The verification of an involuntary petition is not subject to the rules of competency with respect to hearsay testimony, and hence a statement in the verification that the petitioner believed the matter alleged in the petition on information and belief to be true is not sufficient ground for the dismissal of the petition, although such statement should not be used and is mere surplusage.¹⁶⁷

154. *In re Baerncoff* (D. C., Penn.), 9 Am. B. R. 133, 117 Fed. 975; *In re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 147, 188 Fed. 479; *In re Miller* (D. C., Iowa), 27 Am. B. R. 606, 192 Fed. 730; *Matter of Abramovits* (D. C., Fla.), 41 Am. B. R. 588, 253 Fed. 290. See cases cited under Section Fourteen of this work, p. 329, *ante*.

155a. *Matter of Conn. Brass & Mfg. Corp.* (D. C., Conn.), 43 Am. B. R. 376, 257 Fed. 445.
159. *In re Rosenfelds*, Fed. Cas. 12,061; *In re Simmons*, Fed. Cas. 12,864.

160. *Ex parte Jewett*, Fed. Cas. 7,303.

161. *Green River Dep. Bank v. Craig Bros.* (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137, wherein the court said: “A motion for a rule to require a proper verification would probably be the better step, and if such rule was not complied with, the court might then dismiss the petition for that reason.”

162. *In re Main* (D. C., Iowa), 30 Am. B. R. 547, 205 Fed. 421.

163. *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 383, 95 Fed. 637; *Simonson v. Sinsheimer*, 95 Fed. 948, affg. S. C., 1 Am. B. R. 197, 92 Fed. 904; *In re Herzikopf* (D. C., Cal.), 9 Am. B. R. 90, 118 Fed. 101.

164. *Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 115, 228 Fed. 470, holding statements in an answer, that the petition does not conform to the bankruptcy act, and that the facts alleged do not confer jurisdic-

tion nor entitle petitioners to relief, are too general to challenge the verification, and defects therein may be deemed to have been waived.

165. *In re Brumelkamp* (D. C., N. Y.), 3 Am. B. R. 318, 95 Fed. 814.

166. Where a corporation and a partnership join in an involuntary petition, the president of the corporation and a member of the firm may make the verification. *In re Walker* (C. C. A., 9th Cir.), 21 Am. B. R. 132, 164 Fed. 680.

167. *Matter of Ball* (D. C., N. Y.), 19 Am. B. R. 609, 156 Fed. 682.

A verification made by the petitioning creditors that the statements contained in an involuntary petition were true, “according to the best of their knowledge, information and belief,” is defective, as not complying with the official form, but since the verification is not jurisdictional, such defect is not fatal, so as to work a dismissal of the petition, and may be cured by amendment. *In re Farthing* (D. C., N. Car.), 29 Am. B. R. 732, 202 Fed. 557.

Verification on knowledge and belief.—The verification of an involuntary petition, by a statement that “the facts contained in the foregoing petition are true,” as the petitioners “verily believe,” is insufficient, where there is nothing in the petition showing or

If it appear upon the trial that the petitioners who verified the petition had no knowledge of any of the acts alleged therein, and that they did not make oath to the notary public who attached his jurat thereto, the verification is inadequate, and the petition should be dismissed,¹⁶⁸ and in such a case it may not be amended by filing *nunc pro tunc* another petition reciting the same facts and properly verified.¹⁶⁹ A verification is defective if made before a notary public who is one of the attorneys for the party making the verification.¹⁷⁰ But a verification may be made before an attorney, as notary public, who is not yet the attorney of record of the affiant.¹⁷¹

b. Verification by attorney.—There is some conflict among the authorities whether an attorney in fact may verify a petition where the facts are within his knowledge. The weight of authority seems to be in favor of the proposition that he may verify the petition.¹⁷² Though, when the creditor is present and the facts are within his knowledge, he doubtless ought to make the verification.¹⁷³ General Order IV requires no other evidence of an attorney's authority than the fact of his admission to practice in the circuit or district court.¹⁷⁴ The affidavit should be positive, based upon actual knowledge of the attorney.¹⁷⁵ The right of an attorney to verify specifications of objection to bankrupt's discharge are treated elsewhere in this work.^{176a}

VII. TRIALS IN INVOLUNTARY CASES

a. Without a jury.—Subsection *d* provides in effect that if the facts alleged in the petition are duly traversed by an answer, the judge must "determine, as soon as may be, the issues presented by the pleadings, without the interven-

tending to show that the qualification as to the petitioners' belief was necessary to suit the circumstances of the particular case. Although a verification of a petition in involuntary bankruptcy upon belief is insufficient, the defect is not jurisdictional and may be cured by amendment. *Sabin v. Blake-McFall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501.

168. *Matter of Frank* (D. C., Pa.), 37 Am. B. R. 19, 234 Fed. 665 [aff'd. (C. C. A., 3d Cir.) 38 Am. B. R. 674], in which case the court said "The filing of a petition in bankruptcy is not a matter to be recklessly undertaken. The business, the credit, the financial standing, the property and reputation of the person against whom the petition is filed are at stake. The filing of the petition is frequently followed by the appointment of a receiver, which results in taking away from the alleged bankrupt all of his property, closing up and ruining his business and destroying his credit. Thus irreparable damage may result from an honest mistake. Stringent as the provisions of the Act are, they do not contemplate that creditors may invoke the jurisdiction of the court where, without knowledge of the facts, they recklessly subscribe to a petition setting out acts of bankruptcy without even the so-called 'formality' of having appeared before a notary public for the purpose of making oath to the petition, and where the notary public falsely certifies that oath was made before him. Such a certificate is not a verification. It is a falsification."

169. *Matter of Frank* (D. C., Pa.), 37 Am. B. R. 19, 234 Fed. 665, aff'd. (C. C. A., 3d Cir.), 38 Am. B. R. 674.

170. *In re Brumelkamp* (D. C., N. Y.), 2 Am. B. R. 318, 95 Fed. 814.

171. *In re Kindt* (D. C., Iowa), 3 Am. B. R. 443, 101 Fed. 107.

172. *In re Vastbinder* (D. C., Penn.), 11 Am. B. R. 118, 126 Fed. 417; *In re Hunt* (D. C., Iowa), 9 Am. B. R. 251, 118 Fed. 282; *In re Herzikopf* (D. C., Cal.), 9 Am. B. R. 90, 118 Fed. 101; *Matter of Livingston* (D. C., Hawaii), 2 U. S. D. C., Hawaii 54, 13 Am. B. R. 357; *Rogers v. DeSoto Placer Mining Co.* (C. C. A., 9th Cir.), 14 Am. B. R. 252, 136 Fed. 407; *In re Chequasset Lumber Co.* (D. C., N. Y.), 7 Am. B. R. 87, 112 Fed. 56; *Matter of Miles Paint Mfg. Co.* (D. C., Pa.), 32 Am. B. R. 794, holding that the practice of signing petitions in bankruptcy by attorneys for their clients is not to be encouraged, and should not be tolerated, unless a good and sufficient reason is made to appear affirmatively in the affidavit to the petition. *In re Simonson* (D. C., Ky.), 1 Am. B. R. 197, 92 Fed. 904, seems to be contra, though the exact question was not there at issue.

173. *Matter of Herzikopf* (D. C., Cal.), 9 Am. B. R. 90, 118 Fed. 101.

174. *In re Herzikopf* (D. C., Cal.), 9 Am. B. R. 90, 118 Fed. 101; *Matter of Miles Paint Co.* (D. C., Pa.), 32 Am. B. R. 794, holding that an attorney who signs a petition in bankruptcy on behalf of his clients need not attach his written authority.

175. *In re Vastbinder* (D. C., Penn.), 11 Am. B. R. 118, 126 Fed. 417.

Positive terms.—*In re Vastbinder* (D. C., Penn.), 11 Am. B. R. 118, 126 Fed. 417, the court said: "There can be no doubt

tion of a jury, except in cases where a jury trial is given by this act." The trial is brought on on the notice required by the practice of the district court in which the proceeding is, or under the district bankruptcy rules. Customarily, the consent of the court to setting the issue for trial on a day certain, other than during a regular term, is necessary. The burden of proof is on the petitioners, save, in certain circumstances, where the issue is solvency.¹⁷⁶ Thus, creditors must prove that their claims aggregate \$500 over securities, or an adjudication will be refused.¹⁷⁷ The proof must be confined to the acts of bankruptcy alleged in the petition,¹⁷⁸ though, it seems, if the evidence shows the commission of an act of bankruptcy not alleged, the court may allow an amendment.¹⁷⁹ On the other hand, where the proof shows domicile where domicile is not alleged, the petition will be considered amended in accordance with the proof.¹⁸⁰ The practice on the trial itself is like other civil trials in the Federal courts, including the taking and reading of depositions.¹⁸¹

b. Trial by jury.—The trial of the issues may be without the intervention of a jury except in cases where a jury trial is given by the act. Section 19 of the act prescribes when the alleged bankrupt is entitled as a matter of right to a trial by jury. This right pertains solely to the question of his insolvency or whether or not he has committed the alleged act of bankruptcy. In such cases when a jury trial is demanded it must be granted. If no demand is made the court may, in its discretion, submit any specified issue of fact to a jury, in which case the verdict of the jury will be advisory merely and not binding upon the court,¹⁸² and the same is true where the demand for a jury trial is afterwards withdrawn.^{182a} This is in recognition of the equity jurisdiction possessed by the court.¹⁸³

c. Trial by referee or special master.—Subsection *d* of this section provides that if the facts alleged in the petition are controverted, the judge shall determine as soon as may be the issues presented by the pleadings, etc. As the term "judge" does not include a referee, it is evident that there is no authority to refer the issues to a referee. The testimony must be weighed and considered by the judge and his personal judgment exercised in the determination of each issue.¹⁸⁴ Though a reference to a special master or like ministerial officer

as to the right of an attorney in fact to make the necessary oath when the facts are within his own knowledge, and this will be assumed where the oath is in positive terms."

176a. See page 360, *ante*. Verification of specifications.

176. See Bankr. Act, § 3-c-d. As to burden of proof see discussion under § 3, and cases digested Am. B. R. Dig., § 285.

177. In re West (C. C. A., 2d Cir.), 5 Am. B. R. 734, 108 Fed. 940, holding that, where an adjudication is made without such proof, the Circuit Court of Appeals would reverse the adjudication without costs and remand the proceeding to the district court to take proofs upon the question of the amount of the petitioners' claims, and, if the requisite amount should be shown, to reinstate the decree.

178. In re Sykes, Fed. Cas. 13,708; Doan v. Compton, 2 N. B. R. 607.

179. In re Lange (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 197; but for a limitation on this doctrine, see In re Sears (C. C. A., 2d Cir.), 8 Am. B. R. 713, 117 Fed. 294. See further under this section, *ante*, subtitle "Amendments of petitions."

180. In re Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 434, 109 Fed. 453. Compare In re Stout (D. C., Mo.), 6 Am. B. R. 505, 109 Fed. 794.

181. See Bankr. Act, § 21-b; U. S. R. S., §§ 861, 870; and observe Equity Rules LXVII to LXIX and LXXI.

182. In re Neamith (C. C. A., 6th Cir.), 17 Am. B. R. 123, 131, 147 Fed. 160; Oil Well Supply Co. v. Hall (C. C. A., 4th Cir.), 11 Am. B. R. 738, 123 Fed. 875; Moras v. Franklin Coal Co. (D. C., Penn.), 11 Am. B. R. 423, 125 Fed. 908; see cases digested, Am. B. R. Dig., § 270.

182a. Morrison v. Riegan (C. C. A., 7th Cir.), 41 Am. B. R. 325, 249 Fed. 97.

183. Idaho, etc., Co. v. Bradbury, 132 U. S. 509, 23 L. Ed. 433; Wilson v. Riddle, 128 U. S. 608, 31 L. Ed. 280.

184. In re King (C. C. A., 7th Cir.), 24 Am. B. R. 606, 179 Fed. 694. Compare In re Lavoc (C. C. A., 2d Cir.), 13 Am. B. R. 400, 134 Fed. 237, 67 C. C. A. 19; Clark v. Am. Mfg. Co. (C. C. A., 4th Cir.), 4 Am. B. R. 351, 101 Fed. 962.

may be ordered, to hear and report the testimony (with or without advisory findings thereupon), when the issue involves extended testimony and its hearing in open court appears to be impracticable.¹⁸⁵ However, such a reference should not be granted to determine issues of the place of residence and principal place of business of the alleged bankrupt; jurisdictional issues of that nature should be determined by the judge as a condition precedent to a reference of other issues.¹⁸⁶ The powers of such a special master, his compensation, and the method of bringing on and conducting a trial before him are in all respects similar to that on like references on contested discharges.¹⁸⁷ The master's report is brought up either by exceptions or on motion to confirm,¹⁸⁸ and the judge then enters the order of adjudication or dismissal, in accordance as the facts shall warrant.¹⁸⁹ He is, of course, not bound to follow the master's conclusions.

VIII. ADJUDICATION OR DISMISSAL.

a. In general.—Subsection *d* requires the judge "as soon as may be" to determine the issues, and make the adjudication or dismiss the petition. When a creditor's petition has once been filed, there must be either an adjudication or a dismissal.¹⁹⁰ If the former, the order is entered substantially as in Form No. 12. If the bankruptcy is that of a partnership and the individuals composing it, the form should be so changed as to amount to an adjudication of the partnership as such and of each member, all as distinct entities.¹⁹¹ Under the former law, it was held that a mere memorandum of the adjudication was not sufficient.¹⁹² An order must be entered and recorded. So also of the dismissal, which should be substantially in the words of Form No. 11. Both the statute and the general orders provide for costs to the prevailing party.¹⁹³ If petitioning creditors move for an adjudication upon the pleadings, they admit the facts properly pleaded in the answer, and a denial of the motion is in effect a determination that the answer is sufficient in law to defeat the petitioners' application.¹⁹⁴ Where the petition is sufficient an adjudication must be granted unless the answer is responsive to the averments of the petition.¹⁹⁵ When a

185. In re King (C. C. A., 7th Cir.), 24 Am. B. R. 606, 179 Fed. 694; Matter of Bartleson (D. C., Fla.), 40 Am. B. R. 13, 243 Fed. 1001.

For forms of reference, see Supplementary Forms, No. 131 Hagar & Alexander's Bankruptcy Forms (2d Ed.), Nos. 27, 28.

Reference granted.—A reference may be made to a special commissioner to take and report the testimony, with his opinion thereon, on the application of the alleged bankrupt for a trial of the proceeding without a jury; the objection that such a course is more expensive than a trial by the judge himself is not valid. In re Lavoc (C. C. A., 2d Cir.), 13 Am. B. R. 400, 134 Fed. 237, 67 C. C. A., 19. See cases digested, Am. B. R. Dig., § 269.

186. In re King (C. C. A., 7th Cir.), 24 Am. B. R. 606, 179 Fed. 694.

187. See under this section, *ante*, sub-title "Reference to Special Master;" and observe Equity Rules LXXIII to LXXXIV.

188. See also "Supplementary Forms," Nos. 139, 140, *post*; for exceptions to master's report and orders thereon, see Hagar & Alexander's Bankruptcy Forms (2d Ed.), Nos. 34-36.

189. Clark v. Am. Mfg. Co. (C. C. A., 4th Cir.), 4 Am. B. R. 351, 101 Fed. 962.

190. "Judge."—The term judge as used in this section does not include a referee, and the issues cannot be referred. In re King (C. C. A., 7th Cir.), 24 Am. B. R. 606, 179 Fed. 694.

See, for remedy where adjudication has been dismissed, Neustadter v. Chicago Dry Goods Co. (D. C., Wash.), 3 Am. B. R. 96, 96 Fed. 830; In re Belling (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395. As to dismissal of proceedings, see cases digested, Am. B. R. Dig., §§ 272-274; as to adjudication, Am. B. R. Dig., §§ 277-282.

191. See pp. 179, 180, *ante*. For forms of orders of dismissal see Hagar & Alexander's Bankruptcy Forms (2d Ed.), Nos. 31, 36, 41; of order of adjudication, *Id.* Nos. 27, 29; denying adjudication, *Id.* No. 30.

192. In re Boston, etc., Fed. Cas. 1,678; In re Hill, Fed. Cas. 6,484.

193. Bankr. Act, § 3-e; General Order XXXIV.

Trustee's compensation and attorney's fees.—There is, in express terms, no statutory authority for the awarding of trustee's compensation and attorney's fees against petitioning creditors upon a mere dismissal of the petition. Matter of Ohio Motor Car Co. (C. C.

debtor waives its demand for a jury trial, confesses its insolvency and the commission of one of the acts of bankruptcy alleged and formally admits the essential allegations of the creditors' petition, it is the duty of the bankruptcy court to promptly enter an adjudication of bankruptcy.¹⁹³

b. Adjudication on voluntary appearance.—An adjudication on a voluntary appearance by the bankrupt and an answer filed by him admitting the averments of the petition will conclude the bankrupt.¹⁹⁷ But, if such appearance is made and answer filed prior to the expiration of the time for answering, the rights of the creditors to plead to the petition are not affected.¹⁹⁸ On a hearing upon a petition and answer the averments of the answer must be taken as true.¹⁹⁹

c. Dismissal after trial.—If it appears from the pleadings or upon the trial that the court has no jurisdiction, either of the person or subject-matter, the petition should be dismissed.²⁰⁰ The court should direct such dismissal as soon as the want of jurisdiction appears.²⁰¹ If the petition is not sustained by the proof, dismissal will follow as a matter of course. Even if the petition contains a prayer for the appointment of receivers, selected by collusion between the alleged bankrupt and petitioning creditors, the adjudication should be ordered and the prayer for such receivers disregarded.²⁰² The fact that a suit is begun, after a petition in bankruptcy is filed, for the foreclosure of a mortgage on a portion, or on all, of the bankrupt's property, even if the value of the property is less than the amount claimed to be due on the mortgage, is not a sufficient reason for denial of an adjudication of bankruptcy. While it is necessary that a person owe debts in order to be adjudicated a bankrupt, it is not necessary that he have assets.²⁰³ The petition should be dismissed where it is shown that an adjudication would be a fraud upon the bankruptcy court and upon a State court.^{203a}

d. Dismissal by consent.—Where a dismissal is directed by the consent of parties, and not on the merits, the creditors are entitled to at least ten days' notice by mail, as will appear hereafter in the discussion under § 58-a and § 59-g. Some doubt has arisen as to the necessity of notice to all the creditors owing to a decision to the effect that the court may at any time before adjudication dismiss a petition upon the bankrupt's motion, without notice to those creditors who have not intervened or appeared in the proceeding.²⁰⁴ It seems

A., 6th Cir.), 39 Am. B. R. 218, 241 Fed. 330.

194. In re Waugh (C. C. A., 9th Cir.), 13 Am. B. R. 187, 133 Fed. 281.

195. Matter of Cohn (D. C., Pa.), 33 Am. B. R. 686, 220 Fed. 106.

196. Vulcan Sheet Metal Co. v. North Platte, etc., Co. (C. C. A., 8th Cir.), 33 Am. B. R. 686, 220 Fed. 106.

197. In re Columbia Real Estate Co. (D. C., Ind.), 4 Am. B. R. 411, 419, 101 Fed. 965.

Consent after previous resistance.—It was never the intention of the Bankruptcy Act to permit a bankrupt, who has resisted an adjudication for nearly two years, to suddenly change his attitude, and to obtain an adjudication as of the date of filing the petition, upon application, upon securing a substantial property, which cannot be applied to the payment of his debts if his application is granted. Matter of Weidenfeld (D. C., N. Y.), 44 Am. B. R. 62, 257 Fed. 872.

198. Rights of creditors on voluntary appearance of bankrupt.—In the case of In re Humbert Co. (D. C., Iowa), 4 Am. B. R. 76, 100 Fed. 439, the court said: "A waiver on the part of the bankrupt of this period of time cannot deprive creditors of the right to appear in opposi-

tion to the petition, and until that time has elapsed it cannot be known whether a contest will or will not be made on behalf of creditors." In re Woods (D. C., Penn.), 13 Am. B. R. 240, 133 Fed. 82.

Method of review.—An adjudication in a voluntary proceeding in bankruptcy can be contested by creditors only in the manner provided by the Bankruptcy Act, which is either by a petition for review or appeal. Matter of Greer (D. C., Ky.), 40 Am. B. R. 797, 248 Fed. 753.

199. Matter of Cohn (D. C., Pa.), 33 Am. B. R. 689, 220 Fed. 956.

200. In re Plotke (C. C. A., 7th Cir.), 5 Am. B. R. 171, 175, 104 Fed. 964; Matter of Hargadene-McKittrick, etc., Co. (D. C., Mo.), 35 Am. B. R. 142, 239 Fed. 155.

201. In re Columbia Real Estate Co. (D. C., Ind.), 4 Am. B. R. 411, 417, 101 Fed. 956, in which the court said: "Want of jurisdiction is a question that the court should consider whenever or however raised, even if the parties forbear to make it or consent that the case may be heard on its merits."

202. Birmingham Coal & Iron Co. v. Southern

more in accordance with the statute, however, to apply the broad rule of law that, since every creditor has, once a petition is filed, the right to intervene, a petition should not be dismissed without notice to him.²⁰⁵ A petition certainly cannot be dismissed without the consent of all the petitioning creditors,²⁰⁶ and the provisions of the statute above referred to seem clearly to require that notice to the creditors be given. There are exceptions to the rule, as, where there are no assets, no claims proven, and no trustee appointed; though in such a case the petition is withdrawn, not dismissed.²⁰⁷ The practice of omitting such notice is dangerous, however, and the courts will usually decline to grant dismissals without proof of the names and addresses of creditors and due notice to them of the pending proceeding and the motion to dismiss.²⁰⁸ Even if a minority of the petitioning creditors object to the dismissal it should not be directed although the court may specify that it would be for the best interests of the creditors.²⁰⁹ Where all the petitioning creditors in good faith move for a dismissal of their petition the court should not retain the proceeding to determine issues raised by the answer, some of which it had no power to try.²¹⁰ A voluntary bankruptcy proceeding may not be dismissed by consent of the parties on motion after adjudication.²¹¹

e. Intervention by other creditors.—It is provided in § 59-f that “creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.” This subject will be considered at length under that section. Any creditor may join in a petition already filed and pending, as a rule, at any time between the filing of the petition and the order of adjudication or dismissal. Creditors who do not exercise their right to become parties remain strangers to the litigation and, as such, unaffected by the decision of even essential subsidiary issues, and are merely bound by the adjudication so far as it is strictly an adjudication of bankruptcy.^{211a}

f. Effect of adjudication generally.—An adjudication confers jurisdiction both complete and exclusive, and *in rem* as well as *in personam*.²¹² The adjudication

Steel Co. (D. C., Ala.), 20 Am. B. R. 151, 160 Fed. 212.

^{205.} Vulcan Sheet Metal Co. v. North Platte, etc., Co. (C. C. A., 8th Cir.), 33 Am. B. R. 696, 220 Fed. 106.

^{205a.} Zetlinger v. Hargadine, etc., Co. (C. C. A., 8th Cir.), 40 Am. B. R. 324, 244 Fed. 719.

^{204.} Matter of Levi (C. C. A., 2d Cir.), 15 Am. B. R. 294, 142 Fed. 962, holding that, where no list of creditors has been filed and there is no suggestion of collusion between the petitioning creditors and the alleged bankrupt, the court may in its discretion at any time before adjudication dismiss the petition upon the bankrupt's motion without notice to other creditors not intervening or appearing in the proceeding; and the exercise of such discretion, in the absence of abuse, is not reviewable in the Circuit Court of Appeals.

^{205.} In re Plymouth Cordage Co. (C. C. A., 8th Cir.), 13 Am. B. R. 605, 13 Fed. 1,000; In re Lewis (D. C., Del.), 11 Am. B. R. 683, 129 Fed. 147; Matter of Lederer (D. C., N. Y.), 10 Am. B. R. 492, 126 Fed. 96. This seems not to have been the law under the former act. See *Ex parte Harris*, Fed. Cas. 6,110; In re Gile, Fed. Cas. 5,423.

Decree erroneous, not void.—A decree dismissing the proceeding without notice is merely erroneous, not absolutely void, and if application to review the decree is not timely made, it will be sustained. In re Plymouth Cordage Co. (C. C. A., 8th Cir.), 13 Am. B. R. 605, 13 Fed.

1000; In re Jemison Mercantile Co. (C. C. A., 5th Cir.), 7 Am. B. R. 588, 112 Fed. 966, 50 C. C. A. 641.

^{206.} In re Cronin (D. C., Mass.), 3 Am. B. R. 552, 98 Fed. 584; In re Lewis (D. C., Del.), 11 Am. B. R. 683, 129 Fed. 147.

^{207.} In re Hebbart (D. C., N. Y.), 5 Am. B. R. 8, 104 Fed. 322; In re Colaluca (D. C., Mass.), 13 Am. B. R. 292, 133 Fed. 255.

No dischargeable debts.—A petition in voluntary bankruptcy which schedules no dischargeable debt may be dismissed as a matter of discretion. In re Colaluca (D. C., Mass.), 13 Am. B. R. 292, 133 Fed. 255; In re Maples (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 919; In re Yates (D. C., Cal.), 8 Am. B. R. 69, 114 Fed. 365.

^{208.} **Creditors notified.**—Where the alleged bankrupt's answer gives the names and addresses of his creditors in response to a petition alleging that they number less than twelve, such creditors should be notified of the motion to dismiss. In re Jemison, etc. (C. C. A., 5th Cir.), 7 Am. B. R. 588, 112 Fed. 966.

^{209.} In re Lewis (D. C., Del.), 11 Am. B. R. 683, 129 Fed. 147; In re Cronin (D. C., Mass.), 3 Am. B. R. 552, 98 Fed. 584.

^{210.} Bernard v. Abel (C. C. A., 9th Cir.), 19 Am. B. R. 383, 156 Fed. 640.

^{211.} Matter of McKee (D. C., Texas), 32 Am. B. R. 731, 214 Fed. 885.

^{211a.} The purpose of Congress in expressly authorizing creditors, as well as the debtor, to

transfers the title of the bankrupt's property wherever situated, and vests the same in the trustee, to be administered by him under the authority and control of the bankruptcy court.²¹³ All persons named in the schedules as creditors are parties and affected thereby. So, also, are all persons in any way interested in the *res*.²¹⁴ As to such parties the adjudication is conclusive to the extent of the matters necessarily determined in making the adjudication.²¹⁵ An adjudication cannot be attacked for the first time on discharge by a creditor who had proceeded that far under it.²¹⁶

g. Effect of adjudication on rights of creditors.—The adjudication is, like other judicial determinations, subject to the well-settled rule that matters which have been once litigated and determined by the judgment of a court cannot again be made the subject of legal contention as between the parties to such judgment and their privies. So that where the question of the bankrupt's residence,²¹⁷ or the question of insolvency,²¹⁸ or the amount of the petitioner's claim,²¹⁹ were at issue, the adjudication in respect thereto is binding upon the parties and their privies in all subsequent proceedings. Creditors are bound as parties, whether they appear or not, in respect to all issues which must necessarily be determined by the adjudication; otherwise there would be no end to controversy as to these matters, as every creditor might claim the right to be heard by independent suit.²²⁰ But where it appears that the requisite number of creditors join in the petition and it is not necessary to determine the validity of the claim of any one of them for the purpose of conferring jurisdiction, the adjudication is not *res adjudicata* as to the validity or amount of

answer an involuntary petition in bankruptcy, was to guard against an improvident adjudication and to protect those whose peculiar interest might be prejudiced by establishing the status of bankruptcy. *Gratnot County State Bank v. Johnson* (U. S. Sup. Ct.), 43 Am. B. R. 357, 39 Sup. Ct. 263.

213. Decree operates in rem.—In the case of *Carter v. Hobbs* (D. C., Ind.), 1 Am. B. R. 215, 92 Fed. 594, the court said: "The decree operates *in rem*, and from the moment of the adjudication in bankruptcy the bankrupt's estate is *in custodia legis* and under the jurisdiction of this court; it is fundamental that no court or individual can interfere with such court and possession; the assertion of any right against, or to participate in the *res* so *in custodia legis*, must be sought in the court in whose custody it is; an attempt to assert such right elsewhere would be regarded as a contempt."

213. Robertson v. Howard, 229 U. S. 254, 30 Am. B. R. 611, 57 L. Ed. 1174; *In re Baum* (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410; *In re Scruggs* (D. C., Ala.), 31 Am. B. R. 94, 205 Fed. 673; *Koger v. Clark* (Tex. Ct. of Civ. App.), 44 Am. B. R. 512, 218 S. W. 434.

Property never administered.—The adjudication of bankruptcy does not, as a matter of law, destroy forever all the rights and remedies of the bankrupt to all his property, but only to that part thereof which is administered. The bankruptcy court or the trustee may decline to administer all that is returned, or some of it may never be returned; and as to this the bankrupt may recover after his discharge. *Watson v. Motley* (Ala. Sup. Ct.), 39 Am. B. R. 750, 75 So. 147.

Effect on lease to partnership.—An adjudication against a partnership operates to transfer by operation of law to the trustee a lease held by one of the partners, and authorizes the lessor to avoid the lease for a transfer "by operation of law," without his consent, in vio-

lation of a covenant of the lease. *Matter of Georgalas Brothers* (D. C., Ohio), 40 Am. B. R. 163, 245 Fed. 129.

The agency of a third person to act for the bankrupt in the management of his business is discharged by his adjudication in bankruptcy. *Petty v. Portman* (Pa. Com. Pl.), 39 Am. B. R. 747, 65 Pittab. Leg. J. 293.

214. Carter v. Hobbs (D. C., Ind.), 1 Am. B. R. 215, 92 Fed. 594. As to effect generally of adjudication, see Am. B. R. Dig., § 279.

215. In re Uhfelder Clothing Co. (D. C., Cal.), 3 Am. B. R. 426, 98 Fed. 409; *Board of Commerce v. Security Trust Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 762, 225 Fed. 454, holding that the adjudication fixes the status theretofore existing as alleged in the petition; *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 385; *Riggs v. Price* (Mo. Sup. Ct.), 43 Am. B. R. 413, 210 S. W. 420; *Ward v. Central Trust Co.* (C. C. A., 7th Cir.), 44 Am. B. R. 323, 261 Fed. 344; *Matter of Malken* (C. C. A., 2d Cir.), 44 Am. B. R. 433, 261 Fed. 894.

Res judicata.—An adjudication in bankruptcy is, for the purpose of administering the debtor's property, conclusive upon all the world. So far as it declares the status of the debtor, even strangers to the decree may not attack it collaterally. But like other judgments *in rem*, it is not *res judicata* as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceedings or privies thereto. *Gratnot County State Bank v. Johnson* (U. S. Sup. Ct.), 43 Am. B. R. 357, 39 Sup. Ct. 263.

The rights of all parties interested in a bankrupt's estate are to be determined as of the date of the bankruptcy. *Goodwin v. Barro Sav. Bank & Trust Co.* (Vt. Sup. Ct.), 39 Am. B. R. 153, 91 Vt. 228, 100 Atl. 34.

216. In re Polakoff (Ref., N. Y.), 1 Am. B. R. 358; *In re Mason* (D. C., N. C.), 3 Am. B. R. 599 (and foot-note), 99 Fed. 256; *In re Ordway*, Fed. Cas. 10562.

the claims of such creditors offered for allowance before the referee.²²¹ However, an adjudication in a contested bankruptcy proceeding is *res adjudicata* and conclusive upon those who have not actually taken part in the contest only as to the status of the bankrupt and not as to the commission of a particular act of bankruptcy, although it be the one alleged in the petition.²²² Where a petition charges different acts of bankruptcy and the adjudication does not show upon which one of them it proceeded, it does not render either charge *res adjudicata* in further proceedings.²²³ The adjudication will constitute the breach of an executory contract for services²²⁴ and will terminate the agency of a bankrupt connected with the estate transferred by his bankruptcy.²²⁵ Where a bankrupt is denied his discharge, creditors may proceed against him again as to after-acquired property, notwithstanding an appeal from the order denying his discharge.²²⁶ A mere adjudication does not operate as a stay of execution or prosecution of a claim, where the defendant has not been discharged, and the enforcement of such claim has not been regularly stayed.²²⁷

h. Vacating adjudication.—(1) **IN GENERAL.**—An application to vacate the adjudication is unusual but, in given circumstances, proper.²²⁸ The practice is not prescribed, but may be on petition or written motion and such notice as the court may order.^{229a} It can be made only by the bankrupt²²⁹ or a person who could have resisted the original petition, in other words, by one who has a claim provable in the case.²³⁰ The fact that a creditor stated in his petition that he appeared specially, and did not submit himself to the jurisdiction of the court, is no ground for refusing to vacate the adjudication.²³¹ The application must be made to the court that granted the order.²³² On the motion to vacate the proceedings the bankruptcy proceedings are admissible in evidence.^{232a}

(2) **APPLICATION TO BE MADE SEASONABLY.**—The adjudication may be set aside upon the application of creditors, where it was made prior to the expiration of five days after the filing of the petition, although the bankrupt appeared and consented to adjudication.²³³ But such an application must be made promptly.²³⁴ Creditors who would assail the adjudication should act

^{217.} *In re Hintze* (D. C., Mass.), 13 Am. B. R. 721, 134 Fed. 141.

^{218.} *Des Moines Savings Bank v. Morgan Jewelry Co.* (Sup. Ct., Iowa), 123 Iowa 432, 12 Am. B. R. 781, 99 N. W. 121; *In re Chappell* (D. C., Va.), 7 Am. B. R. 608, 113 Fed. 545; *In re Virginia Hardwood Mfg. Co.* (D. C., Ark.), 15 Am. B. R. 135, 139 Fed. 209; *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896.

Adjudication binding on question of insolvency.—The creditors of a bankrupt are parties to the proceeding to have him so adjudged and are precluded by the adjudication from questioning bankrupt's insolvency at the time the petition was filed. *Cook v. Robinson* (C. C. A., 9th Cir.), 28 Am. B. R. 182, 194 Fed. 785.

Adjudication as evidence of insolvency.—While secured creditors are not bound by an adjudication in bankruptcy, and may litigate the same issues in another proceeding, still it is *prima facie* evidence of what is therein decreed, that the bankrupts were insolvent at that date, and may be considered as of some weight in determining whether the bankrupts were insolvent at the date of a transfer made over four and one-half months before. *Cawthorn v. Burley State Bank* (Sup. Ct., Idaho), 26 Idaho 432, 33 Am. B. R. 794, 144 Pac. 1608.

^{219.} *In re Ulfelder Clothing Co.* (D. C., Cal.), 3 Am. B. R. 425, 98 Fed. 409.

^{220.} *Cook v. Robinson* (C. C. A., 9th Cir.), 28 Am. B. R. 182, 194 Fed. 785. In the case of *In re American Brewing Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 463, 470, 112 Fed. 752, 758, 50 C.

C. A. 517, the court said: "If it were necessary in order to bind creditors by a judgment in bankruptcy that they should appear and answer, as they have a right to do, then an adjudication could be prevented simply by creditors abstaining from appearing in the proceedings. But it is well settled that the proceedings are in large part *in rem*, and are binding whether the bankrupt or creditors appear or not." As to adjudication as *res adjudicata*, see Am. B. R. Dig., § 281.

^{221.} *Matter of Continental Corporation* (Ref., Ohio), 14 Am. B. R. 538.

Effect on liability of bankrupt.—An adjudication in bankruptcy does not discharge the liability of the bankrupt to his creditors. *Baltimore Bargain House v. Busby* (Ga. Sup. Ct.), 143 Ga. 734, 35 Am. B. R. 119, 85 S. E. 875. It absolves the bankrupt from no agreement, no contract, and discharges no liability. *Watson v. Merrill* (C. C. A., 8th Cir.), 14 Am. B. R. 454, 136 Fed. 350.

^{222.} *Matter of McCrum* (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207.

In an action to recover preference, the defendant may controvert and contest the trustee's allegations and proofs respecting the defendant's guilty knowledge and fraudulent conduct, notwithstanding the fact that the alleged transfer formed the basis of the adjudication in bankruptcy. *Ward v. Central Trust Co.* (C. C. A., 7th Cir.), 44 Am. B. R. 323, 261 Fed. 344.

^{223.} *Matter of Julius Bros.* (C. C. A., 2d Cir.), 32 Am. B. R. 699, 217 Fed. 2, revg. 31 Am. B. R. 132, 209 Fed. 371.

with reasonable promptness after they received notice of the proceeding and of the reasons of their objections; if creditors knew of the filing of the petition in ample time for them to demur or answer, they should not be permitted, where two months had elapsed, and the condition of the property and the relations of the parties had materially changed, to stay the proceedings and vacate the adjudication, for a cause which might have been set up by demurrer or answer.²²⁵ After affirmance of an adjudication on appeal the district court may not grant a rehearing and thus permit a re-examination of the questions with which the appellate court has dealt.²²⁶

(3) GROUNDS FOR VACATING.—After an order of adjudication is entered it cannot be vacated except upon a ground which goes to the jurisdiction of the court.^{226a} An adjudication in involuntary proceedings obtained by the consent of the bankrupt, where he appeared generally by attorney and in person, filed schedules and otherwise recognized the proceedings, will not be vacated in the absence of proof that he was induced to give his consent by fraud.²²⁷ Being in the nature of a motion for a new trial, the application should rest on a showing of facts, on their face seeming to entitle the moving party to the relief.^{227a} An adjudication will not be set aside where it was warranted by proof of an act of bankruptcy sufficiently alleged, although other acts were not properly pleaded or proved,²²⁸ nor will it be set aside because of a mere clerical error by the referee in fixing the return day in the proceeding.^{228a} An adjudication may be vacated on the ground that the alleged bankrupt was not subject to adjudication, but even in such a case the adjudication is not void, and the court should consider the laches of the petitioner and all other circumstances affecting the right to the relief.²²⁹ Although a creditor may move to vacate an adjudica-

224. *Matter of Schults & Guthrie* (D. C., Mass.), 37 Am. B. R. 604, 235 Fed. 907.

225. *McKey v. Clark* (C. C. A., 9th Cir.), 37 Am. B. R. 609, 233 Fed. 928.

226. *In re Barton's Estate* (D. C., Ark.), 10 Am. B. R. 569, 144 Fed. 540.

227. *Mass v. Kuhn*, 130 N. Y. App. Div. 68, 22 Am. B. R. 91, 114 N. Y. Supp. 444.

228. *In re Ives* (D. C., Mich.), 6 Am. B. R. 632, 111 Fed. 495; *In re De Forest*, Fed. Cas. 3,745. As to vacating or setting aside adjudications, see Am. B. R. Dig., § 282.

228a. Objections.—On petition by a purchaser of the bankrupt's property on execution sale to vacate the adjudication, objections by a creditor on the day of the hearing should be stricken out because such objections were unnecessary and would be considered by the court in reaching a decision upon issues made by the petition and the answer of the bankrupt and trustee. *Abbott v. Wauchula, etc.*, Co. (C. C. A., 5th Cir.), 39 Am. B. R. 634, 240 Fed. 938.

229. See *In re Salaberry* (D. C., Cal.), 5 Am. B. R. 847, 107 Fed. 35.

230. *In re Yates* (D. C., Cal.), 8 Am. B. R. 69, 114 Fed. 365; *Matter of New York Tunnel Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 531, 160 Fed. 284; *Matter of Hargadine-McKittick, etc., Co.* (D. C., Mo.), 39 Am. B. R. 142, 239 Fed. 185. This follows necessarily from the definition of creditor in § 1(9). This was not so under the law of 1867. See *In re Derby*, Fed. Cas. 3,815; *In re Bush*, Fed. Cas. 2,222.

A purchaser of lands sold on execution sale is not entitled, as a matter of right, to have the adjudication vacated and to be allowed to come in and defend where the subpoena was not served and the bankrupt, after withdrawing its answer, consented to adjudication. *Abbott v. Wauchula, etc., Co.* (C. C. A., 5th Cir.), 39 Am. B. R. 634, 240 Fed. 938.

231. *Matter of Altonwood Park Co.* (C. C. A., 2d Cir.), 20 Am. B. R. 31, 160 Fed. 448.

232. *Graham v. Boston, etc.*, 118 U. S. 161, 30 L. Ed. 196; *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83; *In re Ives*, Fed. Cas. 7,115; *Lewis v. Sloan*, 68 N. C. 557.

232a. *Abbott v. Wauchula, etc., Co.* (C. C. A., 5th Cir.), 39 Am. B. R. 634, 240 Fed. 938.

233. *B. R. Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co.* (C. C. A., 8th Cir.), 30 Am. B. R. 424, 206 Fed. 885; *Matter of Gibney Tire & Rubber Co.* (D. C., Pa.), 39 Am. B. R. 355, 241 Fed. 879.

234. *In re Ives* (D. C., Mich.), 6 Am. B. R. 633, 111 Fed. 495; *In re Niagara Contracting Co.* (D. C., N. Y.), 11 Am. B. R. 643, 127 Fed. 782; *In re Urban and Suburban* (D. C., N. J.), 12 Am. B. R. 687, 132 Fed. 140; *In re Warshaw* (C. C. A., 8th Cir.), 15 Am. B. R. 672, 142 Fed. 121, where no effort was made to vacate for a period of one year; *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395, where motion to vacate was denied because the time for an appeal had elapsed.

Laches in making application.—Where the adjudication was made March 28, 1907, and the order to show cause why the same should not be vacated was entered Aug. 2, 1907, upon the petition of a creditor who had no notice of the bankruptcy proceeding until June 14, 1907, his delay, there being no intervening rights, is insufficient to constitute such laches as will debar him from showing that the whole bankruptcy proceedings were invalid. *Matter of Altonwood Park Co.* (C. C. A., 2d Cir.), 20 Am. B. R. 31, 160 Fed. 448. Where three years have elapsed since the adjudication of a husband, the wife is precluded by laches from appearing and contesting the allegations of insolvency in the petition. *Matter of Gibbons* (D. C., Wash.), 35 Am. B. R. 620, 225 Fed. 420.

tion upon a voluntary petition because of the bankrupt's non-residence,²⁴⁰ yet where the petition alleges residence and the creditor assents thereto and proves his claim, he cannot thereafter move to vacate the adjudication.²⁴¹ Creditors who adopt the petition of stockholders of a bankrupt corporation to have a voluntary adjudication vacated and dismissed have no right to contest the voluntary adjudication.^{241a} A voluntary adjudication may be vacated where no assets are shown and the date shows that the petitioner cannot receive a discharge because of having received a discharge on a previous voluntary petition within six years.^{241b}

(4) NOT TO BE ATTACKED COLLATERALLY.—Where the record shows jurisdiction, the adjudication is subject to impeachment only by a direct proceeding in a competent court and may not be attacked collaterally in an action by the trustee to set aside a preference,²⁴² nor in any other similar action or proceeding.²⁴³

IX. DEFAULTS.

a. Where the judge is in the district or division.—If no pleadings are filed on or before the last day for filing, the judge must "on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition." The last three words suggest that, in default cases, the judge is required to do more than grant the prayer of the petition; he must examine the petition and ascertain whether it alleges facts sufficient to bring it within the requirements of the statute; if not, he should dismiss it, notwithstanding the bankrupt's default. Even if an answer is filed after the time to file it has expired, but before adjudication, an adjudication on default must be granted.²⁴⁴ The presence of the judge on the next day after the time to plead expires, seems to make an immediate adjudication imperative. Otherwise, it must be as soon thereafter as practicable. The failure to contest the petition by any person having the right so to do establishes the truth of its allegations, and an adjudication thereon is binding as against everybody.²⁴⁵

After adjudication of term.—It has been held that an adjudication in bankruptcy will not be vacated by an application presented after the adjournment of the term of court at which the adjudication was made. *Matter of Ives* (D. C., Mich.), 6 Am. B. R. 633, 111 Fed. 495. Where three years have elapsed since the adjudication of a husband, the wife is precluded by laches from appearing and contesting the allegations of insolvency in the petition. *Matter of Gibbons* (D. C., Wash.), 35 Am. B. R. 620, 225 Fed. 420.

240. *In re First Nat. Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 274, 152 Fed. 64; *In re Marion Contract & Construction Co.* (D. C., Ky.), 22 Am. B. R. 81, 105 Fed. 618; *Matter of Rodriguez* (D. C., Porto Rico), 40 Am. B. R. 681, 10 P. R. Fed. 162.

Five weeks' delay.—It is not an abuse of the court's discretion to refuse to permit a creditor to attack an adjudication where the motion is first made seven weeks after the filing of the petition and the appointment of receivers, and five weeks after the adjudication, and the creditors were aware of the filing of the petition within forty-eight hours thereafter, and the administration of the estate had, in the meantime, proceeded without objection. *In re First Nat. Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 152 Fed. 264.

241. *In re Lennor* (D. C., Mass.), 24 Am. B. R. 222, 181 Fed. 428.

Effect of appeal.—Under section 1-a (2) of the bankruptcy act defining "adjudication," the mere taking of an appeal and the dismissal of the same, either by the appellant or the appellate court, is not a final confirmation, so as to change the date of adjudication from the time

the original decree is made to the dismissal of the appeal. *Moore Bros. v. Cowan* (Ala. Sup. Ct.), 173 Ala. 534, 20 Am. B. R. 902, 55 So. 908.

241a. Fraud perpetrated on the bankrupt in connection with the adjudication is not sufficient, unless it enters into the order of adjudication. *Matter of S. & S. Mfg. & Sales Co.* (D. C., Ohio), 39 Am. B. R. 766, 246 Fed. 1006.

242. *In re Gill* (D. C., Ga.), 28 Am. B. R. 333, 195 Fed. 643.

243a. *Abbott v. Wauchula, etc., Co.* (C. C. A., 8th Cir.), 20 Am. B. R. 684, 240 Fed. 938; *Matter of Rodriguez* (D. C., Porto Rico), 40 Am. B. R. 681, 10 P. R. Fed. 162.

244. *In re Lynan* (C. C. A., 2d Cir.), 11 Am. B. R. 466, 127 Fed. 123.

Vacating and setting aside.—Where a bankrupt on a motion to vacate an adjudication entered upon its default and to quash service of the petition and subpoena, supported by return of the marshal, upon the ground that the person served was not at the time an officer of the alleged bankrupt, is opposed by an affidavit on behalf of the petitioning creditors questioning the good faith of the resignation by the person served, and the court gives the bankrupt five days within which to appear and plead to the petition, failing to do which, the order of adjudication is to stand, and the bankrupt fails to appear, the adjudication should stand. *Matter of Sutter Hotel Co.* (C. C. A., 6th Cir.), 39 Am. B. R. 620, 241 Fed. 267.

245a. *Hunter, Walton & Co. v. Cherry Co.* (C. C. A., 8th Cir.), 40 Am. B. R. 732, 247 Fed. 438.

246. *In re New England Breeders' Club* (C. C. A., 1st Cir.), 22 Am. B. R. 134, 165 Fed. 517.

b. **Where the judge is absent.**—If the judge is not within the district or division the day after the time to plead expires, the clerk must “forthwith refer the case to the referee.” “Division of the district” here means the divisions into which some of the Federal districts are divided by the general law, and not the referee districts.²⁴⁶ This is done by an order of reference substantially in the words of Form No. 15. On its receipt, the functions and duties of the judge as to making the adjudication or dismissing the petition devolves on the referee.²⁴⁷

X. TRIALS IN VOLUNTARY CASES.

a. **In general.**—Subsection *g* provides that upon filing a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. The practice here is the same as where default was made in an involuntary case, and no pleading had been filed in opposition to the petition on the last day for filing. The judge, if in the district or division, must adjudicate or dismiss; if he is absent, the clerk must forthwith refer the case to the referee, who then proceeds in the stead of the judge. It seems that an answer cannot be interposed to a voluntary petition.²⁴⁸ While creditors may contest any petition in involuntary bankruptcy, no provision is made by the Bankruptcy Act for contesting a petition in voluntary bankruptcy.²⁴⁹ The proper method of attack is by petition or motion to set aside the adjudication.^{249a} A motion to set aside an adjudication may be granted where a bankrupt at the time of filing the petition had not resided within the district the required length of time, but the proceedings will be continued under a second order of adjudication, where when the motion was made the bankrupt had resided in the district a sufficient time to give the court jurisdiction.²⁵⁰

b. **Voluntary petition while involuntary petition pending.**—There was some doubt under the former law whether a debtor, against whom a creditors’ petition was pending, could be adjudicated on his voluntary petition subsequently filed.²⁵¹ And this, even though under that law petitions could be dismissed by consent and without a general notice to creditors. Under the present law it seems well established that the pendency of an involuntary petition will not prevent an insolvent debtor, prior to adjudication thereon, from filing a voluntary petition.²⁵² The tendency of the decisions is to adjudicate on the voluntary petition and, by subsequent steps, protect the rights of the petitioning creditors flowing from their earlier petition.²⁵³ A voluntary proceeding takes precedence over an involuntary proceeding commenced in another dis-

revg. 21 Am. B. R. 849; *In re New York Tunnel Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 531, 164 Fed. 284.

An order of adjudication entered against a corporation upon its default will be vacated upon the petition of interested parties to enable them to raise the question whether the corporation is subject to adjudication as a bankrupt, and the receiver of the corporation having no knowledge of such adjudication may move to vacate it. *In re Hudson River Elec. Power Co.* (D. C., N. Y.), 21 Am. B. R. 915, 167 Fed. 866. See same matter (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934, *affd.* 25 Am. B. R. 504, 183 Fed. 701.

Fraud of bankrupt.—The fact that an insolvent debtor filed a voluntary petition in bankruptcy, with knowledge that his mother, who had made her will in his favor, could live only a few days, is not a sufficient ground for setting aside the adjudication. *Matter of Swift* (D. C., Ga.), 44 Am. B. R. 211, 250 Fed. 612.

No dischargeable debt.—When the fact is brought to the attention of the court that the bankrupt’s petition discloses no debt that would be barred by a discharge, it is within its discretion to vacate the adjudication and dismiss the petition. *Blackstock v. Blackstock* (C. C. A., 8th Cir.), 45 Am. B. R. 192, 265 Fed. 249.

240. *In re Scott* (D. C., Mass.), 7 Am. B. R. 39, 111 Fed. 144.

241. *In re Hintze* (D. C., Mass.), 13 Am. B. R. 721, 134 Fed. 141.

241a. *Matter of United Grocery Co.* (D. C., Fla.), 39 Am. B. R. 501, 239 Fed. 1016.

241b. *Matter of Nash* (D. C., W. Va.), 41 Am. B. R. 657, 249 Fed. 375.

242. *Huttig Mfg. Co. v. Edwards* (C. C. A., 8th Cir.), 20 Am. B. R. 349, 180 Fed. 619, *citing* *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520; *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 532.

243. *Gilbertson v. United States* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672. See cases digested Am. Bankr. Dig., § 280.

trict, especially where the basis of the jurisdiction in the voluntary proceeding, the domicile or residence of the bankrupt, has been clearly established, while the basis of the involuntary proceeding, the principal place of business of the bankrupt is doubtful.²⁵⁴

XI. ORDER OF REFERENCE AND EFFECT.

Under this section two facts must exist in order to warrant the clerk in referring the case to the referee, viz.: (1) That no pleadings have been filed within the time provided for pleading; (2) the absence of the judge from the district, or the division, "on the next day after the last day on which pleadings may be filed." In view of the terms of clause "d" of the section, the requirement that "no pleadings have been filed" should be construed to mean no pleadings in opposition to the petition, and the fact that an answer confessing the allegations of the petition has been filed ought not to be a legal obstacle to the reference of a case by the clerk to the referee.²⁵⁵ The order of reference required under subsections *f* and *g*, where the judge is absent from the district or division of the district in which the petition is filed or pending, should be in the form prescribed by Form No. 15.²⁵⁶ If made after adjudication, Form No. 14 is applicable;²⁵⁷ it has been held that such an order may be made by the deputy clerk, the act of signing being ministerial and not judicial.²⁵⁸ This order and a copy of the petition and schedules in voluntary cases, and of the petition at least in involuntary cases, must be sent by mail or delivered personally by the clerk to the proper referee. The order fixes a day on which the bankrupt must appear and after which the referee shall have jurisdiction. This should usually be the following day. It is thought, however, that the referee has complete jurisdiction the moment the order is made; Form No. 14, to this extent at least, is not in accord with the law. In effect the referee then becomes, as to that proceeding, a court of original jurisdiction,²⁵⁹ and the judge a court of appeal.²⁶⁰ After reference to the referee, the practice on both

Collateral attack.—The ground of an adjudication cannot be collaterally attacked, for as to the bankrupt and the creditors the adjudication is as binding as a judgment *inter partes* upon due hearing in a court of competent jurisdiction. In *re Hecox* (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 823; In *re Dempster* (C. C. A., 8th Cir.), 22 Am. B. R. 751, 172 Fed. 353.

Federal courts have exclusive jurisdiction to adjudge a person a bankrupt and to appoint a receiver, and where the order of a Federal court is irregular, improvident, or unauthorized, it should be corrected or questioned in that forum and not in the State court by collateral attack. *Moore Bros. v. Cowan* (Sup. Ct., Ala.), 173 Ala. 536, 28 Am. B. R. 902, 55 So. 903. A decision of the bankruptcy court sustaining an involuntary petition, although erroneous, is conclusive unless reversed or vacated, and cannot be attacked in a suit to restrain attachment proceedings brought against the bankrupt. *Larkin-Green Logging Co. v. Sabin* (C. C. A., 9th Cir.), 35 Am. B. R. 86, 222 Fed. 814. An adjudication cannot be attacked collaterally on the ground that the principal place of business of the bankrupt was not in the district. *Roszell Bros. v. Continental Coal Corp.* (D. C., Ky.), 38 Am. B. R. 31, 235 Fed. 343, *affd. sub nom.* *Matter of Continental Coal Corporation* (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113.

In a criminal prosecution for the concealment of assets from the trustee, the defendant cannot attack the adjudication upon the ground that it was made by the referee when the judge, in fact, was not absent from the district, if the order of reference recites his absence. *Gilbertson v. U. S.* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672.

244. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102; for effect of such adjudication, see In *re American Brewing Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 463, 112 Fed. 752.

245. In *re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

246. Compare In *re Polakoff* (Ref., N. Y.), 1 Am. B. R. 358.

247. See discussion under Section Thirty-eight of this work.

248. In *re Jehu* (D. C., Iowa), 2 Am. B. R. 498, 94 Fed. 638.

249. *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 888.

249a. *Matter of Nash* (D. C., W. Va.), 41 Am. B. R. 657, 249 Fed. 375, citing *Collier on Bankruptcy* (11th Ed.), 484.

250. In *re Tully* (D. C., N. Y.), 19 Am. B. R. 604, 156 Fed. 634.

251. In *re Flanagan*, Fed. Cas. 4,850; In *re Stewart*, Fed. Cas. 13,419; In *re Canfield*, Fed. Cas. 2,380. Compare In *re Mussey* (D. C., Mass.), 3 Am. B. R. 592, 99 Fed. 71.

voluntary and involuntary proceedings is identical, and is discussed under different sections of this work.²⁵¹

252. See p. 478, *ante*, and under Section Fifty-nine, *post*.

253. *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

Rights of petitioning creditors.—Thus it is still an open question whether an adjudication can be made on the voluntary petition at once, reserving to the petitioning creditors the right to bring forward their proceeding and consolidate as of the date they filed (see *In re Stegar* [D. C., Ala.], 7 Am. B. R. 665, 113 Fed. 978), or whether adjudication must be withheld until the notice is given (*In re Dwyer* [D. C., N. Dak.], 7 Am. B. R. 532, 112 Fed. 777). The former seems the wiser practice. Otherwise great injury to assets may result from the delay. See also *In re Waxelbaum* (D. C., N. Y.), 3 Am. B. R. 392, 98 Fed. 580.

254. *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

255. *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525. In this case it appeared that on the sixth day after a petition in bankruptcy was filed, the bankrupt appeared and filed an answer, admitting the substantial allegations of the petition, and consenting that he be adjudged a bankrupt, and asking that the case be at once referred to the referee, and the clerk, without issuing a subpoena fixing the return day or finding or specifying that the judge was absent "on the next day after the last day on which pleadings may be filed," as required by section 18 of the Bankruptcy Act, found and recited in his order of reference that the judge was absent "at the time of the filing of the petition." It was held that although the procedure was irregular the defects were not jurisdictional and did not render the adjudication subject to collateral attack.

256. **Absence of district judge.**—That an order of reference in a voluntary bankruptcy recites the absence of the district judge from the district does not affect the jurisdiction of the bankruptcy court, acquired upon the filing of the petition, to adjudge the petitioner a bankrupt; such recital relates only to the course of procedure within the jurisdiction of the court, and is not open to collateral attack. *Gilbertson v. United States* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672.

257. *In re Bellamy*, Fed. Cas. 1,268.

258. *Gilbertson v. United States* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672. *Contra*: *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

259. General Order XII. See also under Sections Thirty-eight and Thirty-nine.

260. See General Order XXVII.

261. **Practice after reference.**—For notice of the first meeting and how given, see Bankr. Act, § 53; for proceedings at first meeting, see §§ 55, 56. General Orders IV, XXV; for proof of claims, see § 57, General Order XXI; for appointment and qualification of trustees, see §§ 45, 46, General Orders XIII, XIV, XV, XVI; for bond of trustee and effect when certified copy recorded, see §§ 21-c, 50; for examination of the bankrupt, see §§ 7(9), 21-a, General Order XXII; for setting aside of exemptions, see § 6, General Order XVII; for duties of trustee, see § 47, General Order XVII; for appointment of appraisers, see § 70-b; for sales of assets, see §§ 58-a(4), 70-b, General Order XVIII; for stays, see §§ 2(15), 11; for declaration and payment of dividends, see § 65; for final meetings, see §§ 57-f, 58-a(6), etc.

SECTION NINETEEN.

JURY TRIALS

§ 19. **Jury Trials.**—*a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Analogous provisions: In U. S.: As to jury trials in involuntary proceedings, Act of 1867, §§ 41, 42, R. S., § 5026; Act of 1841, § 1; As to jury trials upon specifications filed against a discharge, Act of 1867, § 31, R. S., § 5111; Act of 1841, § 4; As to trials of issues of fact in the district court, R. S., § 566; As to trials of issues of fact in the circuit court, R. S., §§ 648, 649.

In Eng.: Act of 1883, § 102(3), General Rules 94-97.

In Can.: None.

Cross, references: To the law: Acts of bankruptcy, § 3.
Adjudication where facts are controverted, § 18-d.
Depositions may be taken; notices, § 21-b, c.
Reference of cases after adjudication, § 22.
Who may file petitions, § 59.

Insolvency when preferences were given, § 60-b.

Recovery of property transferred while bankrupt was insolvent, § 67-a.

To the Forms: Order for jury trial, Form No. 7.

See Hagar and Alexander's Bankruptcy Forms (2d Ed.), Nos. 22, 23.

SYNOPSIS OF SECTION.

JURY TRIALS

- I. Jury Trial in Contested Adjudications, 488.
 - a. *Comparative legislation*, 488.
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I. JURY TRIAL IN CONTESTED ADJUDICATIONS.

a. *Comparative legislation*.—In England, a jury trial in bankruptcy proceedings is always discretionary,¹ but, where the facts are disputed, will usually be granted.² Under the law of 1841, trial by jury could be demanded by the debtor within ten days after a decree adjudging him a bankrupt "to ascertain the facts of such bankruptcy."³ By the law of 1867, the demand must have been made in writing on the return day, and then the jury was "to ascertain the fact of such alleged bankruptcy."⁴ There is no provision in the Canadian act regarding jury trials.

b. *Jury trials; when granted*.—The present law clearly limits the issues to be submitted to a jury to two; (a) the question of insolvency and (b) whether the alleged act of bankruptcy has been committed.⁵ It is not thought, however, that this precludes the jury from passing on any other pertinent question, as, whether the alleged bankrupt was domiciled within the district the required time, or whether a petitioning creditor has a provable debt, or whether the debtor is in one of the excepted classes not amenable to involuntary bankruptcy, provided the judge submits such an issue to them.⁶ Subsection a merely declares on what issues in a contested adjudication trial by jury is a matter of right.

1. Eng. Act of Bankruptcy of 1888, § 102(3).

2. In re Carvill, 1 Morrell, 150.

3. Act of 1841, § 1.

4. Act of 1867, § 41.

5. Day v. Beck, etc., Co. (C. C. A., 5th Cir.), 8 Am. B. R. 175, 114 Fed. 834; In re Christensen (D. C., Iowa), 4 Am. B. R. 99, 101 Fed. 802; Simonson v. Sinsheimer (C. C. A., 7th Cir.), 3 Am. B. R. 824, 100 Fed. 426; Bernard v. Abel (C. C. A., 9th Cir.), 19 Am. B. R. 383, 389, 156 Fed. 649; citing Collier on Bankruptcy (6th ed.), 257.

General assignment.—Where a petition in involuntary bankruptcy alleges that within the four months' period, the alleged bankrupt made a general assignment for the benefit of

creditors, and the answer denies each and every allegation of the petition, and a demand for a jury trial is filed therewith, the alleged bankrupt is entitled to a jury trial of the question whether he has made such general assignment. Day v. Beck, etc., Hardware Co. (C. C. A., 5th Cir.), 8 Am. B. R. 175, 114 Fed. 834.

6. See McNaughton v. Osgood, 114 N. Y. 574; McClure v. Gibbs, 157 N. Y. 413; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; In re Neasmith (C. C. A., 6th Cir.), 17 Am. B. R. 128, 147 Fed. 160; Oil Well Supply Co. v. Hall (C. C. A., 4th Cir.), 11 Am. B. R. 738, 128 Fed. 875; In re Farthing (D. C., No. Car.), 29 Am. B. R. 732, 202 Fed. 557.

The right to a jury trial in respect to the questions specified upon application of the person against whom an involuntary petition has been filed, as provided in this section, is absolute and cannot be withheld at the discretion of the court.⁷ In that respect it differs from the trial of an issue out of chancery, which a court of equity is not bound to grant, nor bound by the verdict if such trial be granted.⁸ Acts of bankruptcy are used in this connection, as they are set forth in a preceding section of the statute, and are thus given a definite meaning. Whether one be chiefly engaged in farming has no relation, within this meaning, to any act of bankruptcy; and like other jurisdictional questions is for the court.⁹ Subsection *a* does not confer upon a petitioning or answering creditor the right to a trial by jury of an issue pertaining to alleged acts of bankruptcy or the insolvency of the alleged bankrupt.¹⁰ The right is confined to the debtor; but a debtor cannot bring in issue before a jury the intention alone, with which he, while insolvent, permitted a creditor to have a preference.¹¹ Upon motion the issues will be limited to the insolvency of the alleged bankrupt and the act of bankruptcy charged in the petition to have been committed.¹² The issue of insolvency involves the question of a fair valuation of the bankrupt's property, and the validity and amount of petitioners' claims.¹³ The question as to whether an alleged bankrupt is a partner, when decisive of the question of his solvency, must be kept open for the jury.¹⁴ Where the issue is insolvency, the burden is upon the petitioning creditors.¹⁵ The question of an alleged bankrupt's insanity may be submitted to the jury as an essential part of the defense that he did not commit an act of bankruptcy.¹⁶ Where the bankruptcy court, having exclusive jurisdiction, also has custody of certain money, and the distribution of the fund is the only issue before the court, there is no question under the Bankruptcy Act or other law, to be submitted to a jury for determination.¹⁷

c. How jury trial demanded.—The demand must be by a written application. No form is prescribed,¹⁸ but any statement signed by the bankrupt and indicating the demand will be sufficient. If the application is granted, an order substantially in Form No. 7 should be entered by the clerk. Such an application can be made only by "a person against whom an involuntary petition has been filed;" thus an answering creditor has not the right to a jury trial, even on the two specified questions.¹⁹ The application must be made within

7. *Elliott v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200; *Day v. Beck & Gregg Hardware Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 175, 114 Fed. 834.

8. *Elliott v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200. But see *Oil Well Supply Co. v. Hall* (C. C. A., 4th Cir.), 11 Am. B. R. 738, 128 Fed. 875, holding that where a district court certifies a case to the circuit court for trial by jury, after such a trial had been waived, the verdict is advisory and may be disregarded.

9. *Stephens v. Merchants Bank* (C. C. A., 7th Cir.), 18 Am. B. R. 560, 154 Fed. 341.

10. *In re Herzikopf* (C. C. A., 9th Cir.), 9 Am. B. R. 745, 121 Fed. 544.

11. *In re Harris* (D. C., Ala.), 19 Am. B. R. 204, 156 Fed. 875.

12. *Moras v. Franklin Coal Co.* (D. C., Penn.), 11 Am. B. R. 423, 125 Fed. 998.

13. *Schloss v. Strelow & Co.* (C. C. A., 3d Cir.), 19 Am. B. R. 359, 156 Fed. 663.

14. *In re Neasmith* (C. C. A., 6th Cir.), 17 Am. B. R. 128, 147 Fed. 160; *Buffalo Milling Co. v. Lewisburg Dairy Co.* (D. C., Pa.), 20 Am. B. R. 279, 159 Fed. 319.

15. *McGowan v. Knittel* (C. C. A., 3d Cir.), 15 Am. B. R. 1, 137 Fed. 453, 1,015.

16. *In re Ward* (D. C., N. J.), 20 Am. B. R. 482, 161 Fed. 755.

17. *Matter of Gibbons* (D. C., Wash.), 35 Am. B. R. 620, 225 Fed. 420.

18. See, however, "Supplementary Forms," *post*; *Hagar and Alexander's Bankruptcy Forms*, 2d Ed. No. 22.

19. See Bankr. Act, § 18-b.

five days after the return day. If there has been a general extension of time to plead, it seems that a demand filed after the original day to plead, but before the extension of time expires, will be too late.²⁰

d. **Effect of failure to demand.**—It is clear that, if no application for a jury trial is filed within the time limited, the right is waived.²¹ At the same time, even after such a waiver, an issue or issues of fact may be framed and sent to the jury, though the court in that event will not be bound by its findings, and error is not predicable on the court's remarks or its charge to the jury.²² Where, however, the proceeding is only constructively involuntary, as some partnership proceedings, and the case has already been referred to the referee, the time does not expire until the day set for the hearing.²³ Where a stipulation is entered into by the attorneys of the parties in interest, waiving trial by jury and submitting the case to the trial judge, he is constituted an arbitrator, and his decision will not be disturbed where there is evidence to support it.²⁴

II. HOW A JURY IS OBTAINED.

a. **In general.**—As under the former law, perhaps before and certainly after the amendatory act of 1874,²⁵ the trial may be had at a stated term which has a jury in attendance, or before a special jury called for that purpose.²⁶ But the statute does not specify how such a special jury is to be paid, and this clause, in actual practice, will be found of little avail. The additional clause, permitting the certification of the cause to a circuit court, is of no force since the abolishment of that court by the judicial code.

b. **The trial.**—The trial before a jury is conducted and subject to the immemorial rules surrounding a trial at common law.²⁷ The right to introduce evidence by way of deposition is unquestioned,²⁸ and the method of taking evidence is further suggested by the equity rules.²⁹ The judge can take the case from the jury by directing a verdict, if no question of fact develops, or he can set the verdict aside.³⁰ If each party asks the court to direct a verdict in his favor, it is equivalent to a request for a finding of facts, and if the court directs the verdict, both parties are concluded on such findings.³¹ As has already been suggested, he can submit issues to them, other than those peculiarly

20. Consult *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

21. In re *Neasmith* (C. C. A., 6th Cir.), 17 Am. B. R. 123, 147 Fed. 160; *Oil Well Supply Co. v. Hall* (C. C. A., 4th Cir.), 11 Am. B. R. 738, 123 Fed. 875.

Loches.—Where a bankrupt did not demand a jury trial in his answer but filed a separate demand on the second court day thereafter, the court did not abuse its discretion in denying the demand. *Matter of Wester* (C. C. A., 3d Cir.), 40 Am. B. R. 89, 242 Fed. 465.

22. See cases cited in footnote, *supra*. In such a case the verdict is advisory only. In re *Neasmith* (C. C. A., 6th Cir.), 17 Am. B. R. 123, 147 Fed. 160.

22a. *Morrison v. Rieman* (C. C. A., 7th Cir.), 41 Am. B. R. 325, 249 Fed. 97.

23. In re *Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600.

24. *Fort Worth Co. v. Shapleigh Co.* (C. C. A., 5th Cir.), 31 Am. B. R. 21, 221 Fed. 237.

25. See § 14 of Act of June 23, 1874. And consult In re *Heydette*, Fed. Cas. 6,444; In re *Gebhardt*, Fed. Cas. 5,294.

26. See, under the former law, In re *Findlay*. Fed. Cas. 4,789.

27. *Elliot v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 54, 47 L. Ed. 200; *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839.

28. See Bankr. Act, § 21-b. See also *Ex parte Flak*, 113 U. S. 713, 23 L. Ed. 1117.

29. Equity Rules LXVII-LXXI (Appendix A. *post*). As to burden of proof, see *Brock v. Hoppeck*, Fed. Cas. 1,912; In re *Scudder*, Fed. Cas. 12,563; In re *Oregon Printing Co.*, Fed. Cas. 10,560.

30. In re *Jelsh*, Fed. Cas. 7,257; In re *Corse*. Fed. Cas. 3,254.

31. *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, *aff.* 9 Am. B. R. 441. See *Thompson v. Simpson*, 128 N. Y. 233; *Bentell v. Magone*, 157 U. S. 154, 39 L. Ed. 654.

theirs to determine.³² The verdict will usually be special,³³ and in the form of an answer to one or both the statutory issues raised in the case. The judge is, of course, bound by the jury's determination of questions of fact submitted to them in response to a demand as a matter of right.

III. TRIAL BY JURY OF OFFENSES OR OTHER CONTROVERSIES.

a. Meaning of the subsection.— Subsection *c* unquestionably refers to all issues that may arise in bankruptcy proceedings and as a part thereof, other than contested adjudications. The seventh amendment to the constitution gives an absolute right to trial by jury in all actions at law where the amount in question exceeds twenty dollars. It has, therefore, been suggested that other issues which, were they not parts of a proceeding, as for instance, a motion to expunge a claim duly proved, would be mere actions at law, must, on demand of either party, be submitted to a jury.³⁴ *Barton v. Barbour*,³⁵ decided by the Supreme Court under the former law, seems, however, to be conclusive; it holds that trials without a jury in bankruptcy proceedings are not a violation of constitutional right. Nor does the reference to the Revised Statutes³⁶ made by this subsection change the rule. The district court does not try equity causes by jury; no more did the circuit court, in which, even in actions at law, a jury might be dispensed with by consent. Nor do the words "to submit matters in controversy, or an alleged offense under this act" become meaningless, in this view. Offenses, being crimes, must be tried by jury; actions to recover back property are clearly matters in controversy outside bankruptcy proceedings proper.³⁷ The words quoted clearly refer to these and like controversies, which are not strictly "proceedings in bankruptcy."³⁸ This would seem to be the test. Besides, "hearing" and "trial" are not in the present statute set off against each other.³⁹ The generic word "trial" is used in the present act as indicating a judicial determination of a controverted question, either without or with a jury. If, however, the action is to recover property fraudulently transferred and laid in either Federal court, it is doubtful whether a jury trial can be had as matter of right. If not a part of the proceeding in bankruptcy, such a trial is certainly in equity.^{39a} The judge could, however, frame an issue and submit it to the jury; and in many cases this will be done. Contempts are clearly not within this subsection, and they will be heard by the judge.⁴⁰ But where an action is brought in a State court to recover the value of personal property claimed to have been disposed of by the bankrupt in fraud of creditors, it may be that, under the State laws, either party is entitled to a jury trial.⁴¹

b. Jury trials on contested discharges.— What has gone before indicates that a bankrupt when petitioning for a discharge has not the right to demand a

32. In *re Rude* (D. C., Ky.), 4 Am. B. R. 319, 101 Fed. 805.

33. Compare *In re King*, Fed. Cas. 7,782.

34. Compare *In re Christensen* (D. C., Iowa), 4 Am. B. R. 99, 101 Fed. 902.

35. 104 U. S. 126, 26 L. Ed. 672.

36. See R. S., §§ 566, 648, 649.

37. Compare *In re Baudouine* (C. C. A., 2d Cir.), 3 Am. B. R. 651, 101 Fed. 574, revg. s. c., 3 Am. B. R. 55, 96 Fed. 536. And see *In re Russell* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248.

38. For meaning of the words quoted, see *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175.

39. Compare Act of 1867, § 41, R. S., § 5,026, "upon such hearing or trial," with the use of the word "trial" alone in cases where a jury is clearly not intended, in §§ 13 and 15, Act of 1898.

39a. *Hicks Company, Ltd. v. Moore* (C. C. A., 5th Cir.), 44 Am. B. R. 384, 261 Fed. 773.

40. *Ripon Knitting Works v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810.

41. *Allen v. Gray*, 201 N. Y. 504, 25 Am. B. R. 423, 94 N. E. 652.

jury trial. This was otherwise under the former law.⁴² The omission of the present law to give this right in very words is significant of an intention to deny it. No cases are yet to be found in the books. However, as previously suggested, the judge can, in his discretion, send a specified issue to a jury, and, when the objection to a discharge consists in an offense against the act, will often feel constrained so to do. In such cases he is, of course, not bound by the verdict.

⁴² See Act of 1867, § 31, R. S., § 5,111; *son*, Fed. Cas. 8,151. *Gordon v. Scott*, Fed. Cas. 5,620; *In re Law-*

SECTION TWENTY.

OATHS, AFFIRMATIONS.

§ 20. **Oaths, Affirmations.**—*a* Oaths required by this act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Analogous provisions: In U. S.: As to oaths to schedules and inventory, Act of 1867, § 11, R. S. § 5017; As to oaths to proofs of debt, Act of 1867, § 22, R. S., §§ 5076, 5077, 5079, also § 5076-A; Act of 1841, §§ 5, 7; As to affirmations, Act of 1867, § 48.

In Eng.: None.

In Can.: Act of 1919, § 79.

Cross-references: To the law: Oath includes affirmation, § 1(17).

Verification of petitions, § 18-c.

Examination of witnesses under oath, § 21-a.

Punishment for false oath, § 29.

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I. OATHS.

a. Comparison with former act.—The present act is here much more liberal than its predecessor. Prior to the amendatory act of 1874, even proofs of claim could be sworn to only before a register or circuit court commissioner; if the oath was to the petition or inventory, it could also be sworn to before the judge. Now, an oath to any paper to be used in a bankruptcy proceedings can be taken before any officer authorized to administer oaths in proceedings in either the Federal or State courts of the place where taken. This will in most States include, besides the judge, the referee, United States commissioners, notaries public, justices of the peace, commissioners of deeds, and civil

magistrates in general. An oath taken before a notary public of one State, over his signature and seal, is sufficient for use in proceedings in another State and no further proof is needed, in the first instance, of his official character.¹ If in foreign countries, it must be before a diplomatic or consular officer of the United States there resident; an oath before a foreign local magistrate will not be sufficient.

b. *How oaths are authenticated.*—If the officer taking the oath has a seal, he should impress it on the paper.² If not, the better practice is to secure a certificate from some clerk of a court of record, that he is such an officer. It is not thought, however, that such certificates are necessary, other than to the effect that in the State where taken the officer is authorized to administer oaths in proceedings before its courts. No certificate is, therefore, necessary when the claim is to be filed in the State within which it is verified; the referee should take judicial cognizance of the fact that the officer was so authorized.³ Powers of attorney can be acknowledged before a referee, a United States commissioner, or a notary public,⁴ but it has been held that the power to administer oaths granted by this section carries with it the incidental power to take acknowledgments of letters of attorney.⁵ A person authorized to take affidavits and acknowledgments will not be permitted to do so "before himself" and attest to his own veracity or identity.⁶

c. *Oaths before attorneys of record.*—Under the former act, proofs of debt could not properly be taken before the claimant's attorney of record.⁷ This, it seems, is not so now,⁸ unless the attorney has previously filed an appearance.⁹ A proof is nothing more than an affidavit, and, while amounting to a *prima facie* case,¹⁰ when filed, is not evidence on a motion or petition to expunge. The better practice, however, is to see that a petition is sworn to or a claim is verified before some one other than the claimant's attorney.¹¹

d. *Defects in forms.*—The forms are in this particular frequently misleading. Several seem to indicate that they must be sworn to before the referee. The oaths to the schedules¹² are either unnecessary, or, if not so, ought to have a jurat similar to the oaths to the petition. But, where possible, the forms of oaths prescribed should be followed.¹³

II. AFFIRMATIONS.

The words of this subsection require no discussion. The word "oath" includes "affirmation" wherever used in the statute.¹⁴

1. In re Pancoast (D. C., Pa.), 12 Am. B. R. 275, 129 Fed. 643; Matter of Morse (D. C., N. Y.), 32 Am. B. R. 207, 210 Fed. 900, holding that a petition in involuntary bankruptcy proceedings may be properly verified before a commissioner of deeds.

2. In re Nebe, Fed. Cas. 10,073. Compare In re Phillips, Fed. Cas. 11,098.

3. In re Merrick, Fed. Cas. 9,463.

4. See General Order XXI (5). But see In re Sugenheimer (D. C., N. Y.), 1 Am. B. R. 425, 91 Fed. 744, holding that a power of attorney acknowledged before a foreign consul is sufficient.

5. In re Roy (D. C., N. Y.), 26 Am. B. R. 4, citing under the Act of 1867, the cases of In re Butterfield, Fed. Cas. 2,048; In re McDuffer, Fed. Cas. 8,778.

6. Matter of Grossman (D. C., N. Y.), 34 Am. B. R. 32, 225 Fed. 1020.

7. In re Keyser, Fed. Cas. 7,748; In re Nebe, Fed. Cas. 10,073.

8. In re Kimball (D. C., Mass.), 4 Am. B. R. 144, 100 Fed. 177. See as to verification of petition in bankruptcy, cases cited under § 18, subheading "Verification of pleadings."

9. In re Kindt (D. C., Iowa), 3 Am. B. R. 443, 98 Fed. 403.

10. In re Sumner (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224.

11. Thus, note In re Brumelkemp (D. C., N. Y.), 2 Am. B. R. 318, 95 Fed. 814.

12. See Form No. 1.

13. In re Keeler, Fed. Cas. 7,638.

14. See Bankr. Act, § 1(17).

SECTION TWENTY-ONE

EVIDENCE.

§ 21. **Evidence.**—*a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt* *and his wife,** to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: *Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.†*

b The right to make depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c Notice of the taking of the depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be

* The words "who is a competent witness under the laws of the State in which the proceedings are pending" which occurred here in the original law, were stricken out by the amendatory act of 1903.

† Amendments of 1903 in italics.

evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Analogous provisions: In U. S.: As to examinations of third parties, Act of 1867, §§ 22, 26, R. S., §§ 5081, 5087; Act of 1800, §§ 14, 15; As to depositions, etc., Act of 1867, §§ 5, 7, 38, R. S., §§ 5003, 5004, 5005, 5006; Act of 1841, § 7; Act of 1800, §§ 14, 15; As to certified copies as evidence, Act of 1867, § 38, R. S., § 4992; As to effect of and purpose of recording certified copy of bond, Act of 1867, § 14, R. S., §§ 5044, 5054; Act of 1800, § 11; As to certified copy of order of discharge as evidence, etc., Act of 1867, § 34, R. S., § 5119.

In Eng.: As to examination of third parties, Act of 1883, § 27. See also General Rules 61-72.

In Can.: Act of 1919, §§ 56, 77, 78.

Cross-references: To the law: Definitions of "bankrupt," "creditor," "officer," § 1 (4) (9) (18).

Jurisdiction of bankruptcy court to issue process, § 2(15).

Punishment for contempt on examination, §§ 2(16), 41.

Examination of bankrupt, § 7(9).

Composition, confirmation or setting aside, § 12.

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Jurisdiction of referees in respect to examinations, § 38(2) (4) (5).

Referee to make records of evidence, and to cause evidence to be preserved, § 39-a (4) (9).

Notice to creditors of examinations of bankrupt, § 58-a(1).

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See also Supplementary Forms; Hagar and Alexander's Bankruptcy Forms (2d Ed.), Nos. 210-231.

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a. Comparative legislation.—The English bankruptcy act is similar to our own in respect to the compulsory examination of third parties.¹ In addition to other designated persons, the court may summon for examination any person deemed "capable of giving information respecting the debtor, his dealings or property," and the scope, method, and effect of examinations is prescribed and regulated by the General Rules.² The Canadian statute limits the examination to the debtor and persons connected with the debtor as agents, clerks, servants, etc.^{3a} All previous laws in this country have provided for the examination of third parties, in aid of administration.³ The law of 1867 did so in different words, but much to the same effect. Cases decided under that act will be found useful precedents, and many of the most important ones are cited hereafter in their appropriate places.

b. Scope of subsection.—Subsection *a* provides for the compulsory examination of any person, "including the bankrupt." It should be noted, however, that, while the bankrupt is thus made a compulsory witness as to his own "acts, conduct, or property," by § 7 (9), he must also appear and be ready to testify concerning the same things at the first meeting of creditors. His examination at that time is considered elsewhere;⁴ and whatever is there said will apply equally to an examination of a bankrupt under this subsection. In effect, the only difference, so far as the examination of the bankrupt goes, is one of practice. Where first meetings are kept alive by continuances, as is customary, his examination can be had or resumed so long as the meeting lasts. If the meeting has been adjourned, an examination of the bankrupt can, under § 7 (9), still be had "at such times as the court shall order," or it can be required under the subsection now discussed. Clearly, therefore, the main

1. Eng. Bankr. Act of 1883, § 27.

2. General Rules 61-72.

3a. Can. Bankr. Act of 1919, § 56.

3. Act of 1867, §§ 22, 26, U. S. R. S., §§ 5081,

5087; Act of 1860, §§ 14, 15.

4. Bankr. Act, § 7-a(9) and discussion thereunder.

purpose of § 21-a is to authorize and regulate the examinations of third parties, rather than of the bankrupt.⁵ Without the power so to examine, the remedy of the statute against preferences and fraudulent transfers would often be unavailing. The issuance of an order directing the examination of a third person concerning the bankrupt estate is within the discretion of the court.⁶ The examination concerning "the acts, conduct and property of a bankrupt," is not less broad in its scope than the examination of the bankrupt himself, as provided in § 7.⁷ But the section does not authorize the examination of a third party as to an alleged contract by the trustee transferring the property of the estate to the witness.^{7a} Much of what has already been said as to the examination of the bankrupt⁸ applies with equal force here. If the person to be examined appears before a referee, it is the referee's duty to receive the evidence offered, note objections, and generally follow the equity practice.⁹

c. Who may apply.—The application for examination may be made by the bankrupt, a creditor or any officer,¹⁰ or party in interest.^{10a} In this respect the present law is somewhat broader than the act of 1867.¹¹ "Officer" has been held to include a receiver.¹² A creditor whose claim has not yet been presented may apply.¹³ When a person listed as a creditor states that he has a claim against the bankrupt's estate, and demands an examination to decide whether he will take an affirmative part in the bankruptcy proceedings the court may direct

5. Purpose of examination under § 21-a.—In the case of *Matter of Bryant* (D. C. Pa.), 28 Am. B. R. 504, 188 Fed. 530, the court quotes the text with approval and says: "That is the intention of the law to require a bankrupt to submit freely to examination concerning his estate is very apparent. Application may be granted at any time before final disposition of the estate, in the exercise of a sound discretion of the judge or his referee. Surely the bankrupt should not be unnecessarily harassed, vexed, or annoyed, but where it appears that the creditors may be benefited by further examination, or for any other good reason appearing, the order should be allowed. The vigorous and skillful use of examinations of insolvent bankrupts is often the only means by which creditors are enabled to prevent the Bankruptcy Act being turned into a shield for dishonesty. If hardship and inconvenience results from such examination, as it sometimes may, it should be remembered that a discharge of the bankrupt from his debts is a great privilege and a prize that will reward the honest debtor amply for such inconvenience."

"Nor was the trustee required to set forth the nature and character of the testimony in detail intended to be adduced. The very purpose of an examination under section 21-a is to discover property of the bankrupt, or to learn of its whereabouts and as to the acts of the bankrupt with respect thereto. Such an examination is in its very nature an investigation intended to satisfy the minds of those whose judgment it is true is frequently not well founded by which the honest debtor has all to gain."

The objects of an examination are to assist the trustee to discover concealed assets of the bankrupt, to ascertain whether the bankrupt has given preferences to any of his creditors, to learn whether the bankrupt has been guilty of acts which would prevent him from obtaining his discharge in bankruptcy, and, in general to aid the trustee to recover for the creditors any property to which they are entitled, to protect their rights in the bankruptcy proceedings, and to assist the court in

administering the estate of the bankrupt. *Matter of Prussian* (D. C., Mich.), 43 Am. B. R. 13, 255 Fed. 857.

6. In *re Andrews* (D. C., Mass.), 12 Am. B. R. 267, 130 Fed. 383, wherein the court said: "The examination of third persons concerning the bankrupt estate is anomalous, and, if it were wholly beyond the control of the court's discretion, would be oppressive."

7. The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved." No specific issue can be made up, but any fact or circumstance is relevant and material which fairly tends to establish something which may become important in the administration of the estate. *Ulmer v. United States* (C. C. A., 6th Cir.), 34 Am. B. R. 143, 219 Fed. 641, citing *Cameron v. United States*, 231 U. S. 710, 31 Am. B. R. 604, 58 L. Ed. 448; *Matter of Weidenfeld* (C. C. A., 2d Cir.), 42 Am. B. R. 425, 254 Fed. 677.

7a. *Matter of Madero Bros.* (D. C., N. Y.), 43 Am. B. R. 660, 256 Fed. 850.

8. See under Bankr. Act, § 7-a (9), *ante*.

9. General Order XXII; in *re Sturgeon* (C. C. A., 2d Cir.), 14 Am. B. R. 681, 130 Fed. 606.

10. For statutory definition of "officers" see Bankr. Act, § 1(18). See cases digested Am. B. R. Dig., § 42.

10a. *Matter of Henderson* (D. C., Mass.), 41 Am. B. R. 446.

11. Where claims were being investigated, under the former law only the bankrupt, a creditor, or the assignee could apply (§ 22), though the court could itself require the attendance of any person (§ 26).

12. In *re Flinn* (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748; in *re Fleischer* (D. C., N. Y.), 15 Am. B. R. 194, 151 Fed. 81.

13. See § 1(9), and consult *In re Walker* (D. C., N. D.), 3 Am. B. R. 35, 96 Fed. 550; *In re Jehu* (D. C., Iowa), 2 Am. B. R. 408, 94 Fed. 638; *Matter of Rose* (D. C., Pa.), 19 Am. B. R. 169, 163 Fed. 638. Compare, however, *In re Ray*, Fed. Cas. 11,589, under former law.

the examination.¹⁴ Ordinarily the trustee will make the application and the creditor desiring the examination should appeal to him, and upon his refusal apply directly to the court.¹⁵ An application for the examination of a bankrupt under this section should be made upon notice to the bankrupt.¹⁶ While the present law does not in words authorize the court to proceed *proprio motu*, as did that of 1867, the general powers conferred on it by § 2 (15) seem to imply such an authority.

d. Time of making application.—Being in aid of administration only,¹⁷ an examination of third persons should not be asked after the estate is wound up, and, it has been held, a pending accepted composition is a sufficient closing of the estate to warrant a refusal if application is then made.¹⁸ In such a case, the witnesses can usually be summoned and examined in the composition proceeding.¹⁹ Whether an examination may be had of the bankrupt under this subsection prior to his adjudication is a doubtful question. In two circuits it has been held that the court may, under this section, grant an order for the examination of a bankrupt, before adjudication, where a receiver has been appointed,²⁰ and even in the absence of a receivership,²¹ but that an examination under such circumstances can be useful only in rare instances, since there would be no officer of the bankruptcy court authorized to seize the assets when discovered. But in other circuits it is held that an order under

14. In re Kuffler (D. C., N. Y.), 18 Am. B. R. 587, 153 Fed. 667; Matter of Henderson, Inc. (D. C., Mass.), 44 Am. B. R. 446.

15. In re Andrews (D. C., Mass.), 12 Am. B. R. 267, 130 Fed. 383.

16. Rawlins v. Hall-Epps Clothing Co. (C. C. A., 5th Cir.), 33 Am. B. R. 237, 217 Fed. 884.

17. In re Cobb (Ref., Mass.), 7 Am. B. R. 104, wherein the court said: "It is to be noted in the first place that the examination of a witness under section 21-a, upon the application of the trustee, is an entirely distinct and independent proceeding from the ordinary bankrupt's examination held at the first meeting of creditors or at some adjournment thereof, at which the bankrupt's counsel is usually and generally allowed to cross-examine such witnesses as are presented. The examination of the witness under section 21-a is taken solely for his information to enable him to act intelligently in the premises and to take such steps as may be necessary for the protection and preservation of the estate."

18. In re Tift, Fed. Cas. 14,032.

19. See In re Ash, Fed. Cas. 571. And compare In re Sumner (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224.

20. Cameron v. United States (C. C. A., 2d Cir.), 27 Am. B. R. 657, citing Wechsler v. United States (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579, 86 C. C. A. 37, revd. on other grounds in Supreme Court, 231 U. S. 710, 31 Am. B. R. 604, 58 L. Ed. 448. See cases digested Am. B. R. Dig. § 51.

Process of administration.—United States v. Liberman (D. C., N. Y.), 23 Am. B. R. 734, 176 Fed. 161; Matter of Fleischer (D. C., N. Y.), 18 Am. B. R. 194, 151 Fed. 81, in which the court reasons that the filing of the petition and the appointment of a receiver to protect the estate of the alleged bankrupt brings the estate into the "process of administration" required by this subsection. In speaking of the desirability of permitting an examination prior to adjudication the court said: "The desirability and importance of promptly conducting an investigation into the affairs of any person petitioned into the bankruptcy court has been too often shown to be open to doubt. To wait until adjudication to ascertain from the bankrupt's own lips the *status* of his property and his own explanation of the situation in which the creditors find themselves is in many cases giving those guilty of fraud just the necessary time to permit the fraud to be consummated, and the fruits thereof secured. In my opinion, it is not too much to say that a vigorous and skillful use of the early examinations of involuntary bankrupts is the one thing which enables creditors to prevent this statute being easily turned into a shield for dishonesty and a potent aid to fraud."

20a. Rawlins v. Hall-Epps Clothing Co. (C. C. A., 5th Cir.), 33 Am. B. R. 237, 217 Fed. 884; Matter of Weidenfeld (C. C. A., 2d Cir.), 42 Am. B. R. 425, 254 Fed. 677.

21. Rawlins v. Hall-Epps Clothing Co. (C. C. A., 5th Cir.), 33 Am. B. R. 237, 217 Fed. 884.

this section requiring the bankrupt to be examined is unauthorized.²² Under analogous provisions of former laws such an examination was permitted.²³ It was formerly believed that a reasonable interpretation of the statute did not justify this practice, because it was difficult to conceive how an estate can properly be said to be "in process of administration under this act," when the question of bankruptcy remains undetermined and upon a trial of the issues it may follow that the court has no occasion for the exercise of its jurisdiction. But the Supreme Court has held that where a petition has been filed and a receiver appointed to take possession of the property, the estate was "in process of administration" within the meaning of this section, and the district court had jurisdiction to order an examination of the bankrupt.²⁴

e. Persons who may be examined.—(1) **IN GENERAL.**—Subject to the limitations on the scope of the examination and the usual privileges of witnesses from answering certain classes of questions, any designated person may be subpoenaed and examined in a bankruptcy proceeding.²⁵ It has even been held that a person liable to suit at the instance of a trustee may be compelled to testify.²⁶ Where, however, the purpose is palpable to drag out evidence for use against the third party witness in another court, the examination will be kept within proper bounds. Officers of a bankrupt corporation may be examined concerning the acts, conduct or property of the corporation,²⁷ and so may the officers of a corporation in respect to the relation which a bankrupt stock-

^{22.} *Skubinsky v. Bodek* (C. C. A., 3d Cir.), 22 Am. B. R. 689, 172 Fed. 332; *In re Thompson* (D. C., Penn.), 24 Am. B. R. 655, 179 Fed. 874; *In re Crenshaw* (D. C., Ala.), 19 Am. B. R. 266, 155 Fed. 271; *In re Davidson* (D. C., Mass.), 19 Am. B. R. 833, 158 Fed. 678; *In re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33.

Explanation of rule.—In *Skubinsky v. Bodek* (C. C. A., 3d Cir.), 22 Am. B. R. 689, 172 Fed. 332, the court said. "The special reference before adjudication to inquire into 'matters pertaining to the business and conduct of the alleged bankrupt,' was premature, inquisitorial and not to be tolerated. Common fairness requires that the alleged bankrupt, before being subjected to such a proceeding and before any order can properly be made in that behalf, should have the opportunity to make defense to the petition seeking his adjudication as a bankrupt."

Examination upon written interrogatories.—An alleged bankrupt cannot before adjudication be subjected to an examination upon written interrogatories at the instance of petitioning creditors. *In re Thompson* (D. C., Penn.), 24 Am. B. R. 655, 179 Fed. 874.

In the case of *Matter of Wilkesbarre Light Co.* (C. C. A., 3d Cir.), 31 Am. B. R. 451, 208 Fed. 539, it was held that an order directing a bankrupt to submit to an examination before a referee under section 21-a should not be granted, where no emergency calling for immediate action is established and an involuntary petition with demurrer and answer thereto has been pending for

nearly eighteen months without a hearing. The case of *Skubinsky v. Bodek* (C. C. A., 3d Cir.), *supra*, was cited, but the court based its determination upon the lack of an emergency requiring the examination.

^{23.} *In re Gilbert*, Fed. Cas. 5,410; *Ex parte Lee*, Fed. Cas. 8,178; *In re Salkey*, Fed. Cas. 12,252.

^{24.} *Cameron v. United States*, 231 U. S. 710, 31 Am. B. R. 604, 58 L. Ed. 448, sustaining the Circuit Court of Appeals (27 Am. B. R. 657, 113 C. C. A. 20, 192 Fed. 548), as to this question, but reversing on other grounds; *Matter of Henderson* (D. C., Mass.), 44 Am. B. R. 446.

^{25.} Even a trustee in an insolvency proceeding more than four months before the bankruptcy. *In re Pursell* (D. C., Conn.), 8 Am. B. R. 96, 114 Fed. 371. See also *People's Bank v. Brown* (C. C. A., 3d Cir.), 7 Am. B. R. 475, 112 Fed. 652. See cases digested Am. B. R. Dig. §§ 44-46.

^{26.} *In re Cliffe* (D. C., Pa.), 3 Am. B. R. 257, 97 Fed. 540.

^{27.} *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 12 Am. B. R. 653, 131 Fed. 824; *In re Horgan & Slattery* (C. C. A., 2d Cir.), 3 Am. B. R. 253, 98 Fed. 414.

Corporation books.—Where the inquiry is concerning an alleged fraud between a corporation and the bankrupt's estate, an order may be made directing the production of a book of the corporation, containing required information concerning the question, under investigation, and counsel for the parties will be permitted to examine the same. *In re United States Graphite Co.* (D. C., Pa.), 20 Am. B. R. 280, 161 Fed. 583.

holder or officer may bear thereto.²⁸ But it has been held that a creditor who seeks to vacate or set aside an adjudication of a bankrupt corporation, on the ground that it was not insolvent at the time of the filing of the involuntary petition, should not be compelled to submit to an examination as to certain facts which might be of use on the trial of the issue of solvency. It would be a perversion of the purpose of section 21-a to exercise the power conferred thereby in obtaining evidence to establish the existence of a jurisdictional fact essential to the validity of the adjudication.²⁹

(2) AMENDMENTS OF 1903.—The broad terms of the original law have been made even broader by the amendatory act of 1903. Formerly, a witness not competent "under the laws of the State in which the proceedings are pending" could not be compelled to testify in the court of bankruptcy. This limitation has been stricken out;³⁰ but the change is important only in those States where a wife is not a compellable witness for or against her husband.

(3) WIFE OF THE BANKRUPT AS A WITNESS.—The change just referred to in effect restores the rule under the law of 1867, which made the wife of a bankrupt a compellable witness in all States;³¹ but with a proviso which limits such an examination to "business transactions." This limitation is probably operative even in States where a wife may be a witness for or against her husband. Thus while there is no statutory limitation on the examination of the husband of a bankrupt wife, where the former is the bankrupt, the latter can be forced to testify only as to business transactions with the husband, or to determine the fact whether she has been a party to such transactions.³² In many cases, the wife is the only witness, the bankrupt being protected by his privilege, who can shed light on the whereabouts of secreted assets. Yet, in some States, as the law was, she, too, could claim a privilege.³³ This is no longer so. Congress has added the words "and his wife" after "bankrupt" in this clause, and supplemented them with the proviso clause above referred to. Thus, most of the cases cited just *supra* are no longer in point. Whether a creditor³⁴ or not, the wife of the bankrupt may now be asked any questions as to business transactions with her husband which might be put to any other third party witness, and, on refusal, is liable to the same penalties. A certain degree of latitude in the wife's examination will be allowed so that the court may be sure

28. In re Fixen & Co. (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748; In re Horgan & Slatery (C. C. A., 2d Cir.), 3 Am. B. R. 253, 98 Fed. 414.

An officer of a corporation in which a bankrupt owns stock cannot be compelled, by subpoena, to give evidence as to the value of such stock and to produce in support thereof the records relating to the financial condition of the corporation, as such evidence is a matter of expert opinion, and for the further reason that the evidence sought is beyond the purview of section 21-a of the bankruptcy act. Matter of Seligman (D. C., N. Y.), 26 Am. B. R. 664, 192 Fed. 750.

29. Abbott v. Wauchula Mfg. & Timber (C. C. A., 5th Cir.), 36 Am. B. R. 310, 220 Fed. 677.

30. The exact words dropped out after the words "including the bankrupt" are indicated in foot-note to the section.

31. Act of 1867, § 26, R. S., § 5,088. See In re Campbell, Fed. Cas. 2,348; In re Craig, Fed. Cas. 3,323; In re Anderson, 23 Fed. 482.

32. In re Worrell (D. C., Pa.), 10 Am. B. R. 744, 125 Fed. 159, holding that the wife cannot be examined generally, but that her examination must be confined within the terms prescribed in the proviso. See cases digested Am. B. R. Dig. § 45.

Competency of wife to testify against husband.—Under section 21-a of the Bankruptcy Act, section 858 of the U. S. Revised Statutes, as amended by Act of June 29, 1906, and section 5 of Pennsylvania Act of May 23, 1887, a wife is incompetent to testify against her husband in a civil proceeding under the Bankruptcy Act. Matter of Kessler (D. C., Pa.), 35 Am. B. R. 30, 225, Fed. 394.

33. In re Fowler (D. C., Wis.), 1 Am. B. R. 555, 93 Fed. 417; In re Jefferson (D. C., Wis.), 3 Am. B. R. 174, 96 Fed. 826; In re Mayer (D. C., Wis.), 3 Am. B. R. 222, 97 Fed. 328; In re Cohn (D. C., Mo.), 5 Am. B. R. 16, 104 Fed. 328.

34. Compare In re Richards, Fed. Cas. 11,770. And see In re Post, 1 N. B. N. 527.

that she is not, and has not been transacting business as a mere cover for the bankrupt, or in aid of a scheme to injure his creditors.³⁵

f. Right to counsel.—It has been uniformly held under both statutes that the examination referred to here is not of such a character as to entitle a witness, not a bankrupt, to counsel as a matter of right.³⁶ But the attendance and assistance of counsel will not usually be refused, especially where it appears that the examination tends to show the commission of a crime.³⁷ Yet, even if in attendance, the right of the witness' counsel to cross-examine seems in the discretion of the court.³⁸

g. Scope and conduct of examination.—The subsection authorizes examination "concerning the acts, conduct or property of a bankrupt." This indicates the scope of the examination and generally speaking the examination should be limited to the matters specified. Yet as a rule, large latitude will be permitted, especially where the witness is known to have been closely connected with the bankrupt in his business dealings.³⁹ The field of inquiry is broad; within the limitation prescribed any question is permissible which seeks to ascertain facts concerning the bankrupt's property and affairs.⁴⁰ But, when a witness has clearly indicated that the matter inquired into has nothing to do with the bankrupt's acts, conduct, or property, his examination on that matter should be stopped.⁴¹ For although the bankruptcy act gives latitude in the examination of the bankrupt, it does not otherwise abrogate the orderly method of procedure which prevails in the Federal courts.⁴² The purpose of examining a bankrupt, under this section, is to develop the whereabouts of assets of the estate for the purpose of aiding its administration, and not to

35. *In re Worrell* (D. C., Pa.), 10 Am. B. R. 744, 125 Fed. 159, holding that where the day after an adjudication, the wife bought the lease of a theatre and employed her husband as manager, she may be examined to discover what she paid for the lease and where the money came from and may be asked any other question tending to show whether the enterprise is hers or carried on by the bankrupt in her name.

36. *In re Cobb* (Ref., Mass.), 7 Am. B. R. 104; *In re Howard* (D. C., Cal.), 2 Am. B. R. 582, 95 Fed. 415; *In re Comstock*, Fed. Cas. 3,080; *In re Frenenberg*, Fed. Cas. 5,075; *Matter of Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51; *Matter of Emigh & Straub* (D. C., N. Y.), 40 Am. B. R. 277, 243 Fed. 988.

Every creditor of the bankrupt is a party in interest to an examination and entitled to participate therein and to the presence of counsel on his behalf. *Matter of Prussian* (D. C., Mich.), 43 Am. B. R. 13, 255 Fed. 837.

Same counsel for creditor and bankrupt.—A witness, who is subpoenaed to appear before the referee at the instance of the trustee and for the purpose of inquiring into the conduct, assets and property of the bankrupt, and, although a creditor, has not filed a claim in the proceedings, may be represented by the attorney for the bankrupt, over the protest and objection of the trustee or his attorney. *Matter of Prussian* (D. C., Mich.), 43 Am. B. R. 13, 255 Fed. 837.

37. *In re Hark Bros.* (D. C., Pa.), 14 Am. B. R. 624, 136 Fed. 980, in which the court held that it was to be assumed that the referee will allow a bankrupt representation by counsel at any hearings that may take place.

Counsel for the bankrupt has no absolute right to be present at hearings before a referee conducting an examination of witnesses other than the bankrupt under the provisions of section 21-a. *Matter of Adler* (Ref., La.), 21 Am. B. R. 302.

38. *In re Cobb* (Ref., Mass.), 7 Am. B. R. 104, and the cases cited.

39. *In re Foerst* (D. C., N. Y.), 1 Am. B. R. 239, 93 Fed. 190; *Matter of Horgan & Satterly* (C. C. A., 2d Cir.), 3 Am. B. R. 253, 93 Fed. 414; *In re Pittner*, 2 N. B. N. Rep. 915.

Latitude of inquiry.—Although bankruptcy inquiries are to be conducted only to enable creditors to discover whether the bankrupt is entitled to a discharge and inform the trustee whether any assets exist which should be collected, large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings. *Matter of Lathrop, Hastings & Co.* (D. C., N. Y.), 24 Am. B. R. 611, 184 Fed. 534.

40. *U. S. v. Wechsler* (D. C., N. Y.), 16 Am. B. R. 1, 5; *In re Carley* (D. C., Ky.), 15 Am. B. R. 554, 106 Fed. 862, in which the court held that the witness should fully disclose all his knowledge relative either to the acts, the conduct or the property of the bankrupt; *In re Williams* (D. C., Tenn.), 10 Am. B. R. 538, 123 Fed. 321.

The words "concerning the property of a bankrupt," as found in section 21-a of the bankruptcy act, which provides for the examination of witnesses in such matters, must be taken to mean the discovery of the existence, whereabouts or disposition of property, and cannot be extended so as to draw from unwilling outsiders evidence as to the value of what the bankrupt admittedly has in his possession. *Matter of Seligman* (D. C., N. Y.), 26 Am. B. R. 664, 192 Fed. 750.

41. *In re Carley* (D. C., Ky.), 5 Am. B. R. 554, 106 Fed. 862.

42. *Matter of Kinnane Co.* (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488.

enable the petitioning creditors to elucidate evidence to assist them in establishing the insolvency of the bankrupt or the act or acts of bankruptcy relied upon by them.⁴³ If the questions are not relevant to such matters the witness is justified in refusing to answer them.⁴⁴ Useless repetition should not be permitted,⁴⁵ nor should the examination be needlessly prolonged at the expense of the estate.⁴⁶ A difficult problem often arises when the questions seem directed to the private affairs or individual property of a third party witness. No rigid rule can be stated. If the acts inquired of are interwoven with those of the bankrupt in such a way as to cause a reasonable suspicion that the witness has been preferred or is colluding with the debtor to secrete property, the witness will be required to answer and even to produce his own books.⁴⁷ If, on the other hand, the examination does not develop facts warranting these inferences or seems without sufficient foundation, questions concerning the property or conduct of the witness will be ruled out.⁴⁸ There is no backward limit as to the time of the acts or the ownership of property under investigation;⁴⁹ the further back the questioner goes, however, the narrower should be the limits of the examination. The date the petition was filed is usually the forward limit; what a bankrupt does or earns or has after that date is not the concern of his creditors, so long as the doing, earning, or having is consistent with honest dealing prior to the bankruptcy.⁵⁰

h. Production of books and papers.—The right to the examination of a third person concerning the acts, conduct or property of the bankrupt includes the examination of books, papers and documents in his possession or under his control.⁵¹ The president of a bank may be compelled to produce his private memo-

43. *Rawlins v. Hall-Epps Clothing Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 237, 217 Fed. 884; *Abbott v. Wauchula Mfg. & Timber Co.* (C. C. A., 5th Cir.), 36 Am. B. R. 310, 229 Fed. 677; *Matter of Weidenfeld* (C. C. A., 2d Cir.), 42 Am. B. R. 425, 254 Fed. 677.

44. *In re Howard* (D. C., Cal.), 2 Am. B. R. 582, 95 Fed. 415; *In re Hayden* (D. C., N. Y.), 1 Am. B. R. 670, 96 Fed. 199.

45. *In re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 789, 138 Fed. 837.

46. *In re Stark* (D. C., N. Y.), 18 Am. B. R. 467, 155 Fed. 695.

47. *In re Fixen* (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748; *People's Bank v. Brown* (C. C. A., 3d Cir.), 7 Am. B. R. 475, 112 Fed. 652.

48. *In re Hayden* (D. C., N. Y.), 1 Am. B. R. 670, 96 Fed. 199; *In re Salkey*, Fed. Cas. 12,252.

49. *In re Brundage* (D. C., Iowa), 4 Am. B. R. 47, 100 Fed. 613; *In re Pursell* (D. C., Ct.), 8 Am. B. R. 96, 114 Fed. 371.

Four months' period.—When a bankrupt submits to an examination on behalf of creditors, it is competent to inquire as to the disposition of his property, in order to ascertain whether there exists any property right in which the bankrupt has an interest, and the inquiry is not necessarily confined to transactions which have occurred within four months prior to the filing of the petition. *In re Brundage* (D. C., 613 Pa.), 4 Am. B. R. 46, 100 Fed.

50. See *In re Walton*, 1 N. B. N. 533.

51. *In re Fixen* (D. C., Cal.), 2 Am. B. R.

822, 96 Fed. 748; *In re Hess* (D. C., Pa.), 14 Am. B. R. 826, 136 Fed. 988; *In re United States Graphite Co.* (D. C., Pa.), 20 Am. B. R. 280, 161 Fed. 583.

Order for production of books and papers.

—An order granted under section 21-a of the Bankruptcy Act requiring the bankrupts to produce "all of the books of account * * * and other writings and memoranda, from which may be ascertained any of the matters and things, hereinbefore mentioned, and to be covered in said examination," is too broad and uncertain, especially where the bankrupt lives distant from the place of examination and has been in business many years. *Rawlins v. Hall-Epps Clothing Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 237, 217 Fed. 884.

Minute book of corporation.—Where a referee is engaged in making inquiry as to an alleged fraud between a corporation and the bankrupt's estate, and the corporation is also interested in having an order made for the security of rent, an order for the production of its minute book, containing the truthful information concerning the questions under investigation, will be granted, and counsel for the parties permitted an examination thereof. *In re United States Graphite Co.* (D. C., Pa.), 20 Am. B. R. 280, 161 Fed. 583.

Jurisdiction to compel delivery of books to receiver by state district attorney.—Where a private banker has surrendered his books to the state superintendent of banks, who

random book containing data in respect to the dealings of the bankrupt with the bank.⁵² An order directing a person to appear before the referee and testify, bringing with him certain books and papers, does not authorize the receiver of the bankrupt at whose instance the order was issued, to take possession of such books and papers.⁵³ The books of a corporation may be subpoenaed for examination before a special master, in proceedings to ascertain whether the property interests of the bankrupt and such corporation were identical,⁵⁴ and possession of the books by the proper officers will be presumed.⁵⁵

i. Privileged communications.—The statute is silent in respect to privileged communications. There is no indication, however, that it is intended that the rule in respect to such communications should be disregarded in bankruptcy proceedings. Where by State statute communications between persons occupying certain relations are privileged, they will be recognized as privileged by the bankruptcy courts in that State.⁵⁶ The rule that communications between attorney and client are privileged will be upheld,⁵⁷ although the witness may be questioned by the court to enable it to determine for itself whether communication is a privileged one.⁵⁸ An attorney may not refuse to identify papers signed by him on the ground of privilege, and is bound to testify as to any facts which came to his knowledge in any other way than through confidential communications from his client.⁵⁹ The elimination of the words "who is a competent witness under the laws of the State in which the proceedings are pending," from subsection *a* of this section by the amendatory act of 1903 has not affected the privilege in respect to such communications of any witness other than the bankrupt's wife. Prior to the amendment the competency of witnesses before a court of bankruptcy was determinable by the law of the State in which the case was pending.⁶⁰ As the law now stands this question of competency may be determined by the Federal statutes if any exist which are

after taking possession under the state law, was appointed receiver in bankruptcy, and has not suggested any limitation in their use for eight months, the bankruptcy court will not compel the state district attorney to deliver to the bankrupt's receiver books and papers which he is about to use in the trial of an indictment in the state court. *Matter of Mandel* (D. C., N. Y.), 35 Am. B. R. 386, 224 Fed. 642.

52. *Matter of Wheeler & Co.* (C. C. A., 2d Cir.), 19 Am. B. R. 461, 158 Fed. 603, revg. 18 Am. B. R. 421.

53. *In re Davis Tailoring Co.* (D. C., N. J.), 16 Am. B. R. 486, 144 Fed. 285.

54. *Matter of Iron Clad Mfg. Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 566, 201 Fed. 66.

55. **Presumption of possession of books by corporation.**—Where in a bankruptcy proceeding against a corporation another corporation is ordered to produce its books before the special master for examination, there is a presumption that the corporation is in the possession and control of its own books, which cannot be rebutted by the mere statement of some officer that he does not know where they are. *Matter of Iron Clad Mfg. Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 566, 201 Fed. 66.

56. *Matter of Reid* (D. C., Mich.), 17 Am.

B. R. 477, 155 Fed. 933; holding that a sworn statement delivered by a bankrupt to a city assessor is not admissible in evidence against the bankrupt, where the statute requiring such statement provides that it shall not be used for any other purpose than the making of an assessment of taxes.

Income tax returns.—Where a State law prohibits the production of income tax returns "except as provided by law," the bankruptcy court cannot compel the production of such returns before the referee. *Matter of Valecia Condensed Milk Co.* (C. C. A., 7th Cir.), 39 Am. B. R. 232, 240 Fed. 310.

57. *People's Bank v. Brown* (C. C. A., 3d Cir.), 7 Am. B. R. 475, 112 Fed. 652.

58. *People's Bank v. Brown* (C. C. A., 3d Cir.), 7 Am. B. R. 475, 112 Fed. 652, wherein the court said: "There is no presumption of privilege, and though its allowance may, in a clear case, be founded upon the voluntary statement of the attorney that his knowledge of the fact to which he is asked to testify was acquired in professional confidence, yet, wherever, as in this case the circumstances suggest that the sufficiency of the grounds of that statement should be considered, it is the right of the opposing party to demand that the proponent of the privilege shall be submitted to such interrogation as may be necessary to test its validity."

59. *In re Ruos* (D. C., Pa.), 20 Am. B. R. 281, 159 Fed. 252.

60. *In re Josephson* (D. C., Ga.), 9 Am. B. R. 345, 349, 121 Fed. 142.

applicable to the case.⁶¹ Otherwise the State statute will control. Whatever may be the rule in respect to competency of witnesses the State statute in respect to privileged communications will be observed.⁶²

j. Criminating questions.—It is provided in § 7-a (9) that "no testimony given by him (the bankrupt) shall be offered in evidence against him in any criminal proceeding."⁶³ Early in the administration of the law, it was thought that a bankrupt waived his constitutional privilege by filing a voluntary petition, and that the opposite was the rule where the petition was involuntary.⁶⁴ As has already been stated this doctrine is now rejected.⁶⁵ Notwithstanding the immunity afforded a bankrupt by the statute he may refuse to answer a question on the ground that it will tend to incriminate him.⁶⁶ It is not in any sense essential that a transaction should be pending against the bankrupt to entitle him to claim this constitutional privilege.⁶⁷ If the privilege be thus accorded to a bankrupt, a third party witness is much more entitled to it; the law does not even attempt to give such a witness immunity from punishment. He may therefore refuse to testify on this ground.⁶⁸ The privilege may be claimed in respect to the examination of books, papers and records containing incriminating evidence.⁶⁹ The plea of the privilege should not be permitted to excuse the production of the books, papers and records. They should be produced and if found by the court to contain incriminating evidence, an order may be made to protect the witness from the discovery of the evidence and if possible otherwise direct in respect to the competency of the necessary information.⁷⁰ For instance, an order requiring the bankrupt

61. *Smith v. Township of Au Gres* (C. C. A., 6th Cir.), 17 Am. B. R. 745, 150 Fed. 257, holding that the competency of a witness to testify in a court of bankruptcy as to a transaction between himself and the deceased person is to be tested by § 858 of the United States Rev. Stats., and not by the State statute.

62. *In re Aspinwall*, Fed. Cas. 591; *In re Bellis*, 38 How Pr. (N. Y.) 79.

63. See discussion under Bankr. Act, § 7-a (9) on p. 269, *ante*.

64. Compare *In re Sapiro* (D. C., Wis.), 1 Am. B. R. 296, 92 Fed. 340. *Contra*: *In re Hathorn* (Ref., La.), 2 Am. B. R. 298, and *In re Scott* (D. C., Pa.), 1 Am. B. R. 49, 95 Fed. 815.

65. See p. 270, *ante*, and cases cited.

66. *In re Kanter & Cohen* (D. C., N. Y.), 9 Am. B. R. 104, 117 Fed. 356; *U. S. v. Goldstein* (D. C., Va.), 12 Am. B. R. 755, 132 Fed. 799; *In re Henschel* (Ref., N. Y.), 7 Am. B. R. 207; *Matter of Smith* (D. C., N. Y.), 7 Am. B. R. 213, 112 Fed. 509; *In re Shera* (D. C., N. Y.), 7 Am. B. R. 552, 114 Fed. 207; *In re Feldstein* (D. C., N. Y.), 4 Am. B. R. 321, 103 Fed. 269; *In re Scott* (D. C., Pa.), 1 Am. B. R. 49, 95 Fed. 815; *In re Nachman* (D. C., S. Car.), 8 Am. B. R. 180, 114 Fed. 995; *In re Rosser* (D. C., Mo.), 2 Am. B. R. 755, 96 Fed. 305. *Contra*: *In re Franklin Syndicate* (D. C., N. Y.), 4 Am. B. R. 511, 114 Fed. 205; *Mackel v. Rochester* (C. C. A., 9th Cir.), 4 Am. B. R. 1, 102 Fed. 314; *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 528, 212 Fed. 513.

67. *In re Hess* (D. C., Pa.), 14 Am. B. R. 559, 134 Fed. 109.

68. *Matter of Hooks Smelting Co.* (D. C., Pa.), 15 Am. B. R. 83, 138 Fed. 954, where it was held that an officer of a bankrupt corporation who had been indicted for embezzling its funds may refuse to testify whether he had taken any part of the bankrupt's property upon the ground that his answer might incriminate him.

Trustee protected.—*In the case of Matter of Smith* (D. C., N. Y.), 7 Am. B. R. 213, 112 Fed. 509, it was held that a trustee in bankruptcy cannot be compelled to give testimony which may tend to show that he has misappropriated the funds of the bankrupt estate; *In re Feldstein* (D. C., N. Y.), 4 Am. B. R. 321, 103 Fed. 269.

69. *Matter of Hark Bros.* (D. C., Pa.), 14 Am. B. R. 624, 136 Fed. 986; *In re Hess* (D. C., Pa.), 14 Am. B. R. 559, 134 Fed. 109; *In re Kanter & Cohen* (D. C., N. Y.), 9 Am. B. R. 104, 117 Fed. 356; *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 528, 212 Fed. 518.

70. *Matter of Hark Bros.* (D. C., Pa.), 14 Am. B. R. 624, 136 Fed. 986.

Production of books excused.—*In the case of In re Rosenblatt* (D. C., Pa.), 16 Am. B. R. 306, 143 Fed. 663, it was held that unless the court is satisfied that the bankrupt's claim that the books contain incriminating evidence has some foundation in fact, an order may be issued directing the delivery of the books to the receiver; *In re Hess* (D. C., Pa.), 14 Am. B. R. 559, 134 Fed. 109.

to deposit books of account in the office of the receiver, there to remain in the custody of the bankrupt, for the inspection of the receiver in the administration of the estate, but not for any criminal prosecution, provision being made to give the bankrupt an opportunity to assert his constitutional privilege in case of process for their production, is not an infringement of the bankrupt's constitutional rights.⁷¹ But where the books are in the possession of the trustee, property belonging to him, as the custodian of the bankrupt's property, they may be used against the bankrupt on the trial of an indictment for concealment.⁷² The Supreme Court distinguishes between the compulsory production of books of the bankrupt as evidence against him in a criminal proceeding, and the production by the trustee who succeeds by law to their possession upon the adjudication of the bankrupt. The numerous cases construing the Fifth Amendment will be found valuable precedents.⁷³

k. The use of examination in proceedings in other courts.—Whether the examination may be used in proceedings in other courts is a mooted question. Such examinations may, of course, be used for the purpose of impeachment. If admitted for any other purpose, it should be proven by calling the stenographer or by offering a certified copy of the record.⁷⁴ The examination is so nearly like an *ex parte* inquisition, however, that it will often be ruled out, and, if allowed, should be accompanied with permission to the other party to cross-examine. It seems that the examination of third party witnesses cannot be introduced on the objections to the bankrupt's discharge, though his examination may be,⁷⁵ and testimony taken upon such an examination is inadmissible in

Delivery of books; order protecting witness.—Where a bankrupt declines to deliver his books of account to the receiver on the ground that they contain entries which would tend to criminate him, he must produce the books before the court or referee in order to have the question determined whether they do in fact tend to incriminate him; and if it appears that they do contain incriminating evidence, the court will by order protect the bankrupt from the use of such evidence for any criminal proceeding and at the same time will enable the trustee to make such use of the books as may be necessary to administer the estate. If the books are delivered to such trustee, or to a receiver, the order must provide that the bankrupt be notified of any subpoena or other process to secure possession of the books so that he may have an opportunity to assert his constitutional privilege. In *re Harris* (D. C., N. Y.), 20 Am. B. R. 911, 164 Fed. 292, affd. 221 U. S. 274, 26 Am. B. R. 302, 55 L. Ed. 732.

71. *Matter of Harris*, 221 U. S. 274, 28 Am. B. R. 302, 303, 55 L. Ed. 732, in which Mr. Justice Holmes says: "If the order of the bankrupt, standing alone, infringed his constitutional rights, it might be true that the provisions intended to save them would be inadequate, and that nothing short of statutory immunity would suffice. But no constitutional rights are touched. The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is

entitled to keep. If a trustee had been appointed, the title to the books would have vested in him by the express terms of section 70, and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the misfortunes of bankruptcy if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story. As the bankruptcy court could have enforced title in favor of the trustee, it could enforce possession *ad interim* in favor of the receiver. Section 2 is the properly careful provision to protect him from use of the books in aid of prosecution, the bankrupt got all that he could ask."

72. *Johnson v. United States*, 228 U. S. 67, 30 Am. B. R. 14, 57 L. Ed. 919, distinguishing *Matter of Harris*, *supra*; *Ensign v. Commonwealth of Pa.*, 227 U. S. 592, 30 Am. B. R. 468, 57 L. Ed. 658.

73. For instance *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, and *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819, and the cases there cited.

74. See discussion under this section, subtitle, "Certified Copies as Evidence," *post*; *In re Wiesen Bros.* (D. C., Pa.), 14 Am. B. R. 347, 135 Fed. 442.

Where on the trial of an action to recover a preference, the bankrupt is a witness and testifies, without objection, that the report of his testimony given at a meeting of creditors was correct, and that he confirmed that testimony as being the truth, it is not error to admit in evidence the testimony thus referred to and confirmed. *Radford Grocery Co. v. Haynie* (C. C. A., 5th Cir.), 44 Am. B. R. 300, 261 Fed. 348.

75. *In re Wilcox* (C. C. A., 2d Cir.), 6 Am. B. R. 262, 109 Fed. 628 in effect *rev.* *In re Cooke* (D. C., N. Y.), 5 Am. B. R. 424, 109 Fed. 631. Consult, as to the bankrupt's examination being used, cases cited on pp. 268-271, *ante*.

a proceeding to compel the payment of money alleged to belong to the bankrupt estate,⁷⁶ or in a proceeding to compel the bankrupt to turn over alleged exempt property; and this is so notwithstanding the fact that the witnesses were cross examined.⁷⁷ Upon a proceeding before the referee for the distribution of the fund derived from the sale of bankrupt's assets free from liens, testimony of the former president of the bankrupt company, taken on a general examination under this section, and not directed to any defined issue, is inadmissible in support of a claim.⁷⁸

l. *Refusal to appear and testify; contempt.*—Refusal to appear, under the former statute, made the recusant witness liable in contempt.⁷⁹ The present act does not particularize as to contempts of this character, but a court has power to enforce its commands in the usual way.⁸⁰ Where an order for the examination of a party contains a clause ordering him to produce thereon certain books and papers, and he does not produce them upon the examination, the court may punish him as for contempt.⁸¹ A witness may not be compelled to testify without the payment of his lawful fees.⁸² The application to submit to an examination involves the duty of answering truthfully, and as intelligently and fully as mental equipment will permit, all material questions, and a failure to perform such duty is punishable as a contempt.⁸³

m. *Practice.*—The usual practice upon the examination of a bankrupt has already been considered under § 7-a (9). The practice on third party examinations is not essentially different from that on examinations of the bankrupt at first meetings. The application may either be a formal written petition or be a formal motion. No particular form for the application is prescribed. Grounds for the order, though not absolutely essential, will usually be required.⁸⁴ If the case is pending before a referee, the application should be made to him; he has the same power as the judge to require a designated person to appear and testify.⁸⁵ The court may appoint special masters or

Evidence of partners.—Evidence given by the members of a bankrupt partnership on a general examination before the referee as to the property of the firm is admissible, on an application for a discharge, against each of the members respectively; but the evidence of each member is not admissible against each of the other members. *Matter of Malschick* (D. C., Pa.), 33 Am. B. R. 214, 217 Fed. 492.

76. *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 12 Am. B. R. 653, 131 Fed. 824; *Beckons v. Snyder*, 211 Pa. St. 176, 15 Am. B. R. 112, 60 Atl. 575.

Proof of claim.—Where a trustee takes issue upon the right of a creditor to prove a claim against the estate, testimony taken before the referee upon other issues to which the claimant was in fact not a party, and when he was absent, is inadmissible; the witnesses, including the bankrupt, must be recalled unless the claimant consents to the use of the testimony as it appears in the proceedings. *In re Keller* (D. C., Iowa), 6 Am. B. R. 334, 109 Fed. 118.

77. *Matter of Siskind* (D. C., Penn., Ref.), 32 Am. B. R. 69.

78. *Matter of National Boat & Engine Co.*

(D. C., Me.), 33 Am. B. R. 154, 216 Fed. 208.

79. Act of 1867, § 7.

80. Bankr. Act, §§ 1 (13) (16), 41-b.

81. *Matter of Alper* (D. C., N. Y.), 19 Am. B. R. 612, 162 Fed. 207.

82. *In re Marcus* (D. C., Vt.), 20 Am. B. R. 397, 160 Fed. 229.

83. *In re Fellerman* (D. C., N. Y.), 17 Am. B. R. 785, 149 Fed. 244; *Matter of Lathrop, Haskins & Co.* (D. C., N. Y.), 24 Am. B. R. 911, 184 Fed. 534.

Evasive answers.—Where the referee is convinced that the bankrupt is giving evasive testimony the proper practice is to give him notice that he must answer and to enter of record a formal finding that the answer is an evasion and to require a real answer. *Matter of Blitz* (D. C., Pa.), 36 Am. B. R. 863, 232 Fed. 276.

84. *In re Howard* (D. C., Cal.), 2 Am. B. R. 592, 95 Fed. 415; *In re Earle*, Fed. Cas. 4,244; *In re Mendenhall*, Fed. Cas. 9,424; *In re Lanier*, Fed. Cas. 8,070.

85. Bankr. Act, § 38(2) (4); *Matter of Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51. See also Form No. 28.

commissioners to conduct the examination and report thereon.⁸⁶ The person to be examined is not entitled to notice of the application.⁸⁷ Creditors are entitled to at least ten days' notice by mail of all examinations of the bankrupt.⁸⁸ But if the examination be of a third party notice to the bankrupt or creditors is not required.⁸⁹ It will be frequently advisable, indeed, to have the examination in the absence of the bankrupt and the general creditors.⁹⁰ If the witness is present, he may be ordered to testify; if not present, he should be brought in on a subpoena,⁹¹ and, if books or documents are desired, a subpoena *duces tecum* can be issued; or, it seems, the witness can be brought in on a simple order.⁹² The practice on the taking of testimony is regulated by General Order XXII.⁹³ An attorney in fact, who is not also an attorney at law, will not be allowed to examine witnesses on behalf of creditors.^{93a} The bankrupt is a party in interest and entitled to a copy of the testimony upon the payment of the fee required by the local rule.^{93b}

II. DEPOSITIONS.

a. In general.—Subsection *b* conforms the practice in respect to the taking of depositions in bankruptcy proceedings to that of United States courts generally. It is apparent from subdivision *b* of this section that it was the intention of Congress to confer upon courts of bankruptcy the same jurisdiction and power relating to the taking of depositions as are enjoyed by Federal courts in civil actions.⁹⁴ While a subpoena may, within certain territorial limits, be effective outside the district in issue,⁹⁵ depositions are the usual means of securing testimony at a distance greater than one hundred miles.⁹⁶ It is customary, and will usually be found desirable, to have the deposition taken before the referee of the domicile of the witness. The method of

86. *Matter of Stark* (D. C., N. Y.), 18 Am. B. R. 467, 155 Fed. 694; *In re Herskovits* (D. C., N. Y.), 18 Am. B. R. 247, 152 Fed. 316; *In re Flescher* (D. C., N. Y.), 18 Am. B. R. 194, 151 Fed. 81.

Order for delivery of assets.—Upon an application for an order directing a bankrupt to turn over certain specified assets, the matter may be referred to a special master to take the testimony and report thereon. *In re Herskovits* (D. C., N. Y.), 18 Am. B. R. 247, 152 Fed. 316.

87. *Matter of Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51, 67 C. C. A. 161.

88. Bankr. Act, § 58-a(1).

89. *In re Cobb* (Ref., Mass.), 7 Am. B. R. 104; *Matter of Enigh & Straub* (D. C., N. Y.), 40 Am. B. R. 277, 243 Fed. 968. Compare *In re Macintire*, Fed. Cas. 8,621.

90. *Matter of Adler* (Ref., La.), 21 Am. B. R. 302.

91. As to the territorial effect of a subpoena, see *In re Hemstreet* (D. C., Iowa), 8 Am. B. R. 700, 117 Fed. 568.

92. For form of order, see Form No. 28, and for subpoena, see Form No. 30. It is customary for referees to keep subpoenas signed by the clerk on hand. By analogy to Equity Rule XV, such subpoenas should be served either by the marshal, or by some person designated by the referee. The witness fee is \$1.50 and eight cents a mile one way. Proof of service is made by a return, if service is by the marshal; by affidavit (Form 30), if by a designated person.

93. See also Form No. 29.

93a. *Matter of Looney* (D. C., Tex.), 44 Am. B. R. 542, 262 Fed. 209. See also General Order No. IV.

93b. *Matter of Greenbaum* (D. C., Mich.), 40 Am. B. R. 286, 243 Fed. 965; *Petition of Moulthrop* (C. C. A., 6th Cir.), 41 Am. B. R. 654, 249 Fed. 468.

94. *Matter of Washington Steel & Bolt Co.* (D. C., Wash.), 32 Am. B. R. 153, 210 Fed. 964.

95. See R. S., § 876; *In re Woodward*, Fed. Cas. 18,000.

96. See R. S., §§ 858-879; *Ex parte Flak*, 113 U. S. 713; *In re Hemstreet* (D. C., Iowa), 8 Am. B. R. 700, 117 Fed. 568; *In re Cole* (D. C., Me.), 13 Am. B. R. 300, 133 Fed. 414.

Outside of State.—Under section 41 of the bankrupt act, a person cannot be compelled to leave the State wherein he resides in order that he may be a witness in a hearing before a referee; if the testimony of such witness is desired, it must be procured under the provisions of section 21. *In re Cole* (D. C., Me.), 13 Am. B. R. 300, 133 Fed. 414.

Witness in another district.—Where the witness whose testimony is sought resides in another district, his testimony may be taken by deposition under section 21-b; if the applicant wishes to have him personally appear before a referee in bankruptcy, the application must be made to a court in the district in which the proposed witness resides. *In re Robinson* (D. C., Minn.), 24 Am. B. R. 617, 179 Fed. 724.

Writ of habeas corpus.—Where a person while confined in a State hospital for the criminal insane is adjudicated a bankrupt in another State, a writ of habeas corpus under section 753 of the U. S. Revised Statutes, to produce him for examination, will be quashed, as his deposition may be taken under this section. *In re Thaw* (D. C., Pa.), 22 Am. B. R. 687, 166 Fed. 71.

deposition does not, of course, exclude the more formal method of a commission to take testimony with or without interrogatories, as regulated by Equity Rule LXVII. Cases construing both the Revised Statutes and the Equity Rules in other courts than courts of bankruptcy will be found in point.

b. Notice to adverse party.—Subsection *c* requires, if the evidence is to be taken by deposition, that notice be filed with the referee. If depositions are to be taken in opposition to the allowance of a claim, notice is also to be served upon the claimant, and when in opposition to a discharge, notice should also be served upon the bankrupt. In the absence of any statutory regulation to the contrary it is therefore provided that no notice need be given the opposing party, unless the evidence is to be offered in opposition to a creditor's claim to the bankrupt's discharge.

c. Practice.—The practice on the taking of depositions is controlled by the general law. The practice on depositions in admiralty will be found a safe guide.⁹⁷

III. CERTIFIED COPIES AS EVIDENCE.

a. In general.—Subsection *d* authorizes certified copies of the proceedings before a referee, or the papers when issued by the clerk or referee, to be admitted as evidence with like force and effect as certified copies of the records of the district court. The manifest purpose of this subsection, and also of *e*, *f*, and *g*, is to give to the records of referees when offered in evidence the force of records of the district court proper. It is thought that the clause "when issued by the clerk or referee" refers to the word "papers" and not to prior words of the clause; the clerk often acts in the absence of the district judge. The certificate may be signed either by the clerk or the referee; but the safer practice is to secure the signature of the former, which carries with it the seal of the court. In important districts, the referee usually has a clerk, but the latter is not an officer recognized by the law, and a certificate by him would be unavailing.⁹⁸

b. Order approving bond of trustee.—Under the former law, the register, as soon as the assignee was appointed, by an instrument in writing equivalent to both a deed and a bill of sale, transferred all the assets of the bankrupt to the assignee;⁹⁹ this assignment was recorded in the district court clerk's office,¹⁰⁰ and a certified copy could then be recorded in the record office of the State. Under the present law, there is no such instrument, but a certified copy of the order approving the trustee's bond, when recorded in the proper clerk's or register's office, becomes constructive notice, and operates as would a deed and bill of sale by a bankrupt. It is also made conclusive evidence of the vesting of the title in the trustee. It is wise, therefore, to record such a certified copy in the proper record office where any property of the bankrupt may be situated. Though the trustee is now required to record a certified copy of the adjudication of bankruptcy in each case, its effect as public notice is not fixed. Safe practice will suggest the recording of both instruments. As title passes to the bankrupt's property at the date of the adjudication as of the date the petition is filed,¹⁰¹ the order approving the bond should show these

⁹⁷. See Benedict's Admiralty, and observe the various district court rules. See also R. S., § 863 *et seq.*

⁹⁸. Compare Bankr. Act, § 1(5).

⁹⁹. Act of 1867, § 14; R. S., §§ 5,044, 5,064.

¹⁰⁰. In re Neale, Fed. Cas. 10,066.

¹⁰¹. See Bankr. Act, § 70-a; In re Youngstrom (C. C. A., 8th Cir.), 18 Am. B. R. 572, 575, 153 Fed. 98.

dates, to the end that, when the certified copy is recorded, searchers and title companies may ascertain therefrom the time of devolution of title and what property passed; though this is not so necessary since § 47-c was added by the amendatory act of 1903. This may be accomplished by inserting in Form No. 26, after the word "bankrupt," the words: "who was so adjudged by this court on the day of, 190.., on a petition filed on the day of, 190..."¹⁰²

c. Order on discharge or composition.—Subsection *f* makes a certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made. The fact of these certified copies is thus clearly defined. This subsection was enacted in contemplation of the fact that the bankrupt might thereafter be sued on debts existing at the date of the filing of the petition in bankruptcy; and was intended to relieve him of the necessity of introducing a copy of the entire proceedings, so that he might obtain the benefit of his discharge by the mere production of a certified copy of the order.¹⁰³

d. Confirming composition as evidence of revesting of bankrupt's property.—Subsection *g* makes a certified copy of an order confirming a composition, evidence of the revesting of the title of his property in the bankrupt. When recorded it imparts the same notice that a deed from the trustee to the bankrupt, if recorded, would impart.

102. See form for order approving bond in "Supplementary Forms," *post*.

103. *Kreitlein v. Ferger*, 238 U. S. 31, 34 Am. B. R. 862, 59 L. Ed. 1184, revg. 52 Ind. App. 199, 28 Am. B. R. 908. See also, *Williams v. First Nat. Bank* (Ga. Ct. of App.), 40 Am. B. R. 449, 94 S. E. 73.

Authentication.—A general objection to a certified copy of a discharge in bankruptcy, followed by a specific objection that it has not been shown that a petition in bankruptcy was filed, does not raise the point that the document is not properly or sufficiently authenticated. *Schweigert-Ewald Lumber Co.*

v. Bauman (N. Dak. Sup. Ct.), 43 Am. B. R. 658, 173 N. W. 808.

Burden of proof.—In an action by subsequent indorsers against a prior bankrupt indorser, in which the defendant introduced in evidence a certified copy of the final order of his discharge in bankruptcy, the burden of proof was upon the plaintiffs to show that the debts were not duly scheduled, and that they had no notice of the bankruptcy proceedings. *Manheim v. Loewe* (N. Y. App. Div.), 42 Am. B. R. 606, 185 App. Div. (N. Y.) 601.

SECTION TWENTY-TWO.

REFERENCE OF CASES AFTER ADJUDICATION

§ 22. **Reference of Cases after Adjudication.**—*a* After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Analogous provisions: In U. S.: As to one referee acting in the place of another, Act of 1867, § 4, R. S., § 5007.

In Eng.: None.

In Can.: None.

Cross-references: To the law: Confirmation or rejection of rulings or orders of referees, § 2(10).

Process, pleadings and adjudications, § 18.

Jurisdiction of referees, generally, § 38.

Duties of referees, § 39.

Appointment of trustees, § 44.

And see generally all sections of the law regulating the administration of a bankrupt's estate.

To the General Orders: Duties of referee as to administration of estate, XII.

Approval by referee of appointment of trustee by creditors, XIII.

Notice to trustee of his appointment, XVI.

Hearing exceptions to trustee's report, XVII.

And all other General Orders relating to the administration of the bankrupt's estate.

To the Forms: Order of reference, No. 14.

Order of reference in judge's absence, No. 15.

Oath of office and bond of referee, Nos. 16, 17.

Appointment of trustee by creditors, or by referee, Nos. 22, 23, and other Official Forms having to do with the administration of the bankrupt's estate.

See also Supplementary Forms; Hagar and Alexander's Bankruptcy Forms.

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I. REFERENCES AFTER ADJUDICATION.

a. **Administration without a reference.**—By the terms of this section a bankrupt's estate may be administered under the direct supervision of the judge, and without an order of reference. In such a case, a meeting of the creditors would first be called, the clerk giving the notices and, after the election of the trustee, the case would proceed in the usual way. There is, however, no record of a case where the judge has kept an administration in his own control.

b. **General references.**—These are the references familiar to the bar and the courts. They are accomplished by the entry of an order, substantially in the words of Form 14. The portion of the order which requires the bankrupt to attend before the referee on a day certain follows General Order XII (1), and is in accord with the practice under the former law.¹ Before reference as authorized by this section it is doubtful whether the referee is a court within the definition.²

c. **Limited references.**—These are not the same as the familiar references to the referees as special masters. It is somewhat difficult to conceive of a case where a limited reference would be ordered.

d. **To any referee of the jurisdiction.**—The judge is not bound to refer the case to the referee whose district includes the bankrupt's domicile. Thus, cases often arise where a majority of creditors reside in one referee district and the bankrupt in another. It would then be clearly "for the convenience of parties in interest" to refer the case to the referee where the creditors reside. So, also, when a referee is disqualified,³ as by being the attorney for the bankrupt or by relationship, the reference will be ordered elsewhere "for cause." Likewise, if, in the words of the statute, "the bankrupt does not do business, reside or have his domicile in the district." The only real limitations as to the personnel of the referee then seem to be that he must be (a) a duly appointed referee in bankruptcy, and (b) of the same jurisdiction as the court.⁴ But a district court judge cannot refer a case to a referee appointed for and residing in another district.⁵

II. TRANSFER OF CASES FROM ONE REFEREE TO ANOTHER.

Transfers are often necessary. The reasons prescribed are (a) for the convenience of parties, and (b) for cause. The death or resignation of the referee would be sufficient cause; so would the appointment of another in his stead; so also would be official misconduct on his part.⁶ The power to transfer a case from one referee to another is absolute and discretionary. If exercised, the referee is entitled to a part only of his fees and commissions, the proportion to be fixed by the judge.⁷

1. See General Order IV, Act of 1867. As to power of referee to whom was referred a petition to set aside a composition, as special master, to report the facts, see *Matter of Sonabend* (Ref., Mass.), 18 Am. B. R. 117.

Reference to special master—waiver of irregularity.—An application by a trustee in the first instance to the district judge for a turn-over order against the bankrupt and a reference by the judge to the referee as special commissioner is a mere irregularity in procedure, which may be waived by failing to make an objection until after an appeal to the Circuit Court of

Appeals. *Matter of Nankin* (C. C. A., 2d Cir.), 40 Am. B. R. 469, 246 Fed. 811.

2. In re Back Bay Automobile Co. (D. C. Mass.), 19 Am. B. R. 835, 158 Fed. 679.

3. See "Supplementary Forms" for form of certificate of disqualification.

4. Text quoted with approval in *In re Western Investment Co.* (D. C., Okla.), 21 Am. B. R. 367, 370, 170 Fed. 677.

5. In re Schenectady Engr. & Const. Co. (D. C., N. Y.), 17 Am. B. R. 279, 147 Fed. 863.

6. See *In re Smith*, Fed. Cas. 12,971.

7. Bankr. Act, § 40-b.

SECTION TWENTY-THREE.

JURISDICTION OF UNITED STATES AND STATE COURTS.

§ 23. Jurisdiction of United States and State Courts.—*a* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e,* and section seventy, subdivision e.†*

c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

Analogous provisions: In U. S.: Act of 1867, §§ 1 and 2 (as amended by Act of June 24, 1874), R. S., §§ 4972, 4979; Act of 1841, § 8.

In Eng.: None.

In Can.: None.

Cross-references: To the law: Courts, term defined, § 1(7).

Courts of bankruptcy, term defined, § 1(8).

Jurisdiction of bankruptcy courts, § 2.

Bond on application to take custody of property, § 3-a.

Suits by and against bankrupt; stay; intervention, § 11.

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Actions to recover preferences, § 60-b.

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* Amendments of 1903 in italics.

† Amendment of 1910 added the words "and section seventy, subdivision e."

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JURISDICTION OF UNITED STATES AND STATE COURTS

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I. SCOPE AND GENERAL EFFECT OF SECTION.

a. *In general*.—Ever since *Ex parte Christy*¹ the questions suggested by this section have led to discussions in Congress and confusion in the courts. There is, of course, no analogous section in the English law; the anomalous co-ordinate national and State courts there being impossible. The books are filled with opinions construing the corresponding sections of the law of 1867.² So many cases have already been decided under the law of 1898, and they are often so antagonistic, that the task of the commentator would be hopeless, had not Supreme Court illumined the situation with a few decisions of great importance. Some are, since the amendatory act of 1903, no longer the law; but even these are at least suggestive of other doctrines as to those provisional and summary remedies which are vital to a due and orderly administration in bankruptcy. The section, other than its last subsection, has to do only with suits at law or in equity outside the bankruptcy proceeding proper;³ subsection b only with suits by, not against, the trustee.⁴ Practice under § 23 is, therefore, regulated, not by the General Orders and Forms, but, if in equity, by

1. 3 How. (U. S.) 314.

2. See Cent. Dig., Vol. 6, "Bankruptcy," §§ 410-417; but observe that many of the cases cited are not now in point.

3. See *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1,175.

4. In re *McCallum* (D. C., Pa.), 7 Am. B. R. 596, 113 Fed. 393.

the Equity Rules, if in law, by the State procedure as supplemented or modified by Federal rules applicable to such cases.

b. **Comparative legislation and decisions.**—The history of the development of this section has been elaborately considered by Mr. Justice Gray in *Bardes v. Bank*.⁵ The former law gave concurrent jurisdiction to the circuit and district courts of both law and equity actions, as distinguished from proceedings in bankruptcy *per se*, where the assignee (trustee) was plaintiff or defendant.⁶ It was also in the end settled that the statute meant that, when the holding of a third party against the assignee (trustee) was adverse, a summary remedy within the bankruptcy proceeding was not proper, but resort must be had to a plenary suit.⁷ The law of 1898, as originally enacted, evidenced an intention to transfer all controversies, other than those strictly within the bankruptcy procedure (as, for instance, a contest on a proof of debt), to the State tribunals. Such was the purpose as indicated by the debates in Congress accompanying its passage,⁸ and such seems the literal meaning of the words. The amendatory act of 1903 has, however, re-enacted the doctrine of concurrent jurisdiction, at least as to all suits by the trustee to recover property fraudulently or preferentially transferred or incumbered within the four months' period.⁹

II. JURISDICTION OF DISTRICT COURTS UNDER JUDICIAL CODE.

a. **Circuit courts abolished.**—The circuit courts of the United States are abolished by the judicial code, taking effect January 1, 1912.¹⁰ It is provided

5. 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1,175.

An interesting discussion of the development of this section is found in the case of *In re Hammond* (D. C., Mass.), 3 Am. B. R. 486, 98 Fed. 845.

6. *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Olney v. Tanner*, 10 Fed. 101. So also under the law of 1841. *McLean v. Lafayette Bank*, Fed. Cas. 8,885; *Hallack v. Tritch*, Fed. Cas. 5,956; *Brown v. White*, 16 Fed. 900.

7. *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43; *Moyer v. Dewey*, 103 U. S. 301, 26 L. Ed. 394.

8. See, however, interesting historical matter, pointing to the opposite conclusion, in *In re Murphy* (Ref., Mass.), 3 Am. B. R. 499.

9. Cited with approval in *In re Carlile* (D. C., N. Car.), 29 Am. B. R. 373, 376, 199 Fed. 612.

Jurisdiction of State court.—In the case of *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 658, 50 L. Ed. 1114, Mr. Justice Day said: "The Bankruptcy Act of 1898, in respect to the matters now under consideration, was a radical departure from the Act of 1867, in the evident purpose of Congress to limit the jurisdiction of the United States courts in respect to controversies which did not come simply within the jurisdiction of the federal courts as bankruptcy courts, and to preserve, to a greater extent

than the former act, the jurisdiction of the State courts over actions which were not distinctly matters and proceedings in bankruptcy."

10. The Judicial Code, § 289, provides that: "The circuit courts of the United States, upon the taking effect of this Act shall be and hereby are abolished; and thereupon, on said date, the clerks of said courts shall deliver to the clerks of the district courts of the United States for their respective districts all the journals, dockets, books, files, records, and other books and papers of or belonging to or in any manner connected with said circuit court; and shall also on said date deliver to the clerks of said district courts all moneys from whatever source received, then remaining in the hands or under their control as clerks of said circuit courts, or received by them by virtue of their said offices. The journals, dockets, books, files, records, and other books and papers so delivered to the clerks of the several district courts shall be and remain a part of the official records of said district courts and copies thereof, when certified under the hand and seal of the clerk of the district court, shall be received as evidence equally with the originals thereof, and the clerks of the several district courts shall have the same authority to exercise all the powers and to perform all the duties with respect thereto as the clerks of the several circuit courts had prior to the taking effect of this act."

therein that "All suits and proceedings pending in said circuit courts on the date of the taking effect of this act, whether originally brought therein or certified thereto from the district courts, shall thereupon and thereafter be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun therein, the record thereof being entered in the records of the circuit courts so transferred as above provided."¹¹

b. Powers and duties of circuit courts conferred upon district courts.—The judicial code further provides that "Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such powers and impose such duty upon, the district courts."¹² The evident purpose of this provision is to extend the original jurisdiction formerly possessed and exercised by the circuit courts to the district courts. This purpose is further evidenced by the section of the law, prescribing the jurisdiction of district courts.¹³

c. Effect upon jurisdiction of district courts as to matters in bankruptcy.—The effect of the above quoted provisions of the judicial code is to confer upon district courts the jurisdiction formerly possessed by circuit courts under subsection *a* of section 23. As a result, district courts have jurisdiction of all controversies at law and in equity, as distinct from proceedings in bankruptcy, between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only, as though bankruptcy proceedings had not been instituted and such controversies had been between bankrupts and such adverse claimants. Subsection *a* relates only to controversies between trustees and adverse claimants, relative to property acquired or claimed by the trustees.¹⁴ Notwithstanding the transfer of the jurisdiction of the circuit courts to the district courts, the distinction between controversies arising between trustees and adverse claimants and proceedings in bankruptcy is to be retained; in the former cases the jurisdiction of the district courts as to such controversies remains unaffected by the proceedings in bankruptcy, while in the latter case the jurisdiction of district courts is that of courts of bankruptcy under the bankruptcy act.¹⁵ Suits at law or in equity between a trustee and an adverse claim-

11. Judicial Code, § 290.

12. Judicial Code, § 291.

13. Judicial Code, § 24.

14. *Viquesney v. Allen* (C. C. A., 4th Cir.), 12 Am. B. R. 402, 131 Fed. 21, in which it was held that a circuit court could not entertain a bill in equity, in aid of bankruptcy proceedings against an alleged fraudulent grantor, to set aside a conveyance and for the appointment of a receiver; *Goodier v. Barnes* (C. C., N. Y.), 2 Am. B. R. 328, 94 Fed. 798. As to distinction between "proceedings in bankruptcy" and "controversies at law and in equity," see *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 442, 144 Fed. 245; *Chattanooga Nat. Bank v. Rome Iron Works* (C. C., Ga.), 3 Am. B. R. 582, 99 Fed. 82, holding that the circuit court had jurisdiction in a suit against a trustee to determine the validity of a pledge given by the bankrupt where the pledgee, the plaintiff, resides

in one State and the bankrupt resided in another.

15. *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 82; *Matter of Veles* (D. C., Porto Rico), 39 Am. B. R. 307, 9 P. R. Fed. 404.

Distinction between proceedings in bankruptcy and controversies at law and in equity.—In the case of *Bardes v. Hawarden Bank*, 179 U. S. 524, 531, 4 Am. B. R. 163, 44 L. Ed. 1175, the purpose and intent of subsection (a) of section 23, was under consideration. Mr. Justice Gray speaking for the court said: "The first clause provides that 'The United States Circuit Court shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy,' (this clearly recognizes the essential difference between proceedings in bankruptcy on the one hand and suits at law or in equity on the other). 'Between trustees as such and adverse claimants concerning the property acquired or claimed by

ant, which might have been prosecuted between the bankrupt and such claimant had bankruptcy not intervened, are within the original jurisdiction of district courts, subject to such limitations and conditions as are prescribed by the act.¹⁶ Where such a suit is instituted there must be the same requirements as to diverse citizenship and amount in dispute, as in the case of a similar suit, either by or against the bankrupt, prior to bankruptcy.¹⁷ The section of the code which confers original jurisdiction upon district courts provides that such courts shall have jurisdiction "of all matters and proceedings in bankruptcy." The distinction thus seems to be made between suits at law or in equity between citizens of different States, and such controversies as may arise in bankruptcy.¹⁸ If the suit is one which may be brought by the trustee under subsection *b*, there of course is no limitation as to diversity of citizenship or amount in dispute. If the suit is other than one falling within subsection *b*, the requirements as to diversity of citizenship and amount in controversy must be complied with; that is there must be diverse citizenship as between the bankrupt and the opposing party, and the requisite amount must be involved, or the cause of action must arise under the constitution and laws of the United States.¹⁹ In respect to such suits the trustee may be either plaintiff or defend-

the trustees,' restricting jurisdiction, however, by the further words 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimant.' This clause, while relating to the circuit courts only and not to the district courts of the United States, indicates the intention of Congress, that the ascertainment as between the trustees in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustees, does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of the creditors have been transferred to the trustee in bankruptcy."

16. Judicial Code, § 24.

17. *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1,114; *Hatch v. Curtin* (D. C., Mass.), 16 Am. B. R. 629, 146 Fed. 200, holding that where a circuit court had no jurisdiction of a suit by an adverse claimant against a bankrupt it would not have jurisdiction in a suit against the trustees.

Jurisdiction as to suits at law or in equity.—The district courts have original jurisdiction as follows: First. "Of all suits of a civil nature at common law or in equity, brought by the United States or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or where the matter in controversy exceeds, exclusive of interest and costs the sum or value of \$3,000 and (a) arises under the constitution or laws of the United States or treaties made or which shall be made under their authority, or (b), is between citizens of different states, or (c), is between citizens of a

state and foreign states, citizens or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action, in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made; provided, however, that the foregoing provisions as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in succeeding paragraphs of this section." Judicial Code, § 24, paragraph 1.

18. Judicial Code, § 24, paragraph 19.

19. *Tate v. Brinsler* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878, in which case it was held that in a plenary suit in equity by a trustee in bankruptcy of a partner against another member of the firm, who has not been adjudged a bankrupt, for an accounting relating to an equitable interest in property which had been assigned to the defendant as collateral to secure an indebtedness to the bankrupt, the defendant must be regarded as an adverse claimant, and the suit cannot be maintained against him, unless the bankrupt could have sustained it.

Jurisdiction in controversies at law and in equity.—In the case of *Lovell v. Newman*, 227 U. S. 412, 29 Am. B. R. 482, 57 L. Ed. 577, the court said: "That section 23, subdivisions (a) and (b) gives jurisdiction to the Circuit Courts of the United States of controversies at law or in equity, as distinguished from bankruptcy proceedings, between the trustee and adverse claimants in the same manner and to the same extent as though bankruptcy proceedings had not been instituted. It is also provided that suits by

ant; while like the adverse claimant, he has the option, if such requisites exist, of proceeding either in the State courts or in the district courts.²⁰ A suit against the trustee arising from a transaction not connected with the bankruptcy, and in respect to which the suit could have been brought against the bankrupt if bankruptcy had not intervened, may not be brought in the district court, unless diversity of citizenship and the other essentials to jurisdiction exist.²¹ The diversity of citizenship which gives jurisdiction to the district courts in respect to such suits is that of the bankrupt and not that of the trustee.²² If the suit could have been brought by the bankrupt prior to his bankruptcy, because of diverse citizenship it may be brought in that court by his trustee, although as between the trustee and the defendant there is no such diversity.²³ To summarize the effect of abolishing circuit courts, it may be stated that as to suits, controversies and proceedings falling within the jurisdiction of district courts as courts of bankruptcy, such jurisdiction remains unaffected; as to suits and controversies not falling properly within the jurisdiction conferred expressly by the bankruptcy act the jurisdiction of such courts is limited by the restrictions imposed upon similar suits and controversies, as between the bankrupt and adverse claimants had bankruptcy proceedings not intervened.

d. Removal of suits to district courts.—A suit either by or against a trustee or receiver in bankruptcy cannot be removed from the State court into the district court, unless the amount involved exceeds \$3,000.²⁴ The procedure for the removal of cases from State to district courts is prescribed in chapter 3 of the judicial code. If a suit be transferred from a State court into the district court on the ground of diversity of citizenship, it is placed there as if it had been originally commenced in that court on the ground of jurisdiction, and not as if it had been commenced there by consent of the defendant

the trustee can only be brought in courts where the bankrupt might have brought them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. Later, when Congress enlarged the jurisdiction of the District Court by the Act of February 5, 1903, exception was made in favor of certain suits for the recovery of property in fraud of the Act, but this did not affect suits of the present character. The cases in this court which have considered this section have determined that it was not intended to increase the jurisdiction of the United States Circuit Courts in bankruptcy matters, but rather to limit it to such suits and controversies as are within the jurisdiction given such courts by the acts creating them; that is, controversies in law and in equity with adverse claimants, where the amount involved is in excess of \$2,000, where diverse citizenship exists (the citizenship test being, because of the Bankruptcy Act, that of the bankrupt, and not that of the trustee), or there is a cause of action arising under the constitution or laws of the United States. *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1114, 28 Sup. Ct. Rep. 668."

²⁰ Judicial Code, § 24.

²¹ *Bennette v. Lewis* (Tex. Ct. of App.),

34 Am. B. R. 714, 176 S. W. 660, holding that the provisions of subsection a of § 23, limiting the jurisdiction of the bankruptcy court in contests between third parties and the trustee over property rights to cases of which said court would have had jurisdiction if the suit had been brought against the bankrupt, deprive said court of jurisdiction of a suit by an alleged owner of land purchased for the bankrupt against the trustee to test the validity of the contract, and a temporary injunction may be granted by the State court to restrain the trustee from entering upon plaintiff's land and cutting and removing timber therefrom pending the determination of the validity of the contract.

²² Judicial Code, § 24.

²³ *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1114, in which it was held that the jurisdiction of the circuit court to entertain a suit to recover money alleged to be due the bankrupt at and prior to his adjudication, was not affected by the fact that one of the trustees was a resident of the same State as the bankrupt, it appearing that the bankrupt was a citizen of another State.

²⁴ Judicial Code, § 24, paragraph 1, and § 23.

under this section; the judgment of the Circuit Court of Appeals reversing the judgment of the district court would therefore be final.²⁵

III. JURISDICTION OF DISTRICT COURTS AS TO SUITS BY TRUSTEES.

a. *In general.*—Subsection *b* of § 23 relates to the jurisdiction of district courts as to suits by the trustee respecting the estate which is being administered by him. It is this subsection which has been the cause of the conflict which has arisen among the authorities relative to suits for the recovery of property claimed either by the trustee or a third party. As will be seen hereafter much of the difficulty attending the interpretation and application of this subsection has been removed by the amendment of 1903. Many of the cases which were in point prior to the amendment are now obsolete and it will only be necessary to refer to them when they bear upon the jurisdiction of the district court irrespective of the result of the amendment.

b. *Comparative legislation.*—The district courts have, since the act of 1800,²⁶ always had exclusive jurisdiction of "proceedings in bankruptcy." Under the act of 1867, their jurisdiction, while not exclusive, also extended "to the marshaling of . . . assets,"²⁷ and also to "all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt."²⁸ The same general jurisdiction to "cause the estate of bankrupts to be collected . . . and determine controversies in relation thereto" is conferred on the district court by the present law.²⁹ But with this difference: it is qualified by the words, "except as herein otherwise provided." There being no other grant of ordinary jurisdiction to the district court in the statute, the subsection under discussion seems, and has been authoritatively held, a limitation on that power.³⁰ Hence, the animated controversy over its meaning and the necessity of amendment. The district court is charged with the administration of the law; yet, as the law was before the amendments, it was often impotent and usually forced to order its officers to resort to other tribunals for relief, and this though, from its position as a bankruptcy court, it was naturally more convenient to litigants and more conversant with the law.

c. *Jurisdiction prior to amendment of 1903; case of Barden v. Bank.*—Early in the history of the present statute there was great confusion as to proper forum for suits by or against the trustee. Not until January, 1900, was there an authoritative decision in the leading case of *Barden v. Bank*.³¹ In this case it was held that the district courts as such had no jurisdiction over a suit brought by the trustee to recover property from a stranger to the bankruptcy proceedings, unless by the latter's consent.³² The court said: "Congress, by the second clause of § 23 of the present bankruptcy act, appears to this court to have clearly manifested its intention that controversies, not

25. *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 11 Am. B. R. 563, 48 L. Ed. 287.

26. Note also Act of February 3, 1801.

27. Act of 1867, § 1, R. S., § 4972. *Consult Cook v. Whipple*, 55 N. Y. 160; *Kelly v. Smith*, Fed. Cas. 7,675.

28. Act of 1867, § 2, R. S., § 4,979; *Main v. Glen*, Fed. Cas. 8,973; *In re Sabin*, Fed. Cas. 12,195.

29. Bankr. Act, § 2(7).

30. *Barden v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175.

31. 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1,175.

32. The converse was of course true where the adverse party had consented; for instance, in the cases of *In re Durham* (D. C. Md.), 8 Am. B. R. 115, 114 Fed. 750; *Phillips v. Turner* (C. C. A., 5th Cir.), 8 Am. B. R. 171, 114 Fed. 726.

strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against the strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, unless by consent of the proposed defendant." On the same day this decision was rendered other cases declaring the same doctrine but on different facts were also announced.³³ Later, in *Wall v. Cox*, the doctrine was reaffirmed.³⁴ Subsequently the broad principle was somewhat modified, when applied to other facts. But, prior to the amendments of 1903, the law remained that, provided always the holding of the proposed defendants was adverse, such a suit could be brought only in the State court, or in the circuit court if the usual facts showing Federal jurisdiction appeared.³⁵

d. Purpose of amendments of 1903 and 1910.—The direct results of the case of *Bardes v. Bank* was, as we have seen, to deprive the district court of jurisdiction of a suit brought by the trustee for the recovery of property in the hands of an adverse claimant. It had an appreciable effect upon analogous provisional and summary remedies.³⁶ The amendment of 1903 added to section 70-e a clause conferring upon the court of bankruptcy jurisdiction of a suit to recover property which had been transferred in fraud of creditors, and which any creditor might have avoided.³⁷ Amendments restoring concurrent jurisdiction, at least as to suits to recover property, became imperatively necessary and were very generally demanded. This demand was met by the changes made in this subsection and in §§ 60-b, 67-e, and 70-e by the act of 1903. But the amendatory act failed to include in clause b of this section, suits for the recovery of property under section 70-e. This was evidently a defect. It at once raised a doubt whether a suit to recover property transferred more than four months before the bankruptcy could be instituted other than in a State court.³⁸ The failure to include suits for the recovery of property

33. *Mitchell v. McClure*, 178 U. S. 539, 44 L. Ed. 1182, affg. s. c., 91 Fed. 621; *Hicks v. Knost*, 178 U. S. 541, 44 L. Ed. 1183, affg. 2 Am. B. R. 153, 94 Fed. 625.

34. 181 U. S. 244, 5 Am. B. R. 727, 45 L. Ed. 845; s. c. below, 4 Am. B. R. 659, 101 Fed. 403.

35. Ruling held applicable to circuit court. *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1,114.

36. Compare *In re Ward* (D. C., Mass.), 5 Am. B. R. 215, 104 Fed. 985, and *Mueller v. Nugent* (C. C. A., 6th Cir.), 5 Am. B. R. 176, 105 Fed. 581; s. c., subsequently reversed, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405; *Hull v. Storage House*, 166 N. Y. App. Div. 739, 34 Am. B. R. 375, 152 N. Y. Supp. 363. And see discussion under this section, subtitle "Auxiliary Remedies," *post*.

37. Bankr. Act, § 70-e.

38. See § 70.

The failure to amend sub-section b of this section by the act of 1903 so as to include within the exception suits brought under § 70-e has been commented upon in a number of cases. Nearly all of these cases are in favor of the proposition that the failure to include a reference to § 70-e leaves the jurisdiction of the bankruptcy court in respect to suits to set aside fraudulent conveyances

made prior to the four months' period, the same as it was before the amendatory act. *Gregory v. Atkinson* (D. C., Mo.), 11 Am. B. R. 495, 127 Fed. 183; *Hull v. Burr* (C. C. A., 5th Cir.), 18 Am. B. R. 541, 153 Fed. 945; *Skewis v. Barthell* (D. C., Iowa), 18 Am. B. R. 429, 152 Fed. 534. *Contra: Hurley v. Devlin* (D. C., Kan.), 17 Am. B. R. 793, 149 Fed. 268.

In the case of *In re Hutchinson & Wilmoth* (C. C. A., 6th Cir.), 19 Am. B. R. 313, 158 Fed. 74, the court said: "A court of bankruptcy has no jurisdiction of a suit at law or in equity brought by a trustee to recover property or collect debts, or to set aside transfers of property alleged to be fraudulent, except by consent of the defendant. By the amendment of 1903, such court was given jurisdiction of suits for the recovery of property under §§ 60-b, 67-e and 70-e." The court evidently did not intend by this statement to hold that a suit under § 70-e could be maintained in a bankruptcy court without the consent of the defendant.

The Supreme Court in the case of *Harris v. First National Bank* 216 U. S. 382, 23 Am. B. R. 632, 54 L. Ed. 528, took notice of the fact that in section 23 specifying the cases wherein the Federal courts have jurisdiction, section 70-e is not mentioned. The court,

under section 70-e was obviously an inadvertence. It was at least recognized as such by Congress in enacting the amendment of 1910, which included a reference to suits brought under section 70-e and, as the law now stands, suits for the recovery of property transferred in fraud of creditors prior to the four months' period may be brought in district courts.³⁹ The method adopted by the revisers, of adding the limiting words to the subsection under discussion, makes its phrasing somewhat awkward. There can, however, be no doubt about their intention or the intention of Congress, and little less doubt as to the ultimate construction put on the new words by the courts.^{39a} The amendment to this section has not affected the jurisdiction of a district court to re-examine a transfer to an attorney in contemplation of the filing of a petition against a bankrupt, as conferred by § 60-d.⁴⁰ The amendment to section 47 in 1910 did not confer a new means of collecting ordinary claims due the bankrupt.^{40a}

e. Jurisdiction as to bankruptcy proceedings.—We have already considered under § 2, *ante*, the jurisdiction of a district court as a court of bankruptcy in proceedings generally pertaining to bankruptcy. What it may do and what it may not do in respect to the person and property of the bankrupt subject to its jurisdiction has been considered in a variety of phases under that section. If a proceeding pertains to a matter of administration, not affecting the title to the bankrupt estate, the jurisdiction of the bankruptcy court is exclusive and it may not surrender such jurisdiction to any other court.⁴¹ After the bankruptcy petition has been filed, the property of the bankrupt, not in the possession of adverse claimants, is in the legal custody and under the exclusive control of

however, did not deem it necessary in that case to determine whether an action for the recovery of property transferred prior to the four months' period could be brought in the bankruptcy court without the consent of the defendant. The great weight of authority was doubtless in favor of the proposition that the failure to include a reference to section 70-e deprived the court of jurisdiction in actions brought therein. *Sheppard v. Lincoln* (D. C., N. Y.), 25 Am. B. R. 804, 184 Fed. 182; *Palmer v. Roginsky* (D. C., N. Y.), 23 Am. B. R. 353, 175 Fed. 883.

In the case of *Wood v. Wilbert's Sons Shingle & Lumber Co.* (U. S. Sup. Ct.), 226 U. S. 884, 29 Am. B. R. 220, 57 L. Ed. 264, which arose prior to the amendment of 1910, the Supreme Court sustained the doctrine declared in the case of *Hull v. Burr* (C. C. A., 5th Cir.), 18 Am. B. R. 541, 153 Fed. 945, 83 C. C. A. 61, and held that notwithstanding the amendment of 1903, the consent of the proposed defendant was required in order to confer jurisdiction upon the District Court of an action by the trustee to set aside a conveyance of lands by bankrupt, which conveyance was neither a preference nor made within the four months' period, so as to come within the terms of section 60b or section 67-e.

39. The act of 1903 as introduced and passed by the House of Representatives, contained the words: "And section 70, subsection e," which were inserted in the amendment of 1910. The Senate Judiciary committee, for some reason which does not appear, struck these words out of section 23-b but failed to strike out the corresponding clause conferring jurisdiction which the House bill had added to section 70-e. See *Newcomb v. Blwer* (D. C., So. Dak.), 29 Am. B. R. 15, 199 Fed. 529; *Gooch v. Stone* (C. C. A., 4th Cir.), 44 Am. B. R. 86, 257 Fed. 631.

By the amendment of 1910 to section 23-b, a

trustee in bankruptcy, appointed by the district court of the State in which both he and the bankrupt reside, may, without the consent of the proposed defendant, maintain a suit to avoid a fraudulent transfer under section 70-e in the bankruptcy court of another State where the defendant resides. *Parker v. Sherman* (D. C., Vt.), 28 Am. B. R. 379, 195 Fed. 648.

39a. Consent of defendant.—It is not necessary to the jurisdiction of a bankruptcy court, in an action to recover a preference, which is brought in a court other than one in which the bankrupt might have proceeded, that the consent of the defendant be obtained. *Collett v. Adams* (U. S. Sup. Ct.), 43 Am. B. R. 494, 39 Sup. Ct. 372; *Flanders v. Coleman* (U. S. Sup. Ct.), 43 Am. B. R. 563, 39 Sup. Ct. 472, rev'g. 41 Am. B. R. 727, 249 Fed. 767.

40. In re *Wood & Henderson*, 210 U. S. 246, 20 Am. B. R. 1, 52 L. Ed. 1046.

40a. *Kelley v. Gill* (U. S. Sup. Ct.), 40 Am. B. R. 421, 38 Sup. Ct. 33.

41. *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525; *Matter of Grafton Gas & Elec. Light Co.* (D. C., W. Va.), 42 Am. B. R. 568, 253 Fed. 668.

When jurisdiction exclusive.—The jurisdiction of the bankruptcy court in all "proceedings in bankruptcy" is exclusive of all other courts; and, as such proceedings include all matters of administration, a suit by the surety of bankrupt, a United States contractor, against his trustee in the Circuit Court, the purpose of which is to control the distribution of a fund in the trustee's possession, which admittedly belongs to the bankrupt's estate, and to determine to what extent and in what order the several creditors shall participate therein, cannot be maintained. *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, 28 Am. B. R. 202, 56 L. Ed. 1056.

the court of bankruptcy, and no other court may by order or decree deprive such court of its control over the administration of the bankrupt's estate.⁴³

IV. JURISDICTION AS TO PLENARY SUITS; ADVERSE CLAIMANTS.

a. Suits in respect to bankrupt estate.—Section 23-b requires suits by the trustee in the administration of the bankrupt estate to be brought in those courts where they would have been brought if proceedings in bankruptcy had not been instituted. The suits here referred to are plenary suits to recover assets or enforce rights belonging to the estate, against persons who claim adversely to the bankrupt in respect to such assets or rights. Bankruptcy courts have no jurisdiction to entertain such suits “unless by consent of the proposed defendant” or “except suits for the recovery of property under section 60, subdivision b, and section 67, subdivision c, and section 70, subdivision e.” Bankruptcy courts have jurisdiction of suits for the recovery of property under the sections referred to, without the consent of the proposed defendants.

b. Plenary suits by trustees.—Subsection b requires suits by the trustee to be “brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted.” The district court in the exercise of its jurisdiction as the successor of the circuit court may, under this provision, entertain jurisdiction of a plenary suit by a trustee against an adverse claimant to recover a debt due the estate, if the bankrupt might have proceeded in such court if bankruptcy had not intervened.⁴⁴ A suit for the recovery of a debt does not fall within the exceptions contained in this subsection, and if it could not have been brought by the bankrupt prior to bankruptcy in a district court, it may not be brought therein by his trustee. Thus it will be necessary to show diversity of citizenship, the requisite amount in controversy and the other jurisdictional essentials, to establish the jurisdiction of the court.⁴⁵ In the absence of such jurisdictional essentials the consent of the defendant to the exercise of jurisdiction will not be effectual.⁴⁶

c. Adverse claimants.—(1) IN GENERAL.—The term “adverse claimants” is only used in subsection a of this section, which determines the jurisdiction of circuit courts as to controversies between trustees and adverse claimants.

43. *Lazarus v. Prentice*, 234 U. S. 263, 32 Am. B. R. 559, 58 L. Ed. 1305; *Acme Harvester Co. v. Beekman*, 222 U. S. 300, 27 Am. B. R. 262, 56 L. Ed. 208; *State Bank v. Cox* (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91; *Matter of Diamond's Estate* (C. C. A., 6th Cir.), 44 Am. B. R. 268, 259 Fed. 70.

The jurisdiction of a court of bankruptcy attaches from the time of the filing of the petition in bankruptcy, and the effect of the filing of the petition is to place all of the property of the bankrupt, not in the possession of adverse claimants, in the legal custody and under the exclusive control of the court of bankruptcy. After the petition has been filed no other court can make an order, or decree, which will deprive the court of bankruptcy of its exclusive control over the administration of the bankrupt's property. *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

44. *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1114; *Lovell v. Newman*, 227 U. S. 412, 29 Am. B. R. 482, 57 L. Ed. 577. The jurisdiction of a plenary suit to recover a debt due to the bankrupt estate is unaffected by the amendments of 1903 and 1910. *Harris v. First Nat. Bank*, 216 U. S. 382, 23 Am. B. R. 652, 54 L. Ed. 528; *De Friece v. Bryant* (D. C., Ky.), 37 Am. B. R. 276, 232 Fed. 233.

Suit to recover unpaid stock subscription, when brought against resident stockholders, is not within the jurisdiction of the bankruptcy court. *Kelley v. Gill* (U. S. Sup. Ct.), 40 Am. B. R. 421, 88 Sup. Ct. 38.

45. *De Friece v. Bryant* (D. C., Ky.), 37 Am. B. R. 275, 232 Fed. 233.

46. *Lovell v. Newman*, 227 U. S. 412, 426, 29 Am. B. R. 482, 57 L. Ed. 577; *De Friece v. Bryant* (D. C., Ky.), 37 Am. B. R. 276, 232 Fed. 233.

The term has become of general use, however, in respect to all controversies in bankruptcy as to estates which are being administered in bankruptcy. It will be important to ascertain whether or not a person to be proceeded against is an "adverse claimant" in determining whether a bankruptcy court has jurisdiction of the claim which is the subject of the proceeding. If a bankrupt shall have given a preference within the meaning of § 60 the person receiving it is an adverse claimant; so also if the bankrupt shall have fraudulently transferred any of his property or shall have created an incumbrance thereon in fraud of his creditors, the transferee or incumbrancer is an adverse claimant. This follows as a natural effect of the amendment of subdivision *b* of this section. Suits for the recovery of property so preferentially disposed of or fraudulently transferred are within the jurisdiction of district courts. The question as to whether a person is an adverse claimant also becomes important in determining the jurisdiction of the court to proceed summarily against him. If the person proceeded against is in any sense an adverse claimant he is entitled to have the validity of his claim determined by the court in a plenary suit brought for that purpose.⁴⁶

(2) WHO ARE ADVERSE CLAIMANTS.—(I) *In general*.—It is impossible to declare a general rule which will determine in every case whether a person claiming a right or interest as against the trustee is an adverse claimant. It is not essential that the person should claim to be the absolute owner of property in his possession to constitute him an adverse claimant. For instance, where a bankrupt within the four months' period deposited with sureties on a bail bond given by him upon his arrest in a civil action for deceit a sum of money as security against liability on a bond, it was held that the sureties were adverse claimants.⁴⁷ Cases construing the mean-

46. *Right to determination by plenary suit.*—In the case of *In re Rathman* (C. C. A., 8th Cir.), 23 Am. B. R. 246, 183 Fed. 913, the court said: "The question in this case is whether the controversies between the contestants are controversies at law and in equity, between the trustee and an adverse claimant, as distinguished from controversies arising in proceedings in bankruptcy within the meaning of § 23 of the Bankruptcy Law. If they are the former, the bankruptcy court may not and if they are the latter, it may adjudicate them summarily, without subpoena, summons, pleadings and evidence, according to the principles, rules and practice in actions at law and in equity."

What is controversy in equity.—Where a petition by a trustee in bankruptcy sets out in detail allegations of the concealment and conversion of certain assets by the bankrupts and their agents, the illegal and fraudulent cancellation of certain specified accounts due the bankrupts, the transfer of property to defraud creditors, and illegal preferences, and the answer sets forth in detail all the alleged defenses, a controversy in equity is presented of which the bankruptcy court has jurisdiction. *Jones v. Blair* (C. C. A., 4th Cir.), 39 Am. B. R. 569, 242 Fed. 783.

47. *In re Horgan* (C. C. A., 1st Cir.), 19 Am. B. R. 857, 158 Fed. 774; *In re Horgan* (C. C. A., 1st Cir.), 21 Am. B. R. 31, 164 Fed. 415; *Idler Bldg. Co. v. Reynolds* (C. C. A., 4th Cir.), 40 Am. B. R. 371, 247 Fed. 90, quoting *Collier on Bankruptcy* (10th Ed.) 477.

Sureties on bail bond as adverse claimants.—In the case of *Jacquith v. Rowley*, 188 U. S. 620, 9 Am. B. R. 525, 23 Sup. Ct. 369, 47 L. Ed. 620, the Supreme Court held that a surety in whose hands money was deposited to indemnify him for his liability on a bail bond was an adverse claimant within the meaning of section

23. Mr. Justice Peckam, speaking for the court, said: "The proceeding was a summary application to the court in bankruptcy, to grant an order in a matter, the result of the granting of which would be to immediately take from the surety moneys which had been deposited with him before the commencement of the proceedings in bankruptcy, and thus compel him to come into the bankruptcy court for the litigation of questions as to his right to retain the money claimed by him. . . . The surety into whose hands the money was deposited to indemnify him for his liability on the bail bond was an adverse claimant within the meaning of that section of the act, and could not be proceeded against in the bankruptcy court, unless by his consent as provided for therein. It is not necessary in order to be an adverse claimant that the surety should claim to be the absolute owner of the property in his possession. It is sufficient if, as in the present case, the money was deposited with him to indemnify him for his liability upon the bail bond and that liability had not been determined and satisfied. If the trustee desires to test the question of the right of the surety to retain the money, he must do so in accordance with the provisions of the section of the bankruptcy law above referred to. . . . The surety claims the right to hold the money as against everybody until his liability on the bail bond is satisfied, and that claim is adverse to any claim that the trustee may make upon him for the money which is to indemnify him as stated."

48. *In re Waukesha Water Co.* (D. C., Wis.), 8 Am. B. R. 715, 116 Fed. 1009; *In re Macon Sash & Door Co.* (D. C., Ga.), 7 Am. B. R. 68, 112 Fed. 323, *revd.*, as *Carling v. Seymour Lumber Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 20, 113 Fed. 483; *In re Young* (C. C. A., 8th

ing of the words "adverse claimant" will also be found in the footnote.⁴⁸

(II) *Possession of property controlling element.*—The possession of the property by the person claiming it is a controlling element in determining the adverse character of his claim.⁴⁹ If the possession antedates the bankruptcy and is under a substantial claim of right asserted by the holder, the claimant is entitled to a determination of his claim in a plenary suit.⁵⁰ Where the property, or the proceeds thereof, sought to be recovered by the trustee were in the possession or under the control of a person prior to bankruptcy under some claim of title, his claim thereto is adverse.⁵¹ The converse of

Cir.), 7 Am. B. R. 14, 111 Fed. 158; In re Green (D. C., Pa.), 6 Am. B. R. 270, 108 Fed. 616; Blumberg v. Bryan (C. C. A., 5th Cir.), 6 Am. B. R. 20, 107 Fed. 673; In re Silberhorn (D. C., Ill.), 5 Am. B. R. 568, 105 Fed. 809; In re Scheinbaum (D. C., N. Y.), 5 Am. B. R. 187, 107 Fed. 247; McFarlan Carriage Co. v. Solanas (C. C. A., 5th Cir.), 5 Am. B. R. 442, 106 Fed. 145; In re Adams (D. C., R. I.), 12 Am. B. R. 367, 130 Fed. 788; In re Waterloo Organ Co. (D. C., N. Y.), 9 Am. B. R. 427, 118 Fed. 904; In re Howard (D. C., N. Y.), 10 Am. B. R. 801, 123 Fed. 991; In re Flynn & Co. (D. C., N. Car.), 11 Am. B. R. 318, 126 Fed. 492; Hollingsworth & Whitney Co. v. Petitioner (C. C. A., 1st Cir.), 39 Am. B. R. 678, 242 Fed. 753.

49. In re Rathman (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913; Shea v. Lewis (C. C. A., 8th Cir.), 30 Am. B. R. 436, 206 Fed. 877; Chicago Title & Trust Co. v. National Storage Co. (Ill. Sup. Ct.), 200 Ill. 486, 31 Am. B. R. 310, 103 N. E. 227; Tube City Mining & Milling Co. v. Otterson (Ariz. Sup. Ct.), 16 Ariz. 306, 35 Am. B. R. 500, 146 Pac. 203; Dreyer v. Perkins (C. C. A., 5th Cir.), 33 Am. B. R. 232, 217 Fed. 880; Lillier Bldg. Co. v. Reynolds (C. C. A., 4th Cir.), 40 Am. B. R. 371, 247 Fed. 90; Story & Clark Piano Co. v. Holmes (C. C. A., 7th Cir.), 41 Am. B. R. 668, 251 Fed. 565.

Possession to control.—The jurisdiction of the Bankruptcy Court to determine in a summary proceeding adverse claims, created before the filing of the bankruptcy petition, to liens upon and titles to property claimed by the trustee as that of the bankrupt, is conditioned and limited by its actual possession thereof, the test of summary jurisdiction being that the Bankruptcy Court, through its officers, has taken possession of the *res* as the property of the bankrupt; and where one holds substantial claims, antedating bankruptcy, a plenary suit must be brought by the trustee either in law or in equity, in which the adverse title can be tried and adjudicated. *Shea v. Lewis* (C. C. A., 8th Cir.), 30 Am. B. R. 436, 206 Fed. 877.

Possession by agreement with receiver.—Where by agreement between a person claiming property adversely and a receiver the property is turned over to the receiver to be held by him subject to the final judgment of the "court or courts having jurisdiction" as to the title to the property, the bankruptcy court by reason of its possession has jurisdiction to determine the claim to the property. *Hollingsworth & Whitney Co. v. Petitioner* (C. C. A., 1st Cir.), 39 Am. B. R. 678, 242 Fed. 753.

Mail of bankrupt held by post office.—Where a bankrupt stipulates to permit the post office to hold his mail pending the issuance of a fraud order against him, his receiver being merely a custodian and not vested with title, cannot in a summary proceeding compel the postmaster to turn the mail over to him or give him access thereto. *Matter of Rice* (D. C., N. Y.), 43 Am. B. R. 153, 256 Fed. 853.

50. *Babbitt v. Dutcher*, 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402; *Matter of Goldstein & Moseson* (C. C. A., 7th Cir.), 32 Am. B. R. 802, 216 Fed. 889; *Matter of Midtown Contracting Co.* (C. C. A., 2d Cir.), 39 Am. B. R. 578, 243 Fed. 56; *Eisenberg & Gorenstein v. Weisskopf* (C. C. A., 7th Cir.), 43 Am. B. R. 548, 258 Fed. 498.

Possession under land contract.—A bankruptcy court has no jurisdiction to summarily adjudicate the rights of the trustee and an adverse claimant to lands in possession of the latter under an agreement for a conveyance. *Dreyer v. Perkins* (C. C. A., 5th Cir.), 33 Am. B. R. 232, 217 Fed. 880.

Title under tax certificate.—One claiming title and legal right to possession of land under a certificate of purchase from the State, is entitled to have a controversy with the trustee in bankruptcy as to the claim determined by a plenary suit as distinguished from a summary proceeding. (See Am. B. R. Digest, § 648.) *Peters v. Bowers* (Colo. Sup. Ct.), 37 Am. B. R. 485, 158 Pac. 1101.

51. *Matter of Andre* (C. C. A., 2d Cir.), 18 Am. B. R. 132, 145 Fed. 736; In re Squier (D. C., N. Y.), 21 Am. B. R. 346, 165 Fed. 515; In re Bigcabama Coal Co. (D. C., Ala.), 26 Am. B. R. 910, 190 Fed. 900; *Matter of Midtown Contracting Co.* (C. C. A., 2d Cir.), 39 Am. B. R. 578, 243 Fed. 56; *Gordon-Jones Const. Co. v. Welder* (Tex. Ct. of Civ. App.), 41 Am. B. R. 431, 201 S. W. 681. In the case of In re Mound Mines Co. (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882, 97 C. C. A. 304, the court said: "The law is now settled that the interest of a third party in property claimed to belong to the bankrupt estate, which, at the time of the institution of the proceedings in bankruptcy, is in possession of such third person claiming an interest therein can only be determined by an original suit brought for that purpose."

A mortgagee in possession of chattels, at the time of adjudication, under a chattel mortgage, may not be summarily ordered to surrender the chattels to a trustee in bankruptcy of the mortgagor upon the allegation of the trustee that the mortgagee's interest is merely colorable. In re Tarbox (D. C., Mass.), 26 Am. B. R. 432, 185 Fed. 985.

The decisions of the Supreme Court justify the assertion of the rule that a court of bankruptcy may not summarily determine the merits of issues presented as to property which is in the possession of a claimant and in respect of which the claimant has an actual, substantial, *bona fide* claim. In re Rathman (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, citing *Harris v. First National Bank*, 216 U. S. 382, 23 Am. B. R. 632, 54 L. Ed. 528; *Babbitt v. Dutcher*, 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402; *Hiscock v. Varick Bank of New York*, 206 U. S. 23, 18 Am. B. R. 1, 51 L. Ed. 945; *Frank v. Vollkommer*, 205 U. S. 521, 17 Am.

this proposition that property and the proceeds coming into possession of a party subsequent to the bankruptcy does not make such party an adverse claimant, is also true.⁵²

(III) *Possession by lienor.*—If the property is in the possession of the claimant, his claim is adverse whether he claims to hold an absolute title to such property, or only asserts a lien upon it.⁵³ For instance an alleged lien against a sum on deposit in a bank is an adverse claim,⁵⁴ and when moneys are paid to a judgment creditor under an execution against the bankrupt's property levied prior to the filing of the petition against the bankrupt, no injunction, process or notice having issued from a bankruptcy court against such creditor or the sheriff, such creditor is an adverse claimant.⁵⁵

(IV) *Possession by third person in behalf of bankrupt.*—Where a bankrupt, after the filing of the bankruptcy petition, sells and delivers to a third

B. R. 806, 51 L. Ed. 911; *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1114; *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413; *Jacquith v. Rowley*, 188 U. S. 620, 9 Am. B. R. 623, 23 Sup. Ct. 809, 47 L. Ed. 620; *Bardes v. Hawarden Bank*, 178 U. S. 524, 4 Am. B. R. 103, 44 L. Ed. 1176; *Haffenberg v. Chicago Title & Trust Co.* (C. C. A., 7th Cir.), 27 Am. B. R. 708, 192 Fed. 874.

Salary illegally paid to officer of corporation.—*Matter of Franklin Brewing Co.* (C. C. A., 2d Cir.), 45 Am. B. R. 7, 263 Fed. 512.

52. *Test of jurisdiction to proceed in a summary manner.*—The test of jurisdiction to proceed in a summary way, or by summary proceedings, to determine controversies in regard to real or personal property, is possession of such property in or by the bankrupt at the time of the filing of the petition and adjudication, in circumstances which show that the bankrupt was the true owner, and that he held as owner; and jurisdiction to so proceed is not defeated by a claim of ownership made by a third person, asserted for the first time after the petition is filed, even though the ground work for such a claim has been prepared beforehand. *In re Logan* (D. C., N. Y.), 28 Am. B. R. 543, 196 Fed. 678.

53. *Claim of lien on property.*—In the case of *First National Bank v. Title and Trust Co.*, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102, the Supreme Court said that the distinction between controversies at law and in equity and controversies arising in a proceeding in bankruptcy "existed under the bankruptcy law, and the then decisions in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in possession of the assignee in bankruptcy by summary proceedings, whether absolute title or only a lien was asserted. The present act was plainly framed in recognition of the principle of these cases." Citing *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481; *In re Bonesteel*, 17 Blatch. 175; *Knight v. Cheney*, 14 Fed. 760; *In re Ballou*, 4 Ben. 135; *In re Marter*, 16 Fed. Cas. 857.

The proposition that a holder of a substantial claim to a lien created by a bankrupt upon his property is as much an adverse claimant as a claimant of absolute title is sustained by the following authorities: *Frank v. Vollkommer*, 205 U. S. 521, 17 Am. B. R. 806, 51 L. Ed. 911; *Harris v. First National Bank*, 216 U. S. 382, 23 Am. B. R. 632, 54 L. Ed. 528; *Jacquith v. Rowley*, 188 U. S. 620, 9 Am. B. R. 625, 23 Sup. Ct. 369, 47 L. Ed. 620; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 684, 77 C. C. A. 668; *Carling v. Seymour Lumber Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; *Skillton v. Codington*, 185 N. Y. 80, 15 Am. B. R. 810, 77 N. E. 790; *In re Silberhorn* (D. C., Ill.), 5 Am. B. R. 568, 105 Fed. 899; *Matter of Cotton* (D. C., Cal.), 31 Am. B. R. 568, 209 Fed. 124.

Possession under distress warrant.—Whether a distress warrant secured in Illinois within four months of bankruptcy is one of the "other liens obtained through legal proceedings" which are rendered invalid by section 67-f of the Bankruptcy Act constitutes a substantial controversy. Hence the right to the possession of property taken under such a warrant cannot be determined in a summary proceeding, although the facts are undisputed. *Matter of Luken* (C. C. A., 7th Cir.), 32 Am. B. R. 805, 216 Fed. 890.

54. *Matter of Radley Construction Co.* (D. C., N. Y.), 32 Am. B. R. 514, 212 Fed. 462; *First Nat. Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051; *In re Farrell* (C. C. A.), 29 Am. B. R. 10, 201 Fed. 338.

Possession by bank.—Where it appears that a bank holds money belonging to a bankrupt received prior to the adjudication, and claims a set-off upon the theory that the bankrupt converted property belonging to the bank, a case of an adverse claim is presented which must be prosecuted by a plenary suit and not by a summary order. *In re Boston-Cerrillos Mines Corporation* (D. C., N. Mex.), 30 Am. B. R. 739, 206 Fed. 794.

55. *Stone Ordean Wells Co. v. Mark* (C. C. A., 8th Cir.), 35 Am. B. R. 663, 227 Fed. 976.

person property which was in bankrupt's possession, through his bailee, when bankruptcy intervened, the district court has jurisdiction in a summary proceeding to decree the restoration to the trustee of such property or its proceeds.⁵⁶ If the person in possession holds the property as a bailee, his claim as to the property must be in behalf of the bankrupt and he is therefore not an adverse claimant.⁵⁷ The possession of property of a bankrupt corporation by its officers and agents will be deemed the possession of the bankrupt, and they are not adverse claimants.⁵⁸ And likewise where an individual is insolvent and undertakes to form a corporation with near relatives as incorporators, to which he conveys his property with a view to withdrawing such property from the reach of creditors, such corporation should not be held to be an adverse claimant.^{58a} Where the possession is that a third person who asserts no claim to the property but holds it subject to the claims of the parties interested therein, including the bankrupt, such claims are adverse.⁵⁹

(V) *Possession by wife of bankrupt.*—If a wife of a bankrupt holds property merely as his agent, and not under a *bona fide* claim of ownership, her possession is that of the bankrupt, and she is not an adverse claimant; but if her possession and claim of ownership are in good faith, her claim of title must be adjudicated in a plenary suit.⁶⁰ A wife, in possession of and beneficiary under an insurance policy on the life of her husband, having a cash surrender value, and reserving to the husband the right to change the beneficiary, is an adverse claimant.⁶¹

(VI) *Possession of assignee or receiver.*—If the property claimed is in the hands of a third party; who claims under an assignment of such property

56. In re Denson (D. C., Ala.), 28 Am. B. R. 158, 195 Fed. 854.

57. In re Muncie Pulp Co. (C. C. A., 2d Cir.), 14 Am. B. R. 70, 139 Fed. 546, 71 C. C. A. 580; Johnston v. Spencer (C. C. A., 8th Cir.), 27 Am. B. R. 800, 195 Fed. 215.

58. See also In re Royce Dry Goods Co. (D. C., Mo.), 13 Am. B. R. 257, 133 Fed. 100; In re Muncie Pulp Co. (C. C. A., 2d Cir.), 14 Am. B. R. 70, 139 Fed. 546; In re Holbrook Shoe & Leather Co. (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973; In re Alphin & Lake Cotton Co. (D. C., Ark.), 12 Am. B. R. 653, 131 Fed. 824; In re White (C. C. A., 7th Cir.), 24 Am. B. R. 197, 177 Fed. 194; Matter of Marquette, Inc. (C. C. A., 2d Cir.), 42 Am. B. R. 555, 254 Fed. 419.

Possession by officers of corporation.—In the case of In re Kornit Mfg. Co. (D. C., N. J.), 27 Am. B. R. 244, 258, 192 Fed. 302, the court said: "The bankrupt corporation was the conception of the respondents and they exercised a complete unbroken dominancy over it from its birth to the filing of the petition in bankruptcy. This dominancy was as complete before as after they became its officers, and what was done by the incorporators and first board of directors is as much their acts as what was done by the respondents after they became the executive officers and numerically controlled the board of directors. These incorporators and first board of directors were but the tools of the respondents. On the paper they were free and independent, but in fact only dummies responsive to the beck and call of respondents. In such circumstances respondents, with respect to property obtained by them through the action of such dummy directors, were not adverse claimants. They were its mind, hands and pockets, and will be treated in the bankruptcy court as if they were the bankrupt, and amenable to its jurisdiction with reference to such property."

58a. Liller Bldg. Co. v. Reynolds (C. C. A., 4th Cir.), 40 Am. B. R. 371, 247 Fed. 90.

59. Matter of Interocean Transp. Co. (D. C., N. Y.), 36 Am. B. R. 651, 232 Fed. 408, citing as directly in point First National Bank v. Chicago Title & Trust Co., 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051, in which case the bankrupt had seed in storage with a warehouseman, whose receipts he had pledged; the warehouseman had possession but no claim on the seeds; it was held that the district court had no jurisdiction to determine the validity of the pledgees' claims. Compare Atherton v. Beaman (D. C., Mass.), 42 Am. B. R. 631, 256 Fed. 871.

60. Matter of Shea (D. C., Ky.), 31 Am. B. R. 697, 211 Fed. 865, holding that where a wife, more than a year prior to her husband's bankruptcy, purchased stock in her own name with moneys saved from an allowance given her by her husband for expenses, she may have a *bona fide* claim to such stock as against the trustee in bankruptcy of her husband.

Partition action.—A Federal District Court has no jurisdiction of an action by a trustee in bankruptcy against the bankrupt's wife for partition and cannot authorize the trustee to sell the wife's undivided interest. The most it can do is to order the sale of the undivided interest of the bankrupt. Harlan v. American Trust Co. (Ind. App. Ct.), 41 Am. B. R. 401, 119 N. E. 20.

61. Matter of Flanigan (D. C., Pa.), 35 Am. B. R. 807, 228 Fed. 339.

Possession in wife's name.—Where, by the uncontradicted testimony a motor truck claimed by the wife of a bankrupt is in a garage in her name, she is entitled to retain such possession until it is determined in a plenary action that she is not entitled thereto. Her claim is not merely colorable. Matter of Markel (D. C., Cal.), 35 Am. B. R. 318, 228 Fed. 928.

from the bankrupt, he is an adverse claimant.⁶² Where a bankrupt has, prior to bankruptcy, made an assignment for the benefit of creditors, the assignee is an agent of the bankrupt and is therefore not an adverse claimant; the possession by the assignee, pending the determination of the jurisdiction of the bankruptcy court, will be deemed to be that of the bankrupt.⁶³ The assignee may only be regarded as an adverse claimant as to payments or dispositions of property made by him in good faith, before the institution of bankruptcy proceedings, and as to liens in his favor which accrued prior to that time.⁶⁴ If the assignee has sold property assigned to him prior to the bankruptcy of the assignor the purchaser is an adverse claimant.⁶⁵ And while the assignee may be compelled to account in bankruptcy court for the property of the bankrupt remaining in his possession, he is an adverse claimant to the extent of his claim for disbursements and expenditures lawfully made by him prior to bankruptcy.⁶⁶ The possession by a temporary receiver in bankruptcy of proceeds of the sale of mortgaged chattels, pending the determination as to the title to such chattels, does not deprive the claim of its character as adverse.⁶⁷ While the possession of a State court receiver differs in some respects from that of an assignee for the benefit of creditors, still, when bankruptcy intervenes, the receiver is not holding in his own right, but merely in an official capacity, and not adversely to the bankrupt or his estate, and so a court of bankruptcy has the power to issue an order in summary proceedings directing the receiver to turn the property over to the trustee in bankruptcy,^{67a} unless the receiver's right to possession is conditioned upon some other ground than that of insolvency.^{67b} A receiver appointed by a State court in an action brought more than four months prior to bankruptcy, to set aside a fraudulent conveyance may not be compelled to submit his claim in the bankruptcy proceedings; his claim must be treated as adverse.⁶⁸

(VII) *Possession under attachment.*—Where the claim of possession as against the trustee's right of possession is based solely on an attachment lien,

62. *Copeland v. Martin* (C. C. A., 5th Cir.), 25 Am. B. R. 268, 182 Fed. 805, in which case it was held that a person, who has no claim against the bankrupt's estate and asks nothing from the bankruptcy court but claims, under an assignment from the bankrupt, the right and title to wages in the hands of a third party, earned by the bankrupt prior to adjudication, is an adverse claimant; *Matter of McCrum* (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207.

63. *Bryan v. Bernheimer*, 5 Am. B. R. 623, 181 U. S. 188; *In re Carver* (D. C., N. C.), 7 Am. B. R. 539, 113 Fed. 138; *In re Thompson* (C. C. A., 2d Cir.), 11 Am. B. R. 719, 128 Fed. 576; *Matter of McCrum* (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207; *Matter of Colwell Lead Co.* (C. C. A., 7th Cir.), 39 Am. B. R. 224, 240 Fed. 400; *Matter of Reiswig* (D. C., N. Dak.), 42 Am. B. R. 161, 253 Fed. 390; *Galbraith v. Valley* (C. C. A., 8th Cir.), 44 Am. B. R. 523, 261 Fed. 670.

64. *Matter of Karp* (D. C., Mass.), 36 Am. B. R. 414, 228 Fed. 708, citing *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. Ed. 1165; *In re Chase* (C. C. A., 1st Cir.), 10 Am. B. R. 677, 124 Fed. 753; *In re Thompson* (C. C. A., 2d Cir.), 11 Am. B. R. 719, 128 Fed. 575.

65. *In re Findlay Bros.* (D. C., N. Y.), 4 Am. B. R. 745, 104 Fed. 675.

66. *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413; *In re Manning* (D. C., S. Car.), 10 Am. B. R. 497, 123 Fed. 180. Compare *Matter of Reiswig* (D. C., N. Dak.), 42 Am. B. R. 161, 253 Fed. 390; *Galbraith v. Valley* (C. C. A., 8th Cir.), 44 Am. B. R. 523, 261 Fed. 670.

67. *Frank v. Vollkommer*, 205 U. S. 521, 17 Am. B. R. 806, 51 L. Ed. 911. Compare *In re Briskman* (D. C., N. Y.), 13 Am. B. R. 57, 132 Fed. 201, holding that where the property was taken from the possession of the bankrupt after the appointment of a receiver in bankruptcy

the claim of the replevying creditor is not adverse.

67a. *Matter of Diamond's Estate* (C. C. A., 6th Cir.), 44 Am. B. R. 268, 259 Fed. 70.

Summary proceeding to take possession of property in the hands of assignees and receivers.—In the case of *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, it was held that the bankruptcy court has jurisdiction by summary proceeding to take from assignees and receivers for general creditors in insolvency or winding up proceedings, appointed after the four months prior to the filing of petitions in bankruptcy, from officers of courts attaching or replevying within that time, and from others holding for the bankrupt, property claimed to be that of the bankrupt, and then by virtue of the possession thus taken to determine adverse claims to it by a like proceeding. But the bankruptcy court may not take this possession from a receiver appointed by another court in a suit to enforce a lien antedating the filing of the petition in bankruptcy, or thereby draw to itself jurisdiction summarily to determine the validity of such a lien.

Effect of order directing receiver of State court to turn over property.—Where a bankruptcy court has as a matter of comity required the trustee to apply to the State court for an order directing its receiver to turn over property to him, and the order has been granted as asked, but has been rendered ineffectual by an appeal, the bankruptcy court may order the delivery of the property, and is not bound to await the determination of the appeal. *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

67b. *Martin v. Oliver* (C. C. A., 8th Cir.), 43 Am. B. R. 739, 260 Fed. 89.

68. *In re United Wireless Tel. Co.* (D. C., N. J.), 27 Am. B. R. 1, 192 Fed. 238.

which is annulled by the adjudication in bankruptcy, the person or officer in possession holds as bailee for the trustee; he is not an adverse claimant and his mere refusal to surrender the property does not make him such.⁶⁹ This principle only applies where the lien by attachment is nullified by the adjudication of the debtor as a bankrupt. If the attaching officer is in receipt of the proceeds of the sale of the property attached, and has turned the same over to the attaching creditor, such creditor is an adverse claimant.⁷⁰ If the proceeds of the sale remain in the hands of the officer at the time of the adjudication in bankruptcy, such proceeds become the property of the trustee and the officer or the creditor represented by him are not adverse claimants.⁷¹

(VIII) *Surrender of possession.*—If the court, through its referee, voluntarily delivers property to a claimant, the possession of the court is lost, and the claim of the claimant becomes adverse, precluding the court from summarily determining the claimant's right to the property without his consent.⁷² But if the surrender of the property is unauthorized, the court's jurisdiction is not affected and it may determine all controversies, either by plenary suit or summary action as though such surrender had not been made.⁷³

(3) *INQUIRY AS TO BASIS OF CLAIM.*—(I) *In general.*—The determination of the jurisdiction of the bankruptcy court to summarily dispose of the question of title to the property to which a claim is asserted against that of the bankrupt, will depend upon the nature and validity of such claim. If the property belongs unquestionably to the bankrupt's estate the court may summarily take possession of it. If there is substantial basis for the adverse claim and such claim is not merely colorable, the claimant must be permitted to adjudicate his claim in a plenary suit. It becomes essential for the court to determine as to the substantiality of the adverse claim, prior to assuming summary possession of the property, and for this reason the court may make inquiry into the basis of such claim. If the claimant pleads an adverse claim it may not be summarily determined by the court, without an inquiry as to the basis of the claim; some investigation must be made with a view to ascertaining whether the claim is based on a substantial foundation.⁷⁴

⁶⁹ *Staunton v. Wooden* (C. C. A., 9th Cir.), 24 Am. B. R. 736, 179 Fed. 61; *In re Walsh Bros.* (D. C., Iowa), 20 Am. B. R. 472, 159 Fed. 560; *In re Grassler* (C. C. A., 9th Cir.), 18 Am. B. R. 694, 154 Fed. 473, 83 C. C. A., 304; *In re Breslauer* (D. C., N. Y.), 10 Am. B. R. 33, 121 Fed. 910; *Matter of Ward* (D. C., Cal.), 39 Am. B. R. 506, 245 Fed. 999.

⁷⁰ *In re Knickerbocker* (D. C., N. Y.), 10 Am. B. R. 381, 121 Fed. 1004.

⁷¹ *Clark v. Larremore*, 188 U. S. 486, 9 Am. B. R. 476; *In re Cone* (Ref., Cal.), 18 Am. B. R. 786; *In re Grassler* (C. C. A., 9th Cir.), 18 Am. B. R. 694, 154 Fed. 473, 83 C. C. A. 304.

⁷² *Hinds v. Moore* (C. C. A., 6th Cir.), 14 Am. B. R. 1, 134 Fed. 221.

⁷³ *Whitney v. Wenman*, 196 U. S. 539, 14 Am. B. R. 45, 49 L. Ed. 1157; *In re Schermerhorn* (C. C. A., 8th Cir.), 16 Am. B. R. 507, 145 Fed. 341.

Unauthorized sale by trustee.—Where a trustee sells property at private sale, without appraisal, and without the order of the

court, the purchaser acquires no title. In such a case, the court of bankruptcy has jurisdiction of proceedings, both in the nature of summary and plenary actions, to try title to property of the bankrupt, once in the possession of the court, and sold by the trustee without authority. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 815.

⁷⁴ In the case of *In re Pickens* (D. C., Ga.), 26 Am. B. R. 6, 84 Fed. 954, the court cited the case of *In re Tune* (D. C., Ga.), 8 Am. B. R. 286, 115 Fed. 906, where it was held that summary jurisdiction is ousted if the determination of the validity of an adverse claim involves a decision of matters of fact and the weighing of conflicting evidence which, when presented, leave room for fair doubt as to the invalidity of the claim, since such claim is not merely colorable.

Summary order without investigation unwarranted.—In the case of *In re Gill* (C. C. A., 8th Cir.), 26 Am. B. R. 883, 190 Fed. 706, it appeared that a bank, in response to an

(II) *Jurisdiction of court.*—The bankruptcy court has jurisdiction to inquire into the facts for the purpose of determining whether any basis exists for the adverse claim of title,⁷⁵ and according to the conclusion reached the

order of a referee to show cause why it should not pay over to the trustee an amount deposited with the bank by the bankrupt, three days before the filing of the petition in bankruptcy, stated that the money was deposited without solicitation or agreement, in a long standing general deposit account which the bankrupt had with the bank subject to check, and that at the time of the deposit the bankrupt owed the bank on an overdraft and on past-due notes, an amount nearly equal to the amount deposited. It was held that the bank had stated an adverse claim which constituted a good plea to the jurisdiction of the court, and that an order overruling such plea in the absence of a denial of any of its allegations and without investigation as to whether the claim pleaded is substantial, was unwarranted.

75. *Matter of Yorkville Coal Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 633, 211 Fed. 619; *Matter of Goldstein & Moseson* (C. C. A., 7th Cir.), 32 Am. B. R. 802, 216 Fed. 887; *Matter of Radley Construction Co.* (D. C., N. Y.), 32 Am. B. R. 514, 212 Fed. 462; *Matter of Kramer and Muchnick* (D. C. Pa.), 33 Am. B. R. 223, 218 Fed. 138; *Matter of Seger Bros. Co.* (D. C., Mich.), 39 Am. B. R. 660, 243 Fed. 459; *Gray v. Gudger* (C. C. A., 5th Cir.), 44 Am. B. R. 228, 260 Fed. 931.

Inquiry as to basis of claim.—The bankruptcy court has power to ascertain if an adverse claim be made by a third person in possession of property of the bankrupt, whether such claim is in fact well founded, or is fictitious or colorable. In *re Norris* (D. C., N. Y.), 24 Am. B. R. 444, 177 Fed. 598. In the case of *In re Rathman* (C. C. A., 5th Cir.), 25 Am. B. R. 246, 183 Fed. 913, the court held that the bankruptcy court may proceed by order to show cause and ascertain whether the claimant had the actual possession of the property in controversy, and whether the claimant had a substantial, or only a frivolous and baseless adverse claim. In the case of *In re Tarbox* (D. C., Mass.), 26 Am. B. R. 432, 185 Fed. 985, the court held that a referee has jurisdiction under a summary petition to inquire and decide whether or not the claim under which property is held adversely to the trustee is merely colorable; but unless he can find it merely colorable he has no jurisdiction to proceed further; he cannot hear and determine its merits under a summary petition if there is a real controversy as to the merits; In *re Hayden* (D. C., Mass.), 22 Am. B. R. 764, 172 Fed. 623; In *re Ellis Bros. Printing Co.* (D. C., N. Y.), 19 Am. B. R. 472, 156 Fed. 430, holding that the mere assertion of an adverse claim of title will not preclude the bankruptcy court from exercising its jurisdiction to proceed summarily; *Linstroth Wagon Co. v. Ballew* (C. C. A., 5th Cir.), 18 Am. B. R. 23, 32, 149 Fed. 960, in which the court said: "The district court has

power to ascertain whether the claim asserted is an adverse claim, within the meaning of the provision of the bankruptcy law, existing at the time the petition was filed, and in accordance to the conclusion reached, that court will retain jurisdiction to decline to adjudicate the merits;" *Mueller v. Nugent*, 184 U. S. 17, 7 Am. B. R. 224, 46 L. Ed. 405, in which the Supreme Court held that the district court has power to ascertain whether in the particular instance the claim asserted is an adverse claim existing at the time the petition was filed; *Louisville Trust Co. v. Cominger*, 184 U. S. 26, 7 Am. B. R. 421, 46 L. Ed. 413. Where property, alleged to be part of the bankrupt's estate, is found in the possession of third parties who assert right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court has power to ascertain whether any basis for such claim actually existed at the time of the filing of the petition. The court is bound to enter upon that inquiry, and, in doing so, acts within its jurisdiction, while its conclusion may be that an adverse claim, not merely colorable, but real, even though fraudulent and voidable, exists in fact, so that it must decline to finally adjudicate on the merits. If it errs in its ruling either way, its action is subject to review. *Matter of Friedman* (C. C. A., 2d Cir.), 20 Am. B. R. 37, 161 Fed. 290; *Johnston v. Spencer* (C. C. A., 8th Cir.), 27 Am. B. R. 800, 195 Fed. 219.

76. *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413; In *re Davis* (D. C., Tex.), 9 Am. B. R. 670, 119 Fed. 960; In *re Scherber* (D. C., Mass.), 12 Am. B. R. 616, 131 Fed. 121; *Matter of Andre* (C. C. A., 2d Cir.), 13 Am. B. R. 182, 68 C. C. A. 374, 135 Fed. 736; In *re New York Wheel Works* (D. C., N. Y.), 18 Am. B. R. 61, 132 Fed. 203; In *re Baird* (D. C., Pa.), 8 Am. B. R. 649, 116 Fed. 765.

77. *Matter of Kramer & Muchnick* (D. C., Pa.), 33 Am. B. R. 223, 218 Fed. 138; In *re Tarbox* (D. C., Mass.), 26 Am. B. R. 432, 185 Fed. 985.

77a. *Matter of Dalley and Irvin* (C. C. A., 2d Cir.), 42 Am. B. R. 731, 255 Fed. 629.

Determining character of claim.—The bankruptcy court has jurisdiction under an order to show cause to investigate and determine whether or not it had at any time actual possession of the property involved in the order, and whether those asserting liens or title thereto have a substantial, or only a frivolous and baseless, adverse claim; but where no such possession is found, and the claim asserted is actual and substantial, as distinguished from one merely colorable and fictitious, it may proceed no further, but should decline to adjudicate on the merits without consent. *Shea v. Lewis* (C. C. A., 8th Cir.), 30 Am. B. R. 436, 206 Fed. 877.

The term "colorable," as used with reference to adverse claims, means merely that if a claimant sets up as facts, and not as conclusions of law, matters which if true, would constitute a statement of an adverse claim, then the claim would be adverse, and not colorable, and not within the jurisdiction of the referee. In *re Blum* (C. C. A., 7th Cir.), 20 Am. B. R. 332, 202 Fed. 883.

Colorable claim.—A claim is open to the objection of being colorable when it is merely asserted; there being no foundation upon which it rests. A colorable claim is one which is a mere pretext and without reality. *Matter of McCrum* (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207.

court will retain jurisdiction or decline to adjudicate the merits.⁷⁶ The inquiry may be made by a referee, and he has jurisdiction to determine upon conflicting testimony whether property claimed by the trustee is in the possession of an adverse claimant under claim of title.⁷⁷

(III) *Test to be applied.*—Whether a claim is real or colorable does not depend upon whether it turns upon a question of fact or question of law. If a claim rests upon a mere pretense of fact or law it is colorable but it is not colorable if it is put forth in good faith and is real.^{77a} The test is, that where a party in possession sets out in his answer facts which, if true, would constitute an adverse title, the court may not in a summary proceeding, and against his protest, dispose of his rights in the property.⁷⁸ Whether a bankruptcy court has jurisdiction to proceed in a summary manner depends upon the facts disclosed by the record from time to time, and while it may have jurisdiction to institute such summary proceedings, it may be ousted therefrom by a presentation of facts showing that the title to such property is claimed by another.^{78a} A claim is adverse if the evidence offered as a basis is sufficient, if uncontroverted, to establish the validity of the claim.⁷⁹

(IV) *Effect of inquiry.*—If it be ascertained by proper inquiry that a real adverse claim existed—no matter how ill-supported it might appear to be—the court cannot summarily decide as to the validity of the claim.⁸⁰ If it is decided that the claim is without actual merit or legal foundation, the court may order the surrender of the property.⁸¹ If the property claimed is real property in the possession of the trustee, the court may summarily order its surrender, and in a proper case where the record title is in a third person may order a deed to be executed to the trustee.⁸²

d. When consent of adverse claimant required.—(1) IN GENERAL.—Subsection b of this section confines the trustee in maintaining suits in respect to the estate of the bankrupt to those courts where the bankrupt himself might have appeared to prosecute them if proceedings in bankruptcy had not been instituted against him, unless the proposed defendant shall consent to the bringing of such suits in the bankruptcy court, "except suits for the recovery of property" under § 60-b, § 67-e, or § 70-e. The result is that if the suit is not one for the recovery of property either preferentially or fraudulently transferred or incumbered, it must be brought in a court other than

76. In re Blum (C. C. A., 7th Cir.), 29 Am. B. R. 332, 202 Fed. 883. See Matter of Mansen (Ref., Mass.), 36 Am. B. R. 57.

The determination as to whether an adverse claim is real or colorable does not depend upon whether it turns upon a question of fact or a question of law. Matter of Midtown Contracting Co. (C. C. A., 2d Cir.), 39 Am. B. R. 573, 245 Fed. 56.

78a. Morgan v. Chicago & N. W. Ry. Co. (Wis. Sup. Ct.), 41 Am. B. R. 422, 106 N. W. 777.

79. Matter of Kramer & Muchnick (D. C., Pa.), 33 Am. B. R. 223, 218 Fed. 138; Matter of Goldstein & Mosson (C. C. A., 7th Cir.), 33 Am. B. R. 802, 216 Fed. 887.

80. In re Teschmacher v. Mrazay (D. C., Pa.), 11 Am. B. R. 547, 127 Fed. 728; In re Davis (D. C., Tex.), 9 Am. B. R. 670, 119 Fed. 950; In re Kane (D. C., N. Y.), 12 Am. B. R. 444, 131 Fed. 396; In re Kessler & Co. (D. C., N. Y.), 21 Am. B. R. 583, 165 Fed. 508; In re Hayden (D. C., Mass.), 22 Am. B. R. 764, 172 Fed. 623; In re Peacock (D. C., N. Car.), 24 Am. B. R. 150, 178 Fed. 851; In re Green (D. C., Pa.), 30 Am. B. R. 464, 207 Fed. 603; Matter of Looschen Piano Case Co. (D. C., N. J.), 44 Am. B. R. 190, 261 Fed. 53; Matter of Dailey and Iwins (C. C. A., 2d Cir.), 42 Am. B. R. 731, 255 Fed. 529. But

see opinion of Judge Lowell in the case of In re Scherber (D. C., Mass.), 12 Am. B. R. 610, 131 Fed. 121, where the case of In re Steuer (D. C., Mass.), 5 Am. B. R. 200, 104 Fed. 976, was distinguished in that jurisdiction of the referee in proceedings to recover a preference on a summary petition was not objected to; the judge in effect held that in such a case if objection was duly made to the form of the proceeding the court was without jurisdiction, except by plenary suit. It was held that the amendatory act of 1903 gave jurisdiction to the district court over such a controversy, but had done nothing to provide that such jurisdiction should be exercised by summary proceedings on a petition. See In re Auerbach (C. C. A., 2d Cir.), 29 Am. B. R. 791, 202 Fed. 132; Matter of Yorkville Coal Co. (C. C. A., 2d Cir.), 33 Am. B. R. 633, 211 Fed. 619.

81. In re Holbrook Shoe & Leather Co. (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973; Matter of Looschen Piano Case Co. (D. C., N. J.), 44 Am. B. R. 190, 261 Fed. 53.

82. In re Logan (D. C., N. Y.), 23 Am. B. R. 543, 106 Fed. 673, in which Judge Ray writes an exhaustive opinion reviewing all the leading cases as to the exercise of summary jurisdiction where the property claimed is in either actual or constructive possession of the court.

the bankruptcy court unless the defendant shall express his consent to the exercise of jurisdiction by that court.⁸³ The consent here required was not intended to affect the jurisdiction of the district courts as successors of the circuit courts, abolished by the Judicial Code of 1912. Such jurisdiction may be exercised without the consent of the defendant if the essential jurisdictional facts exist, such as diversity of citizenship and the requisite amount in controversy.⁸⁴ If once the consent to the jurisdiction of the bankruptcy court appears, the jurisdiction will be retained for the determination of all the claims of the parties and for the enforcement of all their rights against each other.⁸⁵ If the adverse claimant voluntarily submits the question of his claim to the bankruptcy court, it constitutes the required consent and the trustee's objection to the jurisdiction will not be sustained.⁸⁶ The consent having been given, the claimant may not upon the appeal from a decision that the title to the property was in the trustee, raise the question of want of jurisdiction to decide the claim.⁸⁷ The term "consent" refers to consent to the tribunal in which the controversy is to be carried on, and not to the mode of

83. Consent of parties.—In the case of *In re Blake* (C. C. A., 8th Cir.), 17 Am. B. R. 668, 151 Fed. 279, it was held that a court of bankruptcy may acquire by consent of all the parties in interest jurisdiction to determine a controversy between the trustee and an adverse claimant concerning an indebtedness of a third party and the lawful power to adjudicate all the claims of the parties thereto and to enforce their rights against each other by decree and execution. In *re Rosenberg* (D. C., Pa.), 8 Am. B. R. 624, 116 Fed. 402; *Bryan v. Bernheimer*, 5 Am. B. R. 623, 181 U. S. 188, holding that where a claimant does not protest against the jurisdiction of the court of bankruptcy, but submits his claim to that court and asks for such orders as may be necessary for his protection, the court has jurisdiction of the subject-matter. In *re Hadden Rodee Co.* (D. C., Wis.), 13 Am. B. R. 604, 130 Fed. 977; *Harris v. First Nat. Bank*, 216 U. S. 382, 23 Am. B. R. 632, 54 L. Ed. 528; *Babbitt v. Dutcher* (Sup. Ct.), 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402; In *re White* (C. C. A., 7th Cir.), 24 Am. B. R. 197, 177 Fed. 194; *Matter of Continental Producing Co.* (D. C., Cal.), 44 Am. B. R. 216, 261 Fed. 627, citing *Collier on Bankruptcy* (11th Ed.) 531.

Enforcing payment of stock subscriptions; consent of parties.—The enforcement of an assessment, directed by the bankruptcy court to be levied upon the unpaid capital stock of a bankrupt corporation, against stockholders alleged to be liable thereto, is plenary in its nature, and, except with their consent cannot be made in the bankruptcy court; and in a suit to collect such assessment, the defendant is entitled to make all defenses that relate to him in his individual as distinguished from his corporate capacity, such as that he is not a stockholder, or that he has fully paid for the stock taken. In *re Newfoundland Syndicate* (D. C., N. J.), 28 Am. B. R. 119, 196 Fed. 443. See also *Kelley v. Aarons* (D. C., Cal.), 39 Am. B. R. 115, 238 Fed. 996; *Bergdoll v. Harrigan* (C. C. A., 3d Cir.), 44 Am. B. R. 633, 263 Fed. 279.

84. Lovell v. Newman, 227 U. S. 412, 29 Am. B. R. 482, 57 L. Ed. 577, holding that the consent provided for in section 23b of the

bankruptcy act, was not intended to enlarge the jurisdiction of the U. S. Circuit Courts (now district courts), so as to give them a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy, or by reason of a cause of action arising under the Constitution or laws of the United States; *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878.

85. In re Blake (C. C. A., 8th Cir.), 17 Am. B. R. 668, 150 Fed. 279, holding that a court of equity which has acquired jurisdiction of the subject-matter and of the parties to a controversy may, and it should, grant complete relief, to the end that litigation over it may cease, and a multiplicity of suits may be avoided.

Jurisdiction to determine as to alleged preferential transfer.—Where a petition is filed in involuntary bankruptcy, upon the ground of an alleged preferential transfer of property to one of the bankrupt's creditors, within the four months' period, and the record shows that the creditor entered into the litigation in the bankruptcy court as to the good faith of the transfer and all other material facts, he cannot be heard to deny the jurisdiction of the court to make an order directing him to render an account to the referee of all property received from the bankrupt and to deliver such property to the trustee. *Philips v. Turner* (C. C. A., 5th Cir.), 8 Am. B. R. 171, 114 Fed. 726.

86. In re Hadden Rodee Co. (D. C., Wia.), 13 Am. B. R. 604, 135 Fed. 886; *Wright v. Harris* (D. C., Ga.), 34 Am. B. R. 574, 231 Fed. 736, in which the court says: "It is settled that where an adverse claimant seeks to recover property in the bankruptcy court, he consents to the jurisdiction." Citing *Le Master v. Spencer* (C. C. A., 8th Cir.), 29 Am. B. R. 264, 203 Fed. 210.

87. In re Bacon (C. C. A., 2d Cir.), 30 Am. B. R. 107, 159 Fed. 424.

procedure, which is regulated by general principles of law unless other provision is made.⁸⁸

(2) **EFFECT OF VOLUNTARY SURRENDER.**—It is a general principle governing jurisdiction of all courts that where a court has in its possession a fund in respect to which there is a dispute such court may determine the rights of parties asserted in such fund.⁸⁹ The voluntary surrender of the property in controversy to the court or its officers is equivalent to a consent and the bankruptcy court may then have jurisdiction of claims in respect to such property.⁹⁰ The possession of the property thus acquired by the court may be protected by it in the exercise of its general jurisdiction,⁹¹ rather than the jurisdiction conferred by this subdivision. Where an officer of the State court voluntarily surrenders to a receiver in bankruptcy property in his possession the State court is divested of jurisdiction.⁹² Where the property is surrendered in pursuance of a stipulation between the claimant and the bankrupt's receiver in bankruptcy, the court acquires jurisdiction and the trustee who is subsequently appointed is bound by the terms of the stipulation.⁹³ Once the property has been yielded to the jurisdiction of the court the court retains possession thereof for the purpose of settling all controversies which may arise in respect thereto.

(3) **HOW CONSENT MAY BE SHOWN.**—(1) *In general.*—The consent may be shown by any act indicating a willingness on the part of the defendant that his claim or his rights thereunder should be adjudicated by the court.

88. *Haffenbery v. Chicago Title & Trust Co.* (C. C. A., 7th Cir.), 27 Am. B. R. 709, 192 Fed. 874; *Sinsheimer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898, 47 C. C. A. 51; *Kelley v. Aarons* (D. C., Cal.), 39 Am. B. R. 115, 238 Fed. 906.

89. *In re Antigo Screen Door Co.* (C. C. A., 7th Cir.), 10 Am. B. R. 359, 153 Fed. 249, in which it was held that where a mortgagee takes possession of certain property of the bankrupt just prior to the filing of the petition in bankruptcy, claiming under a chattel mortgage thereon, and by agreement the property is turned over to the trustee in bankruptcy for sale, the proceeds to be paid into the bankruptcy court, the right of property to follow the fund with like effect as if the mortgagee had retained and sold the property under its mortgage, the court has, by virtue of its inherent powers, jurisdiction to determine the respective rights of the parties to the fund.

Jurisdiction in respect to fund in possession of the court.—In the case of *Havens & Geddes Co. v. Pierek* (C. C. A., 7th Cir.), 9 Am. B. R. 569, 120 Fed. 244, the court said in speaking of an agreement between the trustee and the assignee of certain proceeds of a fire insurance policy belonging to the bankrupt, that such proceeds should be paid to the trustee, subject to the order of the district court: "The effect of the agreement under which the moneys were received was to transfer them to the custody of the district court, so that court might adjudge the rights of the respective parties thereto. The fund being in the registry of the court, or in the hands of its officers or appointees,

the court, whether one of equity, common law, admiralty or bankruptcy, could determine informally and by summary intervening petition." See also *In re McCallum* (D. C., Pa.), 7 Am. B. R. 596, 113 Fed. 393; *In re Kellogg* (D. C., N. Y.), 7 Am. B. R. 623, 113 Fed. 120; *In re Riker* (C. C. A., 2d Cir.), 5 Am. B. R. 720, 107 Fed. 96.

90. **Validity of chattel mortgage; consent of claimant.**—The question as to the validity of a chattel mortgage as between the mortgagee and trustee in bankruptcy of the mortgagor should generally be determined in a plenary action. But where the mortgagee allows the bankruptcy court to take possession of the mortgaged property and convert the same into money, provided it preserves the mortgagee's rights, whatever they may be, in the money instead of the property itself, and fails to appeal from the orders of the bankruptcy court or question the jurisdiction until the proceeds of the sale of the property are in process of administration, it will be deemed to have voluntarily submitted the question as to the validity of the mortgage to the bankruptcy court. *Wells & Co. v. Sharp* (C. C. A., 8th Cir.), 31 Am. B. R. 344, 208 Fed. 393.

91. See cases cited under § 2(7).

92. *In re Hymes Buggy & Implement Co.* (D. C., Mo.), 12 Am. B. R. 477, 130 Fed. 977. See *Wright v. Harris* (D. C., Ga.), 34 Am. B. R. 574, 221 Fed. 736. See also *Covington v. Barber* (Ga. Sup. Ct.), 41 Am. B. R. 573, 95 S. E. 705.

93. *Bryant v. Swofford Bros. Dry Goods Co.* 214 U. S. 279, 22 Am. B. R. 111, 53 L. Ed. 907.

If a mortgagee petitions for the payment of his mortgage debt he thereby consents to the jurisdiction of the court.⁹⁴ If the evidence is conflicting as to the consent of the exercise of jurisdiction, the determination of the district court will not ordinarily be disturbed on appeal.⁹⁵

(II) *By appearance and pleading.*—The general rule is that the defendant by appearing generally and demurring or answering on grounds going to the merits of the controversy as well as to the jurisdiction of the court, waives the objection that the court is without jurisdiction of the person.⁹⁶ If the adverse claimants proceed to a hearing upon the merits, without objection to the jurisdiction, they will be deemed to have consented to the jurisdiction.⁹⁷ Where proceedings are instituted in respect to property in possession of an adverse

94. In re Platteville Foundry & Machine Co. (D. C., Wis.), 17 Am. B. R. 291, 149 Fed. 828; In re Durham (D. C., Md.), 8 Am. B. R. 115, 114 Fed. 750, holding that where a receiver is appointed upon the petition of a chattel mortgage creditor by a bankruptcy court jurisdiction is thus conferred by consent to determine controversies which may arise in respect to the mortgaged property; if the defendant voluntarily appear and proceed to a hearing upon the merits without objection, he consents to the jurisdiction of the court; Ryttenberg v. Schefer (D. C., N. Y.), 11 Am. B. R. 652, 131 Fed. 313; Chauncey v. Dyke Bros. (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1; In re Steuer (D. C., Mass.), 5 Am. B. R. 209, 104 Fed. 976; Reeve v. Kernan (Ct. of Errors and Appeals, N. J.), 85 N. J. Law 641, 32 Am. B. R. 278, 90 Atl. 285.

95. In re Kohn (C. C. A., 7th Cir.), 13 Am. B. R. 631, 134 Fed. 557.

96. Sheppard v. Lincoln (D. C., N. Y.), 25 Am. B. R. 834, 154 Fed. 182; Ryttenberg v. Schefer (D. C., N. Y.), 11 Am. B. R. 652, 131 Fed. 313; Phillips v. Turner (C. C. A., 5th Cir.), 8 Am. B. R. 171, 114 Fed. 726; Wright v. Harris (D. C., Ga.), 34 Am. B. R. 574, 221 Fed. 736; McEldowney v. Card (D. C., Tenn.), 27 Am. B. R. 937, 193 Fed. 475; In re Kornit Mfg. Co. (D. C., N. J.), 27 Am. B. R. 214, 192 Fed. 392; In re MacDougall (D. C., N. Y.), 23 Am. B. R. 762, 175 Fed. 400; In re Hadden Rodes Co. (D. C., Wis.), 13 Am. B. R. 604, 135 Fed. 886; Jones v. Blair (C. C. A., 4th Cir.), 39 Am. B. R. 530, 242 Fed. 783; Matter of Brantman (C. C. A., 2d Cir.), 40 Am. B. R. 18, 214 Fed. 101; Seegmiller v. Day (C. C. A., 7th Cir.), 41 Am. B. R. 317, 249 Fed. 177; Matter of Franklin Brewing Co. (D. C., N. Y.), 43 Am. B. R. 653, 257 Fed. 135; Matter of Barnes Gear Co. (D. C., N. Y.), 44 Am. B. R. 275, 259 Fed. 320; Commercial Security Co. v. Holcombe (C. C. A., 5th Cir.), 44 Am. B. R. 451, 202 Fed. 657; Van Slyke v. Huntington (C. C. A., 8th Cir.), 45 Am. B. R. 173, 265 Fed. 86.

The general appearance and pleading to the merits, without objection to jurisdiction, in a plenary suit brought by a trustee in bankruptcy in the district court which had jurisdiction of the subject-matter, constitutes a consent to the jurisdiction of such court; and a challenge to the jurisdiction made by the defendant, after it had taken some testimony under the issues joined, comes too late. Detroit Trust Co. v. Pontiac Sav. Bank (C. C. A., 6th Cir.), 27 Am. B. R. 821, 196 Fed. 29.

Filing demurrer and answering.—Where an adverse claimant in possession of property alleged to have been transferred by the bankrupt by way of preference and fraudulent conveyance, in answer to the prayer of the trustee's petition that such conveyance

be declared null and void, files a paper in which he sets up want of jurisdiction to grant relief, and also files an answer on the merits, denying that the conveyance was without consideration or fraudulent as to creditors, and contends on review of an adverse finding that the referee had no jurisdiction in the matter, the adverse claimant cannot be deemed to have consented to the jurisdiction of the bankruptcy court. In re Michie (D. C., Mass.), 8 Am. B. R. 734, 116 Fed. 749.

The general appearance of defendants who are adverse parties to the trustee to a rule to show cause issued upon his application and their failure to set up their right to be sued in the State court until after the filing of the second amended petition, when for the first time a case was made out upon which relief could be obtained against them does not constitute consent. In re Henby-Hutchinson Pub. Co. (D. C., Ill.), 5 Am. B. R. 569, 106 Fed. 909.

Appearance and submission of rights.—Although a landlord has the right to insist that title to property placed upon leased premises and claimed by bankrupt's trustee as trade fixtures should be determined by a plenary suit, such right may be waived; and where the landlord appears without objection and submits her rights to the special master and the bankruptcy court, she cannot, after a finding has been made against her as to part of her claim, urge the objection of lack of jurisdiction. In re Howard Laundry Co. (C. C. A., 2d Cir.), 30 Am. B. R. 167, 203 Fed. 445.

97. In re Steuer (D. C., Mass.), 5 Am. B. R. 209, 104 Fed. 976; In re Porterfield (D. C., W. Va.), 15 Am. B. R. 11, 138 Fed. 193, in which case it appeared that all the interested parties, including the holder of the legal title to the land in controversy, came into the bankruptcy proceedings and submitted to a sale of the land free and clear of all liens and the proceeds of the sale were paid into court for distribution, and it was held that the parties had submitted to the jurisdiction of the bankruptcy court; Kilgore v. Barr (Sup. Ct., Va.), 114 Va. 70, 28 Am. B. R. 860, 75 S. E. 762; Wells & Co. v. Sharp (C. C. A., 8th Cir.), 31 Am. B. R. 344, 306 Fed. 393.

claimant, and he is made a party and by answer interposes a defense upon the merits, he thereby consents to the jurisdiction.⁹⁸ The fact that a claimant "without waiver," proved a judgment secured in a State court in a suit to set aside a trust deed of property does not amount to a consent to the exercise of jurisdiction by the district court in respect to such property.⁹⁹ And where in a summary proceeding instituted by a trustee, a claimant filed a statement of his claim and produced evidence in support thereof, at the same time objecting to the jurisdiction of the court to determine such claim, he has not consented to such jurisdiction.¹⁰⁰ On the other hand if a creditor files his claim, and requests final disposition thereof, without objection to the jurisdiction, he will be deemed to have consented to such jurisdiction and will be controlled by the court's determination.¹⁰¹

(III) *Effect of objection to jurisdiction.*—Where objection is made to the jurisdiction of the court before proceeding to a hearing on the merits, and where before a final decision specific objection is made to the jurisdiction of the court, the appearance is not voluntary and is not sufficient to constitute a consent.¹⁰² If the defendants do not object to the jurisdiction of the court at any stage of the proceedings, it is too late to urge the objection on appeal.¹⁰³

98. *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 Am. B. R. 754, 80 L. Ed. 841, affg. *Matter of Federal Contracting Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 381, 212 Fed. 688; *Haffenberg v. Chicago Title & Trust Co.* (C. C. A., 7th Cir.), 27 Am. B. R. 708, 192 Fed. 874; *Matter of Berry* (D. C., Mich.), 41 Am. B. R. 357, 247 Fed. 700; *Matter of Gottlieb & Co.* (D. C., N. J.), 40 Am. B. R. 247.

99. *Proving claim not consent to jurisdiction.*—The fact that an adverse claimant in a suit, "without waiving her preference," proved her judgment as a preferred debt, did not deprive the State court of jurisdiction, nor amount to a consent to the exercise of jurisdiction by the court of bankruptcy. *Pickens v. Dent*, 187 U. S. 177, 9 Am. B. R. 47, 47 L. Ed. 128. The bankruptcy court upon finding that a claim was secured, has no jurisdiction to enter a decree against a creditor, an adverse claimant, for the excess value of his security over his debt without the consent of such claimant. *Fitch v. Richardson* (C. C. A., 1st Cir.), 16 Am. B. R. 735, 147 Fed. 197; *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 600, 226 Fed. 878, holding that proof of claims against a bankrupt and the voting or attempting to vote them does not amount to a consent to the jurisdiction of the bankruptcy court, within the meaning of section 23b of the Bankruptcy Act; such section refers to consent relative to the institution of actions at law or in equity in the district court.

100. *Matter of Bacon* (C. C. A., 2d Cir.), 31 Am. B. R. 777, 210 Fed. 129.

101. *In re White* (C. C. A., 7th Cir.), 24 Am. B. R. 197, 177 Fed. 194.

102. *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413; *Matter of Looschen Piano Case Co.* (D. C., N. J.), 44 Am. B. R. 190, 261 Fed. 93. See also *Board of Road Comrs. v. Kell* (C. C. A., 6th Cir.), 44 Am. B. R. 259, 269 Fed. 76.

Objections to jurisdiction.—In the case of *First Nat. Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051, the court said: "Petitioners asserted this express statutory limitation on

jurisdiction and objected that the district court could not proceed, but their objections were overruled. That they then did not abandon their claims did not amount to a waiver of their objections or to a consent to an exercise of jurisdiction against which they protested." *In re Horgan* (C. C. A., 1st Cir.), 19 Am. B. R. 857, 158 Fed. 774, holding that where the sureties on the return of a citation served upon them subject to the power of the court to order them to turn over the amount of a deposit for their security, and prior to the entry of the final decree specifically objected to the jurisdiction of the court to proceed summarily, it is sufficiently shown that they did not consent to the jurisdiction of the court. And see *In re Hayden* (D. C., Mass.), 22 Am. B. R. 764, 172 Fed. 623, holding that though a claimant appeared generally and took part in a hearing upon the merits, after his motion to dismiss for want of jurisdiction had been denied, he did not consent to the exercise of jurisdiction.

103. *Booneville Nat. Bank v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891.

Objection first raised on appeal.—In the case of *In re Connolly* (D. C., Pa.), 3 Am. B. R. 842, 100 Fed. 620, it was held that the appearance of the respondent on a petition of a trustee for an order compelling the delivery of property and proceeding upon the hearing before the referee without objection to the jurisdiction, implies consent and precludes the respondent from raising the point of lack of jurisdiction for the first time upon exception to an adverse report. *In re Emerick* (D. C., Pa.), 4 Am. B. R. 89, 101 Fed. 231, holding that while the court has jurisdiction of the subject-matter a party submitting thereto cannot for the first time complain of the lack of jurisdiction when the decision is adverse.

c. Suits for recovery of property.—(1) IN GENERAL.—The exceptions added to subsection *b* by the amendments of 1903 and 1910 result directly in the clothing of a district court with full jurisdiction to entertain a suit brought by a trustee to recover property preferentially transferred within the meaning of § 60-b or fraudulently transferred or incumbered within the meaning of § 67-e, or 70-e,¹⁰⁴ without the consent of the defendant.^{104a} The jurisdiction of the bankruptcy court may only be sustained by bringing the allegations of the bill within the provisions of § 60-b, § 67-e or § 70-e of the act.¹⁰⁵ Such a suit may be laid either in the proper State court or in a district court even without the consent of the proposed defendant.¹⁰⁶ If brought in a State court, a Federal question is presented, which may be certified to the United States Supreme Court.¹⁰⁷ If in the district court, it need not be in the district where the bankruptcy proceeding is pending,¹⁰⁸ nor the district of the residence of the defendant.^{108a} Such a suit could formerly be brought, under certain circumstances, in the circuit court (now district court), as has already been shown.¹⁰⁹

(2) WHO MAY BRING SUIT.—The extension of jurisdiction resulting from the amendment of this subsection was probably intended only for the benefit of the trustee. The adverse claimant certainly cannot sue under § 23-b in

104. *Kelley v. Gill* (U. S. Sup. Ct.), 40 Am. B. R. 421, 38 Sup. Ct. 38; *Golden Hill Distilling Co. v. Logue* (C. C. A., 6th Cir.), 39 Am. B. R. 731, 243 Fed. 342. If preferentially transferred, it must have been within four months of the bankruptcy (§ 60-b); if fraudulently, the State statute of limitations controls (§ 70-e). See *Gregory v. Atkinson* (D. C., Mo.), 11 Am. B. R. 495, 127 Fed. 183, holding that except as to conveyances or preferences made within the four months' period the law remains as it was before the amendment. To a similar effect is the case of *Harris v. First Nat. Bank* (Sup. Ct.), 216 U. S. 352, 23 Am. B. R. 531, 54 L. Ed. 528; *Palmer v. Roginsky* (D. C., N. Y.), 23 Am. B. R. 353, 175 Fed. 883; *Newcomb v. Blevin* (D. C., So. Dak.), 29 Am. B. R. 15, 199 Fed. 629. So far as these cases deny the jurisdiction of the district court to entertain suits by the trustee for the recovery of property fraudulently conveyed under § 70-e, they have been nullified by the amendment of 1910. As to jurisdiction to entertain a bill in equity by a trustee to set aside a mortgage as preferential and fraudulent, see *Hawkins v. Dannenberg Co.* (D. C., Ga.), 37 Am. B. R. 262, 234 Fed. 752; *Trice v. Coolidge Banking Co.* (D. C., Ga.), 39 Am. B. R. 843, 242 Fed. 175.

Diversity of citizenship is not necessary. *Ward v. Central Trust Co.* (C. C. A., 7th Cir.), 44 Am. B. R. 323, 261 Fed. 344.

Reference to master.—A suit in equity by a trustee in bankruptcy against an adverse claimant may be referred to a master. *Flanders v. Coleman* (D. C., Ga.), 41 Am. B. R. 727, 249 Fed. 757.

Recovery of property.—In the case of *Linstroth Wagon Co. v. Ballew* (C. C. A., 5th Cir.), 18 Am. B. R. 23, 32, 149 Fed. 960, Judge McCormick said: "The amendatory act of 1903 gave concurrent jurisdiction to the courts of bankruptcy and any State court which would have had jurisdiction if bankruptcy had not intervened, in suits by a trustee for the purpose of such recoveries as are authorized by § 60, subd. b, and § 67, subd. e, in addition to those which could be entertained by the consent of the proposed defendant." *Milkman v. Arthe* (C. C. A., 2d Cir.), 34 Am. B. R. 536, 223 Fed. 507 (rev'g 32 Am. B. R. 519, 213 Fed. 642), holding that section 23 b as amended by the act of 1910 gives the district court as a court of bankruptcy jurisdiction of a suit by the trustee to trace certain funds of the bankrupt

into the purchase of property; *Loganville Banking Co. v. Forrester* (Ga. Ct. of App.), 36 Am. B. R. 279, 87 S. E. 694 (quoting text).

Recovery of preferences under § 66 of New York Stock Corporation Law, see *Grandison v. Robertson* (C. C. A., 2d Cir.), 36 Am. B. R. 432, 220 Fed. 965, mod. 34 Am. B. R. 609, 220 Fed. 985; *Cardoso v. Brooklyn Trust Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 351, 228 Fed. 353.

104a. *Collett v. Adams* (U. S. Sup. Ct.), 43 Am. B. R. 496, 39 Sup. Ct. 372; *Flanders v. Coleman* (U. S. Sup. Ct.), 43 Am. B. R. 533, 39 Sup. Ct. 472, rev'g 41 Am. B. R. 727, 249 Fed. 757.

105. *Flanders v. Coleman* (U. S. Sup. Ct.), 43 Am. B. R. 533, 39 Sup. Ct. 472, rev'g 41 Am. B. R. 727, 249 Fed. 757; *Waite v. Gottstein* (D. C., Wash.), 35 Am. B. R. 353, 224 Fed. 231, holding that the bankruptcy court has no jurisdiction, under section 23b of the Bankruptcy Act, over a suit by a trustee to recover property of the bankrupt forcibly seized by a creditor against the will and without the collusion of the bankrupt, and wrongfully held by such creditors without consent.

106. *Collett v. Adams* (U. S. Sup. Ct.), 43 Am. B. R. 496, 39 Sup. Ct. 372; *Lawrence v. Lowrie* (D. C., Pa.), 13 Am. B. R. 297, 133 Fed. 965; *Horner-Gaylord Co. v. Miller* (D. C., W. Va.), 17 Am. B. R. 257, 147 Fed. 235; *Drew v. Myers*, 61 Neb. 750, 22 Am. B. R. 658, 116 N. W. 731; *Blick v. Nimmo* (Md. Ct. of App.), 121 Md. 139, 30 Am. B. R. 770, 772, 83 Atl. 116, citing text.

107. *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 15 Am. B. R. 336, 50 L. Ed. 627, where the court holds that where an action was brought by a trustee to recover what is asserted to be an asset of the bankrupt estate, a Federal question is presented, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States.

108. *Collett v. Adams* (U. S. Sup. Ct.), 43 Am. B. R. 496, 39 Sup. Ct. 372; *Hall v. Glenn* (D. C., Cal.), 39 Am. B. R. 54, 247 Fed. 997. See *Lathrop v. Drake*, 91 U. S. 616, 23 L. Ed. 416. And compare *Sherman v. Bingham*, Fed. Cas. 12,762, with *Shearman v. Bingham*, Fed. Cas. 12,733.

108a. *Collett v. Adams* (U. S. Sup. Ct.), 43 Am. B. R. 496, 39 Sup. Ct. 372.

109. See p. 517, ante; *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1114.

the district court,¹¹⁰ nor can he by consent confer summary jurisdiction upon the court to determine the merits of a real adverse claim in property alleged to belong to the bankrupt but in the claimant's possession.¹¹¹ The right to sue in a court of bankruptcy, to recover property preferentially or fraudulently transferred, belongs exclusively to the trustee;¹¹² such right is not assignable.¹¹³ But if no trustee has yet been chosen, creditors may sue to recover such property in the State or Federal courts, on behalf of themselves and all other creditors.¹¹⁴ Receivers in bankruptcy have no legal right or capacity to recover a fraudulent or preferential transfer made by a bankrupt; this seems to be established by a majority of the cases and is based upon the correct principle.¹¹⁵

(3) WHEN SUITS MAY BE BROUGHT.—A district court has by subsection *b* of this section full jurisdiction to entertain a plenary suit to set aside a preference or a fraudulent conveyance made within the four months prior to bankruptcy, or any transfer by the bankrupt, which any creditor of such bankrupt might have avoided, and to recover the property so transferred or its value. "To recover property" undoubtedly includes a suit, the real purpose of which is to annul an incumbrance, other than through legal proceedings.¹¹⁶ Thus, practically all suits to set aside preferences or fraudulent transfers,¹¹⁷

110. *Viquesney v. Allen* (C. C. A., 4th Cir.), 12 Am. B. R. 402, 131 Fed. 21, in which the court says: "The original act, § 23-a, relates only to controversies between the trustee in bankruptcy and adverse claimants to property acquired or claimed by the trustee. So also § 23-b relates only to suits brought by trustees in bankruptcy, and the amendments, if applicable here, likewise only apply to suits by trustees in bankruptcy."

111. *In re Teschmacher & Mrazay* (D. C., Pa.), 11 Am. B. R. 547, 127 Fed. 729.

112. *Frost v. Latham & Co.* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866; *Lowell v. Latham & Co.* (D. C., Ala.), 32 Am. B. R. 191, 211 Fed. 374; *Viquesney v. Allen* (C. C. A., 4th Cir.), 12 Am. B. R. 402, 131 Fed. 21. The restrictive effect of this subsection has no application to the right of a receiver to maintain or defend his possession of goods seized as those of the bankrupt. *In re Lipman* (D. C., N. J.), 29 Am. B. R. 139, 201 Fed. 169. See also discussion under § 60, "Recovery of preference," *post*.

In an ancillary suit by a trustee in bankruptcy to set aside an alleged preferential transfer of property by the bankrupt, other claimants will not be allowed to intervene, but must proceed in the court of original jurisdiction. *Knauth, Nachod & Kuhne v. Latham & Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 631, 219 Fed. 721.

113. *Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co.* (C. C. A., 6th Cir.), 23 Am. B. R. 595, 175 Fed. 335.

114. *Guarantee Title & Trust Co. v. Pearlman* (D. C., Pa.), 16 Am. B. R. 461, 144 Fed. 560; *In re Schrom* (D. C., Iowa), 3 Am. B. R. 352, 97 Fed. 760. See also *Googins v. Skillings* (Me. Sup. Jud. Ct.), 44 Am. B. R. 378, 108 Atl. 50.

Right of creditors to sue.—A trustee in bankruptcy represents all persons interested in the estate of the bankrupt. He is the

representative of the creditors of the bankrupt, and if he in any given case would have a right as their representative to institute a suit to set aside a fraudulent or preferential transfer, it seems to follow as a necessary consequence that such creditors are entitled to do so also, in the absence of a trustee, and to maintain the same until such trustee shall have been chosen when he would be entitled to become a party plaintiff in the suit. *In re Frost v. Latham & Co.* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866.

See also *Board of Directors v. Lowrance* (S. Car. Sup. Ct.), 43 Am. B. R. 31, 97 S. E. 830.

Intervention by trustee.—It is proper that a trustee in bankruptcy should intervene in a suit brought by a creditor to set aside a fraudulent transfer made by the bankrupt. *McCrory v. Donald* (Miss. Sup. Ct.), 43 Am. B. R. 181, 80 So. 643; *Bennells v. Potter* (Mich. Sup. Ct.), 40 Am. B. R. 490, 164 S. W. 476.

115. *Frost v. Latham & Co.* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866; *Booneville National Bank v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891; *Beach v. Macon Grocery Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 751, 118 Fed. 143. *Contra: In re Fixen & Co.* (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 749; *In re McClellum* (D. C., Pa.), 7 Am. B. R. 596, 113 Fed. 303. See discussion under § 2(3), Powers of receivers, *ante*.

116. As indicating this, note the use of the word "incumbrance" in § 67-a. And compare *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83. For an interesting case where jurisdiction was declined see *Real Estate Trust Co. v. Thompson* (D. C., Pa.), 7 Am. B. R. 520, 112 Fed. 945.

117. See *Gregory v. Atkinson* (D. C., Mo.), 11 Am. B. R. 495, 127 Fed. 183; *Lynch v. Bronson* (D. C., Conn.), 20 Am. B. R. 409, 160 Fed. 139, holding that, where an insolvent within the four months' period purchased merchandise on credit and, with intent to defraud the seller, transferred the same for an inadequate price, the trustee of the insolvent buyer may recover the value of the property.

As depending on amount involved or citizenship.—If a cause of action is stated

and to avoid liens other than those through legal proceedings, may be laid in the district court; with, it is thought, in most instances, a reference by consent to one of the referees in bankruptcy, as special master, to hear and report on the facts as special master. Where the litigants are at a distance from the stated sittings of the district court, resort may still be had to the then more accessible State tribunals. In whichever court the suit is laid, it at once becomes subject to the rules and practice there followed. It has been held that a district court may not entertain a plenary suit in equity to annul a cancellation of a mortgage, made by the bankrupt to himself as executor under a will, brought by beneficiaries, where the general creditors of the bankrupt have no interest.¹¹⁸ Where neither of the parties was a party to the bankruptcy proceeding, this section confers no jurisdiction.¹¹⁹ If the property in controversy is not a part of the bankrupt estate and may not be distributed in the proceeding, the controversy cannot be determined therein.¹²⁰ Irrespective of the amendment of 1903, a district court has jurisdiction to determine in a plenary suit, the rights of parties in respect to property which has been surrendered by a receiver without authority.¹²¹ Where property has passed into the actual or constructive possession of the trustee, it has been held that the district court may entertain a plenary suit brought against the trustee to

under the bankruptcy act over which the United States District Court has jurisdiction, that jurisdiction will not be ousted by failure to plead or show that the amount involved was more than \$3,000, or that the residence of all parties was within the same district. *Milkman v. Arthe* (D. C., N. Y.), 32 Am. B. R. 519, 213 Fed. 642.

118. *Brumley v. Jones* (C. C. A., 5th Cir.), 15 Am. B. R. 578, 141 Fed. 318, 72 C. C. A. 466. Compare *Horner-Gaylord Co. v. Miller* (D. C., W. Va.), 17 Am. B. R. 257, 147 Fed. 295.

119. *Henrie v. Henderson* (C. C. A., 4th Cir.), 16 Am. B. R. 617, 145 Fed. 316.

120. *Matter of Girard Glazed Kid Co.* (2) (D. C., Pa.), 14 Am. B. R. 485, 136 Fed. 511.

Recovery of damages for conspiracy.—A suit by a trustee in which the complaint states a cause of action to recover damages for a conspiracy with the bankrupt, whereby the bankrupt, known by the defendants to be insolvent, purchased goods on credit and turned them over to the defendants for less than their value, is not a suit to set aside a fraudulent transfer within the provisions of section 67-e, and the bankruptcy court has no jurisdiction thereof under section 23-b. *Lynch v. Bronson* (D. C., Conn.), 24 Am. B. R. 513, 177 Fed. 605.

Recovery of property held under secret trust.—The bankruptcy court has no jurisdiction of an action by a trustee in bankruptcy, wherein no question of preference is involved, to recover real property which has never been in the possession of bankrupt or the trustee, but which is alleged to be held by bankrupt's wife, who received title thereto long prior to the four months' period, as trustee, in secret trust for the bankrupt, the record title being in her but the real ownership of the property being in bankrupt, since

in such case, no "transfer" of the property is shown. *Newcomb v. Biwer* (D. C., S. Dak.), 29 Am. B. R. 15, 199 Fed. 523.

Property held in trust for wife.—Although a transfer by some third person for the benefit of the bankrupt cannot be avoided by a creditor under section 70-e of the Bankruptcy Act, still when it is alleged in a suit by the trustee that money of the bankrupt was by agreement used by his brother in creating a trust for his wife, and that the entire transaction was an attempt to conceal the money of the bankrupt by transferring it in the form of stock, relief may be granted if the facts are substantiated. *Milkman v. Arthe* (D. C., N. Y.), 32 Am. B. R. 519, 213 Fed. 642.

Property not belonging to bankrupt estate.—The bankruptcy court has no jurisdiction of a suit by the trustee in bankruptcy of a contractor, under an agreement to construct a building for a nonresident owner at the date of the bankruptcy, against the owner and nonresident subcontractors to determine the validity of orders given by the bankrupt to the subcontractors or the owner. This because the court is not in possession of the res. Under such circumstances the court has no jurisdiction of resident claimants holding no property belonging to the bankrupt estate. *Matter of Smith Construction Co.* (D. C., Ga.), 35 Am. B. R. 227, 224 Fed. 223.

121. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, 49 L. Ed. 1157. In which it appeared that a temporary receiver in bankruptcy had turned over to third parties warehouse receipts belonging to the bankrupt, and it was held that such surrender being unauthorized suit might be brought by the trustee in a district court to recover such property. See also, *Atherton v. Beaman* (D. C., Mass.), 40 Am. B. R. 273, 243 Fed. 930.

determine the validity of liens claimed against such property,¹²² but in both instances jurisdiction exists under § 2 (7) of the act which vests district court with original jurisdiction to determine controversies with relation to estates of bankrupts, rather than under subsection b of § 23.¹²³ A suit, either at law or in equity, may be brought in the district court to recover a voidable preference;¹²⁴ it will become important in determining the question of jurisdiction to ascertain whether the transfer was in fact preferential, and the cases cited under § 60-a-b will be helpful. Where property in the possession of the adverse claimant was sold to him, title thereto may not be tried in a suit brought by the trustee in the district court.¹²⁵ A plenary suit by the trustee of a bankrupt corporation to recover unpaid subscriptions is not for the recovery of property under this subsection and may not be brought in a court of bankruptcy without the consent of the proposed defendants.¹²⁶ Suits against wrongdoers, who have wrongfully appropriated or misapplied funds belonging to the bankrupt estate, without the consent of the bankrupt do not fall within the meaning of the subsection as amended,¹²⁷ nor do suits for the recovery of ordinary contract debts.¹²⁸ The performance by a third person of a contract with the bankrupt cannot be enforced in summary proceedings.¹²⁹ It is no defense to an action, in a bankruptcy court, to set aside a preference that an action is pending in a State court between the bankrupt and the transferee, involving the same property.¹³⁰

f. Summary jurisdiction.—(1) IN GENERAL.—The amendments have not, it is thought, changed the effect of present precedents against the exercise of jurisdiction summarily. If the party proceeded against is "an adverse claimant," in the broad sense of the words, he should not, under the present law, be asked to respond to a petition, order to show cause, or motion, any more than he was under the law of 1867, as it was interpreted in *Eyster v. Gaff*.¹³⁰ If the party is in possession of the property adversely claimed by

122. *Goodnough Mercantile & Stock Co. v. Galloway* (D. C., Or.), 19 Am. B. R. 244, 156 Fed. 504.

123. See cases cited under § 2(7), ante.

124. *Bowman v. Alpha Farms* (D. C., N. Y.), 18 Am. B. R. 700, 153 Fed. 380; *Parker v. Black* (D. C., N. Y.), 16 Am. B. R. 202, 143 Fed. 580; *Parker v. Sherman* (C. C. A., 2d Cir.), 32 Am. B. R. 393, 212 Fed. 917.

125. *In re Flynn* (D. C., N. Car.), 11 Am. B. R. 318, 126 Fed. 422.

126. *In re Hutchinson & Wilmoth* (C. C. A., 6th Cir.), 19 Am. B. R. 312, 158 Fed. 74, holding that a suit for the recovery of unpaid stock subscriptions is not a suit for the recovery of property under § 60-b, § 87-c, or § 70-e. Compare *Skiffin v. Magnus* (D. C., N. Y.), 19 Am. B. R. 397, 162 Fed. 689; *Thrall v. Union Made Tobacco Co.*, 22 Am. B. R. 237, 54 Ohio Law Bull. 732; *In re Eureka Furniture Co.* (D. C., Pa.), 22 Am. B. R. 395, 170 Fed. 483.

127. Recovery of funds withdrawn by officers of bankrupt corporation.—Where the bill in a suit by a trustee in bankruptcy against the director of the bankrupt to recover funds formerly belonging to the bankrupt, imports not that the bankrupt corporation has done anything, but that certain of its officers, by false pretenses, have withdrawn its funds, the suit is not to avoid a transfer by the bankrupt of its property, but a suit against wrongdoers, who have appropriated it without the bankrupt's assent,

and is, therefore, not within sections 23-b and 70-e of the Bankruptcy Act. *Park v. Cameron & Bolton*, 237 U. S. 618, 34 Am. B. R. 849, 59 L. Ed. 1147.

128. *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 565, 50 L. Ed. 1114; *Hinds v. Moore* (C. C. A., 6th Cir.), 14 Am. B. R. 1, 134 Fed. 221; *Matter of Ballou* (D. C., Ky.), 33 Am. B. R. 21, 215 Fed. 810.

129. *Matter of Ballou* (D. C., Ky.), 33 Am. B. R. 21, 215 Fed. 810, holding that a referee in bankruptcy has no jurisdiction of a summary proceeding to compel the issuance of stock by a corporation to a trustee in bankruptcy under an agreement by the promoters of the corporation to issue stock to the bankrupt in payment of services.

130a. *Collett v. Adams* (U. S. Sup. Ct.), 43 Am. B. R. 496, 39 Sup. Ct. 372.

130. 91 U. S. 521, 23 L. Ed. 403. Compare *Burbank v. Bigelow*, 92 U. S. 170, 23 L. Ed. 542; *Smith v. Mason*, 81 U. S. 419; *Marshall v. Knox*, 89 U. S. 551, 21 L. Ed. 481; also in re *Rockwood* (D. C., Iowa), 1 Am. B. R. 272, 91 Fed. 363; *In re Kelly* (D. C., Tenn.), 1 Am. B. R. 303, 91 Fed. 801; *In re Franks* (D. C., Ala.), 2 Am. B. R. 634, 95 Fed. 635; *In re Baudouine* (C. C. A., 2d Cir.), 3 Am. B. R. 651, 101 Fed. 547; *In re Cohn* (D. C., N. Y.), 3 Am. B. R. 421, 98 Fed. 75; *Matter of Lummus* (D. C., Ga.), 32 Am. B. R. 740, 214 Fed. 801. When the claimant also is a bankrupt, summary jurisdiction exists; *In re Rosenberg* (D. C., Pa.), 8 Am. B. R. 624, 116 Fed. 402. See also cases decided by the Supreme Court under the present law

the bankrupt or his trustee he cannot be deprived of the right to litigate the disputed right to possession or ownership in a plenary suit brought either in a district court or the proper State court.¹³¹ An undisputed debt due the bankrupt cannot be collected by a summary proceeding. It can only be collected by an independent suit brought by the trustee against the debtor in a court of competent jurisdiction.¹³² A claimant may not be directed summarily to surrender property in his possession to the trustee, upon the mere allegation of the trustee that the claimant's interest is not in good faith, and that he intends to attack the claim on the ground that it is fraudulent.¹³³ Where the claimant has submitted to the jurisdiction of the court, he cannot complain of the summary disposition of his claim.¹³⁴ A voluntary bankrupt cannot question the court's jurisdiction to act summarily against him and direct the delivery of his property to the trustee.^{134a}

(2) INVESTIGATION AS TO NATURE OF CLAIM.—If it is ascertained upon investigation that the claim is adverse, the court will refuse to issue a summary order against third persons, requiring them to turn over property alleged to have been transferred by the bankrupt after adjudication.¹³⁵ The referee

referred to in the next paragraph. The case of *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906, is a valuable addition to the discussion and points out clearly when summary jurisdiction should be assumed and when not.

Summary jurisdiction should not be enlarged by construction or implication. *Matter of Cox-Eackley Co.* (D. C., N. Car.), 40 Am. B. R. 487, 245 Fed. 367.

131. *In re Knickerbocker* (D. C., N. Y.), 10 Am. B. R. 381, 121 Fed. 1004; *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 182; *Matter of Andre* (C. C. A., 2d Cir.), 13 Am. B. R. 132, 58 C. C. A. 874, 135 Fed. 736; *Matter of Lummus* (D. C., Ga.), 32 Am. B. R. 740, 214 Fed. 891; *Matter of Kramer & Muchnick* (D. C., Pa.), 33 Am. B. R. 223, 218 Fed. 138; *Matter of McCrum* (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207; *Matter of Velez* (D. C., Porto Rico), 39 Am. B. R. 307, 9 F. R. Fed. 407; *Gavilan v. Lugo* (D. C., Porto Rico), 39 Am. B. R. 826, 9 F. R. Fed. 344; *Matter of Midtown Contracting Co.* (C. C. A., 2d Cir.), 39 Am. B. R. 578, 243 Fed. 56; *Matter of Continental Producing Co.* (D. C., Cal.), 44 Am. B. R. 216, 261 Fed. 627, citing *Collier on Bankruptcy* (11th ed.) 531.

If a person claims property in his possession, in good faith, the referee cannot by summary order direct that it be surrendered to the bankrupt's trustee. *In re Walsh Bros.* (D. C., Iowa), 21 Am. B. R. 14, 163 Fed. 352.

The legitimate object of summary proceedings by a trustee in bankruptcy is accomplished when it appears that the property sought to be recovered is in the possession of a third person and held under an adverse claim, which existed at the time the petition in bankruptcy was filed, and which, if supported by uncontradicted testimony, would sustain a judgment in favor of the claimant—even though the claim might in the end prove to be fraudulent and voidable; but a merely frivolous claim, such as that of an agent or bailee holding in the interest of the bankrupt, will not be allowed to defeat summary process. *Courtney v. Shea* (C. C. A., 6th Cir.), 34 Am. B. R. 753, 225 Fed. 358.

Evidence of ownership.—Where by the uncontradicted testimony a motor truck claimed by the wife of a bankrupt is in a garage in her name, she is entitled to retain such possession until it is determined in a plenary action that she is not entitled thereto. Her claim is not merely colorable. *Matter of Markel* (D. C., Col.), 35 Am. B. R. 818, 228 Fed. 920.

132. *Matter of Ballou* (D. C., Ky.), 33 Am. B. R. 21, 215 Fed. 810.

133. Claim alleged to be fraudulent.—In the case of *In re Tarbox* (D. C., Mass.), 25 Am. B. R. 432, 185 Fed. 985, the court said: "The referee has jurisdiction under a summary petition to inquire and decide whether or not the claim under which property is held adversely to the trustee is merely colorable. But unless he can find it merely colorable he has no jurisdiction to proceed further. He cannot hear and determine its merits under a summary petition, if there is a real controversy as to the merits. Plainly the trustee cannot enlarge the referee's jurisdiction merely by alleging that the claim under which the property is held has no merits or is fraudulent, or by calling it 'merely colorable' when no other reasons appear for so describing it than its alleged want of merit or its fraudulent character."

In the case of *In re Franklin Suit & Skirt Co.* (D. C., Pa.), 28 Am. B. R. 278, 197 Fed. 591, the court said: "If as the result of such an inquiry, it should appear that the goods in question are held under a real adverse title, even if such title be founded upon what may seem to be a fraud, it would, no doubt, be necessary to fight that controversy out in a plenary suit; but if there should be no real claim of title, either fraudulent or bona fide, and if the goods should be merely held by a person who is the bankrupt himself in disguise, the court would unquestionably have power to take the goods into its own custody as the property of the bankrupt, and proceed to administer them according to law."

134. *Matter of Traustein v. White* (D. C., Mass.), 34 Am. B. R. 482, 225 Fed. 317; *Matter of Brantman* (C. C. A., 2d Cir.), 40 Am. B. R. 18, 244 Fed. 101.

Surrender under agreement with receiver.—Where property is surrendered to a receiver in bankruptcy under an agreement that it is to be held subject to the final judgment of a court having jurisdiction as to the title to the property, such question may be determined in a summary proceeding provided that the proceeding is of such a character as to secure to each party a full and fair opportunity to present his case on the merits. *Hollingsworth & Whitney Co., Petitioners* (C. C. A., 1st Cir.), 39 Am. B. R. 678, 212 Fed. 753.

134a. *Matter of Brantman* (C. C. A., 2d Cir.), 40 Am. B. R. 18, 244 Fed. 101.

135. *In re Hayden* (D. C., Mass.), 22 Am. B. R. 704, 172 Fed. 622; *Matter of Lummus* (D. C., Ga.), 32 Am. B. R. 740, 214 Fed. 891. As to inquiry into basis of adverse claim see discussion under "Inquiry as to basis of claim."

may pursue the investigation and for such purpose may cite the creditor to show cause, but if the creditor asserts a claim which is substantial, and objects to the jurisdiction of the court, the trustee should be directed to recover by plenary suit.¹³⁶ As a matter of right, the claimant should have his day in court in the regular way, i. e., by pleadings, trial, and judgment. On the other hand, if his claim is not strictly adverse, summary process is permissible, even that of contempt.¹³⁷

(3) EFFECT OF AMENDMENT OF 1903.—The act of 1903 having made *Bardes v. Bank* no longer the law, it has been suggested that resort may now be had to summary remedies in many cases where it was denied before.¹³⁸ But the only change accomplished by the amendment is to give jurisdiction of suits at law and in equity to recover property to the district courts, as well as to the courts of the State.

(4) JURISDICTION AS DEPENDENT UPON POSSESSION.—(I) *General rule.*—The power of the district court to proceed summarily will depend largely upon whether the subject-matter is in its possession, either actually or constructively; where such possession is shown the court may proceed summarily to determine controversies in respect to the property, and the extent and character of liens thereon or rights therein.¹³⁹ Once acquiring possession, the

136. *Matter of Vallozza* (D. C., N. J.), 34 Am. B. R. 409, 225 Fed. 334, citing text.

137. *In re Davis* (D. C., Tex.), 9 Am. B. R. 670, 119 Fed. 950.

138. *Lawrence v. Lowrie* (D. C., Pa.), 13 Am. B. R. 297, 133 Fed. 995.

139. *Whitney v. Wenman*, 198 U. S. 553, 14 Am. B. R. 45, 49, 49 L. Ed. 1161; *First Nat. Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 290, 14 Am. B. R. 102, 49 L. Ed. 1051, where the court states that the rule in force under the act of 1867 that the bankruptcy court was without jurisdiction to determine adverse claims in property not in possession of the assignee in bankruptcy by summary proceedings, whether absolute title or only a lien was asserted, is equally applicable under the present law; *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 756, 150 Fed. 731; *In re Baudouine* (C. C. A., 2d Cir.), 3 Am. B. R. 651, 101 Fed. 574; *In re Lemmon & Gale* (C. C. A., 6th Cir.), 7 Am. B. R. 291, 112 Fed. 296; *Cleminshaw v. International Shirt & Collar Co.* (D. C., N. Y.), 21 Am. B. R. 616, 165 Fed. 797; *Galbraith v. Grocery Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 752, 216 Fed. 842; *Hollingsworth & Whitney Co., Petitioners* (C. C. A., 1st Cir.), 39 Am. B. R. 678, 242 Fed. 753; *Matter of Victor* (D. C., Ga.), 40 Am. B. R. 399, 246 Fed. 727; *Matter of Marquette, Jr., Inc.* (C. C. A., 2d Cir.), 42 Am. B. R. 535, 254 Fed. 419; *Matter of Clayton* (D. C., N. J.), 43 Am. B. R. 687, 239 Fed. 911.

The possession of the res draws to the court jurisdiction of all questions in respect to title or lien. *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 684. Where the property is in possession of the trustee, the bankruptcy court may, upon notice to claimants, determine the conflicting claims of the parties interested in the property. *In re Noel* (D. C., Md.), 14 Am. B. R. 715, 137 Fed. 694. The bare possession of the property by the court through its officers, is sufficient to give the court jurisdiction to determine to whom the property belongs. *In re Leeds Woolen Mills*

(D. C., Tenn.), 12 Am. B. R. 136, 129 Fed. 922. The summary jurisdiction of the bankruptcy court can be sustained only when said court, through the acts of its officers, such as referees, receivers, or trustees, has taken possession of the res as the property of the bankrupt. *Matter of Schmiek Handle & Lumber Co.* (D. C., Me.), 37 Am. B. R. 494, 233 Fed. 446.

Summary proceedings in respect to property in possession of trustee.—In the case of *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, the court said: "The bankruptcy court has jurisdiction to draw to itself, and to determine by summary proceedings after reasonable notice to claimants, the merits of controversies between the trustee and such claimants over liens upon and the title to property claimed by the trustee as that of the bankrupt which has been lawfully reduced to the actual possession of the trustee or of some other officer of the bankruptcy court as the property of the bankrupt." Citing *Murphy v. John Hoffman Company*, 211 U. S. 562, 570, 21 Am. B. R. 487, 29 Sup. Ct. 154, 53 L. Ed. 327; *White v. Schloerb*, 178 U. S. 542, 545, 546, 548, 4 Am. B. R. 178, 20 Sup. Ct. 1007, 44 L. Ed. 1183; *In re Epstein* (C. C. A., 8th Cir.), 19 Am. B. R. 89, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.), 465; *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585, 587, 590, 97 C. C. A. 535, 537, 540, 26 L. R. A. (N. S.), 1180; *Mound Mines Company v. Hawthorne* (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882, 886, 97 C. C. A. 394, 398; *Goodnough Mercantile & Stock Co. v. Galloway* (D. C., Ore.), 19 Am. B. R. 244, 156 Fed. 504, 509; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 77 C. C. A. 668, 669, 671, 147 Fed. 684, 685, 687; *Whitney v. Wenman*, 198

jurisdiction to determine by plenary suit or summary proceedings all conflicting claims will remain in the court, and there can be no interference with such possession upon the part of any other court, except by way of review or appeal.¹⁴⁰ Summary jurisdiction may not be exercised to determine adverse claims to property not in the possession of the trustee, whether the adverse claimant asserts absolute title or merely a lien.¹⁴¹ It has been held that where

U. S. 539, 549, 553, 14 Am. B. R. 45, 25 Sup. Ct. 778, 49 L. Ed. 1157.

Cases where summary jurisdiction may be exercised.—The district court sitting in bankruptcy has jurisdiction to draw to itself and to determine by summary proceedings after reasonable notice to the claimants, all controversies between the trustee and adverse claimants over liens upon, and the title and possession of (1) property in the possession of the bankrupt when the petition in bankruptcy is filed, (2) property held by third parties for him, (3) property lawfully seized by the marshal as the bankrupt's under clause 3 of section 2 of the bankruptcy law, and (4) property claimed by the trustee which has been lawfully reduced to actual possession by the officers of the court. *Darrough v. First National Bank of Claremore* (Okla. Sup. Ct.), 37 Am. B. R. 75, 156 Pac. 101.

140. *Matter of Barker Piano Co.* (C. C. A., 2d Cir.), 37 Am. B. R. 271, 233 Fed. 522; *Williams v. Noyes & Nutter Mfg. Co.* (Sup. Ct., Me.), 112 Me. 408, 33 Am. B. R. 865, 92 Atl. 482; *Meek v. Eggerman* (Okla. Sup. Ct.), 36 Am. B. R. 488, 155 Pac. 522; *Matter of Ballou* (D. C., Ky.), 33 Am. B. R. 21, 215 Fed. 810; *Mound Mines Co. v. Hawthorne* (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882; *In re Schermerhorn* (C. C. A., 8th Cir.), 16 Am. B. R. 507, 145 Fed. 341; *In re Moody* (D. C., Iowa), 12 Am. B. R. 718, 724, 131 Fed. 525; *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 187; *Crosby v. Spear*, 98 Me. 542, 11 Am. B. R. 613; *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1, holding that where the bankruptcy court in the exercise of its customary jurisdiction obtains the lawful custody of property to which liens attach, it has the jurisdiction to determine the relative priorities of conflicting claims to the fund realized from the sale of the property; *In re Reynolds* (D. C., Mont.), 11 Am. B. R. 758, 127 Fed. 760; *In re Kellogg* (C. C. A., 2d Cir.), 10 Am. B. R. 7, 121 Fed. 333; *In re McCallum* (D. C., Pa.), 7 Am. B. R. 598, 113 Fed. 893; *In re Whitener* (C. C. A., 5th Cir.), 5 Am. B. R. 198, 105 Fed. 180; *Keegan v. King* (D. C., Ind.), 3 Am. B. R. 79, 96 Fed. 768; *Story & Clark Piano Co. v. Holmes* (C. C. A., 7th Cir.), 41 Am. B. R. 608, 251 Fed. 565; *Spencer Commercial Club v. Bartness* (Ind. App. Ct.), 43 Am. B. R. 560, 123 N. E. 435. See also cases cited under § 2(7), *ante*.

Court acquiring possession.—In the case of *Murphy v. John Hoffman Co.*, 211 U. S. 562, 21 Am. B. R. 487, 53 L. Ed. 327, affg. 187 N. Y. 548, 80 N. E. 1104, the court said: "But where the property in dispute is in the actual possession of the court of bank-

ruptcy there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, federal or state. Where a court of competent jurisdiction has taken property into its possession through its officers the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it, as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court." In this case the court held that the seizure of goods in the possession of a receiver appointed in the bankruptcy court could not be interfered with on a writ of replevin from another court.

Exclusive jurisdiction.—Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting title, possession, or control of the property. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts. *Wright v. Harris* (D. C., Ga.), 34 Am. B. R. 574, 221 Fed. 736, citing *Murphy v. John Hoffman Co.*, 211 U. S. 562, 21 Am. B. R. 487, 53 L. Ed. 327; *Whitney v. Worman*, 198 U. S. 553, 14 Am. B. R. 45, 49 L. Ed. 1157.

141. *First National Bank v. Chicago Title & Trust Co.*, 198 U. S. 230, 14 Am. B. R. 102, 49 L. Ed. 1051; *Morning Telegraph Pub. Co. v. Hutchinson* (Sup. Ct., Mich.), 146 Mich. 38, 17 Am. B. R. 425, 109 N. W. 42; *Cooney v. Collins* (C. C. A., 9th Cir.), 23 Am. B. R. 840, 170 Fed. 189; *Matter of Phoenix Planing Mill* (D. C., Ga.), 42 Am. B. R. 143, 250 Fed. 898; *Matter of Moose River Lumber Co.* (D. C., N. Y.), 42 Am. B. R. 242, 251 Fed. 400; *Matter of Marquette, Inc.* (C. C. A., 2d Cir.), 42 Am. B. R. 553, 254 Fed. 419.

Property held under writ of replevin prior to bankruptcy.—Where the sheriff, in an action pending in a State court, holds property in replevin taken by him prior to bankruptcy proceedings under claim of owner-

property in the possession of the trustee is claimed by a person who was not a party to the bankruptcy proceedings, or any other controversy as to distribution of the estate, the court or referee has no jurisdiction to summarily determine the ownership of such property. The claimant is at least entitled to a determination of the claim, in judicial proceedings in which he has had an opportunity to appear.¹⁴²

(II) *Claim of interest in property in possession of court.*—Where a third person claims an interest in property in the possession of the bankrupt adjudication and which thereupon passed into the possession of the trustee, the referee may, by summary proceedings, require the claimant to appear in the bankruptcy court, and may adjudicate the rights of the parties in respect to such property.¹⁴³ This includes the power to determine by any valid mode or procedure the validity of the lien of a mortgage¹⁴⁴ or of a mechanic's lien on property which is in the possession of the bankruptcy court,¹⁴⁵ or the right to possession of leased premises in the possession of the bankrupt.^{146a} When the property of the bankrupt, or the fund resulting from the sale thereof, is in the custody of the court's officers, the court may summarily determine the validity of all subsisting liens thereon.¹⁴⁶

ship, the bankruptcy court has not jurisdiction, by summary order, to compel the sheriff to deliver the property to a receiver in bankruptcy. *Matter of Rudnick & Co.* (C. C. A., 2d Cir.), 20 Am. B. R. 33, 100 Fed. 903.

Possession of assignee or receiver for creditors.—The bankruptcy court has jurisdiction, by summary proceeding, to take from assignees and receivers for general creditors in insolvency or winding up proceedings, appointed within four months prior to the filing of the petitions in bankruptcy, from officers of courts attaching or replevying within that time, and from others holding for the bankrupt, property claimed to belong to the bankrupt, and then by virtue of the possession thus taken, to determine adverse claims to such property by a like summary proceeding. But the bankruptcy court may not thus take possession from a receiver appointed by another court, in a suit to enforce a lien antedating the filing of the petition in bankruptcy, or thereby draw to itself jurisdiction summarily to determine the validity of such a lien. *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913.

142. *Matter of Petronio* (C. C. A., 7th Cir.), 34 Am. B. R. 470, 220 Fed. 260.

Bankruptcy of contractor.—A State court upon the bankruptcy of a contractor has jurisdiction to distribute money in the possession of the owner. *Gordon-Jones Const. Co. v. Welder* (Tex. Ct. of Civ. App.), 41 Am. B. R. 431, 201 S. W. 681.

143. *Matter of Seger Bros. Co.* (D. C., Mich.), 39 Am. B. R. 660, 243 Fed. 450.

Claim to property in possession of bankrupt which passes to trustee.—In *Mound Mines Co. v. Hawthorne* (C. C. A., 8th Cir.), 23 Am. B. R. 242, 178 Fed. 882, the court says: "The law is now settled that the interest of a third party in property claimed to belong to the bankrupt estate which, at the time of the institution of the proceedings in bankruptcy, is in the possession of such third person claiming an interest therein, can only be determined by an original suit brought for that purpose. Where, however, property which is in the possession of a bankrupt at the time of the bankruptcy proceedings and passes as a part of his estate into the possession of the trustee in bankruptcy, and a third party claims an interest therein,

the referee may, by a summary proceeding, require such third party to appear in the bankruptcy court, present his claim, and the referee may adjudicate the rights of the parties in respect thereof." *In re Epstein* (C. C. A., 8th Cir.), 19 Am. B. R. 80, 156 Fed. 42, in which it was held that a court of bankruptcy may, by summary process, require those who assert title to, or interest in property, which has rightfully come into its possession and control as part of the bankrupt estate, to present their claims to that court, and the notice being reasonable, may proceed to adjudicate the merits of such claims.

Dower rights.—A bankruptcy court or referee has jurisdiction to determine in a summary proceeding the inchoate right of dower of the widow of the bankrupt under an agreement between her and the trustee by which the latter agreed to pay her not less than a certain amount upon the sale of the property. *Matter of Dialogue & Son* (D. C., N. J.), 39 Am. B. R. 70, 241 Fed. 290.

144. *Galbraith v. Grocery Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 752, 216 Fed. 842; *Matter of East Stroudsburg, etc., Co.* (D. C., Pa.), 41 Am. B. R. 57, 248 Fed. 350.

145. *Mechanic's lien.*—The bankruptcy court has jurisdiction to pass upon the validity of mechanics' liens on property of the bankrupt which has come into the possession of the court. *Matter of Kligerman* (D. C., Pa.), 33 Am. B. R. 608, 219 Fed. 768.

145a. *Lawhead v. Monroe Building Co.* (C. C. A., 6th Cir.), 41 Am. B. R. 800, 252 Fed. 758.

146. *Lien on fund.*—Where a claimant of logs also claimed by the receiver in bankruptcy agrees to remove and sell the logs, advance expenses and value of liens and after deducting said amount and proper compensation pay the balance to the receiver or their successors, and also agrees to submit the question of ownership to the court having jurisdiction, the bankruptcy court has jurisdiction of the fund and may summarily determine the ownership. (See Am. B. R. Digest, § 637.) *Matter of Schmiek Handle & Lumber Co.* (D. C., Me.), 37 Am. B. R. 494, 233 Fed. 446.

Determination as to liens.—After property of a bankrupt which is in his possession at the time of his bankruptcy has come within

(III) *Constructive possession*.—The rule which gives the bankruptcy court exclusive jurisdiction to determine claims to property in its custody is not limited to actual possession, but extends to constructive possession as well, including property held not only by but for the bankrupt.¹⁴⁷ Where property is not capable of tangible or actual physical custody, constructive possession will suffice to confer summary jurisdiction upon the bankruptcy court in respect to such property, as for instance where the bankrupt was possessed of a seat in a stock exchange and according to the rules of which proceedings must be taken to complete a transfer thereof; in such a case the seat passed to the bankruptcy court subject to the required transfer and the court may summarily direct the necessary action to be taken to complete the transfer.¹⁴⁸ And also in the case of grain or other property stored in a warehouse or in the possession of a bailee.¹⁴⁹ If the property claimed was in the possession of an agent of the bankrupt, it will be deemed to have been transferred to the possession of the trustee and the bankruptcy court may exercise summary jurisdiction over it.¹⁵⁰ And property in the hands of an officer of a bankrupt corpora-

the jurisdiction and custody of the bankruptcy court by virtue of the filing of the petition in bankruptcy and his subsequent adjudication, a creditor holding a lien or security deed cannot thereafter acquire title to the property or the possession thereof so as thereby to become an adverse claimant, so that his rights if any so acquired may not be inquired into and determined by a summary proceeding. *Cohen v. Nixon & Wright* (D. C., Ga.), 37 Am. B. R. 646.

147. *Orinoco Iron Co. v. Metzel* (C. C. A., 6th Cir.), 36 Am. B. R. 247, 230 Fed. 40, citing *Mueller v. Nugent*, 184 U. S. 1, 14, 17, 7 Am. B. R. 224, 46 L. Ed. 405; *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45; *Lazarus v. Prentice*, 234 U. S. 263, 266, 32 Am. B. R. 559; *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585, 590; *Clay v. Waters* (C. C. A., 8th Cir.), 24 Am. B. R. 293, 178 Fed. 385, 392; *In re Schermerhorn* (C. C. A., 8th Cir.), 16 Am. B. R. 507, 145 Fed. 341-2; *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731, 737; *Matter of Gottlieb* (D. C., N. Y.), 40 Am. B. R. 247; *Board of Road Comrs. v. Keil* (C. C. A., 6th Cir.), 44 Am. B. R. 259, 259 Fed. 76; *Matter of Diamond's Estate* (C. C. A., 6th Cir.), 44 Am. B. R. 268, 259 Fed. 70.

Constructive possession insufficient.—In the case of *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, the court said: "If the commencement of bankruptcy proceedings without more, without any act of the bankruptcy court, or any of its officers, to give notice to adverse claimants, or to reduce the property claimed to belong to the bankrupt to the possession of the officers of that court as his property gives it constructive possession, and hence a legal custody that enables it to determine by summary proceedings the merits of adverse claims to liens and titles to such property in the actual possession of others, then no case could ever arise in which any other court could have jurisdiction by plenary suit to determine the merits of such claims, for in every case a bankruptcy proceeding is commenced and the only ground on which the jurisdiction to determine summarily the

merits of such claims is sustained, is that the bankruptcy court's legal custody of the property excludes the jurisdiction of every other court and gives it the power to determine summarily all claims to liens upon, or interests in, the property in such custody. But this theory flies in the face of the settled rule repeatedly announced by the Supreme Court that the actual possession by the bankruptcy court is the indispensable condition of its exclusive and of its summary jurisdiction here."

148. *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731; *Page v. Edmunds*, 187 U. S. 596, 9 Am. B. R. 277, 47 L. Ed. 318. See also *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915; *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264; *In re Ketchum*, 1 Fed. 840.

149. *Herbert v. Crawford*, 228 U. S. 204, 57 L. Ed. 800; *Babbitt v. Dutcher*, 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402; *Matter of Wegman Piano Co.* (D. C., N. Y.), 36 Am. B. R. 210, 238 Fed. 60.

150. *Gavilan v. Lugo* (D. C., Porto Rico), 39 Am. B. R. 326, 9 P. R. Fed. 344.

Possession of agent.—*Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405, where it appeared that the property of the bankrupt was in the hands of the third person before the filing of the petition in bankruptcy, as an agent of the bankrupt, and in respect to which he asserted an adverse claim; it was held that the bankruptcy court had power, by summary proceeding, to compel the surrender of the property to the trustee.

Where a third party does not admit that he is entitled to the possession of property and makes no claim to title thereto, he may not object to the exercise of summary jurisdiction by a court of bankruptcy in attempting to trace into his hands property of the bankrupt, where such property or its proceeds are traced through the hands of the bankrupt into the possession of the agent. The trustee may demand that the agent be compelled to make good or account for the

tion which belongs to the corporation may be summarily seized by an officer of the court, and thereupon comes into the possession of the court so as to authorize the exercise of summary jurisdiction by the court.¹⁵¹

(IV) *Unauthorized surrender of possession.*—The jurisdiction to proceed summarily is not lost by the unauthorized surrender of possession by officers of the court or by seizure of the property by an adverse claimant.¹⁵² If property of the bankrupt, once in the possession of the court, has been sold by the trustee without authority the court may summarily direct the return of such property.¹⁵³

(V) *Possession under attachment annulled by adjudication.*—Where the claim of possession as against the trustee's right of possession is based solely on an attachment lien which is annulled by the adjudication in bankruptcy, the person or officer so in possession holds as bailee for the trustee, and may be required to deliver the property by summary order issued from the bankruptcy court.¹⁵⁴

(VI) *Property wrongfully retained; fraudulent transfers.*—If property of the bankrupt is wrongfully withheld or is fraudulently and illegally

bankrupt's property. In re Fogelman (D. C., N. Y.), 26 Am. B. R. 742, 188 Fed. 755.

Officer of bankrupt corporation.—The district court has jurisdiction to order an officer of a bankrupt corporation to turn over property of such corporation, which he holds without himself making any adverse claim to it. In re Brockton Ideal Shoe Co. (C. C. A., 2d Cir.), 29 Am. B. R. 846, 202 Fed. 199.

Insurance policy in possession of bankrupt's wife.—Where it appears that bankrupt's wife had in her possession a policy of insurance taken out by bankrupt on his life and that she had paid premiums on said policy with money which she herself had earned, the bankrupt should not be required by summary order to surrender such policy, but he should only be required to assign to his trustee in writing his rights thereunder. In re Loveland (C. C. A., 1st Cir.), 29 Am. B. R. 560, 200 Fed. 136.

151. *Le Master v. Spencer* (C. C. A., 8th Cir.), 29 Am. B. R. 264, 203 Fed. 210, in which case it was held that where upon the arrest of the secretary, treasurer and general manager of a corporation upon a criminal charge, a large sum of money, valuable jewelry and other property was found upon his person, and the marshal, acting under a special warrant issued upon the application of creditors petitioning for the corporation's adjudication in bankruptcy, seized such property in the custody of the sheriff as assets of the alleged bankrupt, the district court had jurisdiction to determine the claim of the accused to such property. Compare *Matter of Marquette, Inc.* (C. C. A., 2d Cir.), 42 Am. B. R. 555, 254 Fed. 419.

152. In re Schermerhorn (C. C. A., 8th Cir.), 16 Am. B. R. 507, 145 Fed. 341. See also *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, 49 L. Ed. 1157; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405; *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178, 44 L. Ed. 1183; *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9

Am. B. R. 444, 110 Fed. 1; In re Corbett (D. C., Wis.), 5 Am. B. R. 224, 104 Fed. 872; In re Rose Shoe Mfg. Co. (C. C. A., 2d Cir.), 21 Am. B. R. 725, 168 Fed. 39, holding that where, under a claim of ownership, there is taken from the possession of a receiver property held by him as part of the bankrupt's estate, the court of bankruptcy has jurisdiction to compel its return by summary order, and may adjudicate all claims relating thereto.

Fraudulent transfer of assets to corporation, formed by alleged bankrupt, during the four months' period, for purpose of avoiding administration in bankruptcy does not affect summary jurisdiction. *Matter of Berkowitz* (Ref., N. J.), 22 Am. B. R. 227.

153. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 815.

Unauthorized surrender by receiver.—Where the court had possession of the property, and jurisdiction to hear and determine the interests of those claiming a lien thereon, or ownership thereof, such jurisdiction cannot be ousted by a surrender of the property without the authority of the court. *Whitney v. Wenman*, 198 U. S. 539, 553, 14 Am. B. R. 45, 49 L. Ed. 1157; In re Baudouine (C. C. A., 2d Cir.), 3 Am. B. R. 651, 655, 101 Fed. 574.

154. *Stanton v. Wooden* (C. C. A., 9th Cir.), 24 Am. B. R. 736, 179 Fed. 61; In re Grassler (C. C. A., 9th Cir.), 18 Am. B. R. 694, 154 Fed. 478. Compare *Martin v. Oliver* (C. C. A., 8th Cir.), 43 Am. B. R. 739, 260 Fed. 89.

Possession of property attached.—An attachment upon property is discharged by the debtor's adjudication as a bankrupt. The adjudication operates as seizure of the attached property which is in *custodia legis* from that time, and the title thereto passes to the trustee. The possession of the sheriff under the attachment is that of the bankruptcy court. In re Walsh Bros. (D. C., Ia.), 20 Am. B. R. 472, 159 Fed. 560.

retained by a third party, he may be compelled summarily to surrender it to the trustee.¹⁵⁵ If it be asserted that a third person is in fraudulent possession of property belonging to the bankrupt, it should be clearly shown that such property may be sufficiently identified to enable the proper officer to take it into his possession.¹⁵⁶ If property fraudulently transferred by the bankrupt subsequent to the adjudication, is sold or mingled with the vendee's property so as not to be capable of identification, the court may direct the vendee to restore the value of the goods.¹⁵⁷ It does not follow that a bankrupt or a third party may be summarily ordered to deliver property to the trustee, because such property was conveyed within the four months' period, with alleged intent to defraud creditors; it may be that the transferee has a valid claim to such property, notwithstanding such transfer; it should appear that the possession and control of the property is in the bankrupt or in one who holds for him or in his right.¹⁵⁸ Even though the possession of the adverse claimant is merely colorable and founded upon a preposterous claim, the trustee may not proceed summarily, but the party claiming possession should be heard in defense of such possession.¹⁵⁹ Property in the possession of a third person cannot be recovered summarily on the mere suspicion raised by the haste with which the property was sold and delivered immediately preceding bankruptcy.¹⁶⁰

155. *In re Famous Clothing Co.* (D. C., N. Y.), 24 Am. B. R. 780, 179 Fed. 1,015; *American Trust Co. of Pittsburgh v. Wallis* (C. C. A., 3d Cir.), 11 Am. B. R. 360, 126 Fed. 464; *In re Friedman* (D. C., N. Y.), 18 Am. B. R. 712, 153 Fed. 939; *Matter of Risnek, Shapiro & Co.* (D. C., N. Y.), 39 Am. B. R. 816, 240 Fed. 579.

Summary proceedings to recover goods held for bankrupt's benefit.—The bankruptcy court has jurisdiction to summarily determine whether certain specified goods are the property of an alleged bankrupt and are being withheld from his receiver by a person who is merely the bankrupt under another name, and for that purpose may issue process and call before it the necessary parties and witnesses. *In re Franklin Suit & Skirt Co.* (D. C., Pa.), 23 Am. B. R. 278, 177 Fed. 591.

Gift of balance of earnings to wife after payment of family expenses.—In a summary proceeding by a trustee in bankruptcy to recover moneys deposited in bank and invested in shares of stock of building associations it appeared that the bankrupt had an agreement with his wife under which he placed most of his earnings in her possession and gave her the balance after she paid the family expenses. Held, that an order compelling payment to the trustee of a portion of the moneys deposited in the name of the wife should be affirmed. *Courtney v. Shea* (C. C. A., 6th Cir.), 34 Am. B. R. 753, 225 Fed. 358.

Burden of proof.—Where, in proceedings against a third person to recover money belonging to the bankrupt which the third person has withheld from the trustee, the moneys are traced into the hands of the third person, the burden is upon him to account therefor. *Matter of Musica* (D. C., N. Y.), 44 Am. B. R. 623, 263 Fed. 156.

156. *In re Jackier* (D. C., Pa.), 24 Am. B. R. 790, 179 Fed. 720.

157. *In re Denson* (D. C., Ala.), 28 Am. B. R. 158, 195 Fed. 854.

158. *In re Nisenson* (D. C., N. J.), 24 Am. B. R. 915, 183 Fed. 912.

Corporate stock issued in exchange for

property of bankrupt.—Where more than four months prior to the filing of a petition against him, a bankrupt had transferred his property to a corporation in exchange for stock, a portion of which was issued to others, such stockholders should not be proceeded against summarily to have their stock turned over to the trustee in bankruptcy as the property of the bankrupt's estate, on the theory that the original transfer by the bankrupt of his property to the corporation in exchange for stock was fraudulent, but the issue should be determined in a plenary suit by the trustee, even if objection to the jurisdiction of the bankruptcy court be deemed waived by answering to the merits, it appearing that various other transactions, involving the rights of an infant, required determination in passing upon the validity of the stockholders' claim of title. *In re Mills* (D. C., N. Y.), 25 Am. B. R. 278, 179 Fed. 409.

159. *Matter of Vyse* (D. C., N. Y.), 34 Am. B. R. 378, 220 Fed. 727; *In re Friedman*, (C. C. A., 2d Cir.), 20 Am. B. R. 37, 161 Fed. 260; *In re Siegel* (D. C., N. Y.), 21 Am. B. R. 154, 164 Fed. 559. If a claim of title is fairly interposed, then a plenary suit is necessary. *In re Bacon* (C. C. A., 2d Cir.), 31 Am. B. R. 777, 210 Fed. 129.

160. *Matter of Lummums* (D. C., Ga.), 33 Am. B. R. 740, 214 Fed. 891, in which the court held that where a creditor purchases property from a bankrupt on the day before the filing of the petition in bankruptcy, with the intention of applying it on his account, and takes possession thereof, he is an adverse claimant, and the bankruptcy court has no jurisdiction to summarily determine his rights on an application by the

(VII) *What constitutes possession of court.*—Property is in possession of the court when an officer of the court is in possession, whether such officer be a trustee, a receiver, or any other judicial representative.¹⁸¹ The test of the summary jurisdiction is that the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of the res as the property of the bankrupt.¹⁸²

(VIII) *When possession takes effect; filing petition as notice.*—Upon the filing of a petition in bankruptcy, followed by adjudication, the property in the possession of the bankrupt of which he claims the ownership passes at once into the custody of the court of bankruptcy and becomes subject to its jurisdiction.¹⁸³ It has been expressly stated in a number of cases that the property of the bankrupt, after the filing of the petition against him and before adjudication thereon, is in *custodia legis*; that from that time it becomes subject to the prehensory power of the court and the bankrupt or his creditors cannot take any action in respect to it.¹⁸⁴ This principle is based upon the often-repeated statement that the filing of a petition is a *caveat* to all the world, and is in fact an injunction and attachment.¹⁸⁵ But it applies only to parties who have no substantial claim to a lien upon or title to the property of the bank-

receivers of the bankrupt for an order to compel the creditor to deliver the property to them.

181. In re Franklin Lumber Co. (D. C., N. J.), 17 Am. B. R. 443, 444, 147 Fed. 852. In re Henda (D. C., Pa.), 17 Am. B. R. 521, 523, 149 Fed. 614; Crosby v. Spear, 98 Me. 542, 11 Am. B. R. 612, 67 Atl. 861. McFarland Carriage Co. v. Seabass (D. C., La.), 8 Am. B. R. 221, 106 Fed. 146, holding that a thing is in *custodia legis* when it is shown that it has been and is subject to the official custody of a judicial executive officer in pursuance of his execution of a legal writ.

Where bankrupt's receiver actually obtained possession of goods at the very inception of a controversy concerning the title thereto and they remained in his possession and that of the trustee until sold by order of the court and consent of all parties, since which time the trustee held the proceeds, the bankruptcy court had jurisdiction to determine the title to the goods in summary proceedings. Bainsburg v. Blackford (C. C. A., 4th Cir.), 30 Am. B. R. 230, 204 Fed. 493, affg. 27 Am. B. R. 64, 186 Fed. 63.

Possession of books of account.—The physical possession by a receiver or trustee of the books of account of a bankrupt give him, at least, constructive possession of the unpaid accounts therein recorded, he thereby obtains all the indicia of possession that usually accompanies the transfer of property of that character from the bankrupt. Matter of Gottlieb (D. C., N. Y.), 40 Am. B. R. 247, 245 Fed. 139.

Property coming into possession of officers by agreement.—Hollingsworth & Whitney Co., Petitioner (C. C. A., 1st Cir.), 30 Am. B. R. 678, 242 Fed. 763.

Possession of contested claims against alleged stockholders is not such possession by the bankruptcy court as to give it jurisdiction of a suit in equity to enforce the unconditional liability of the stockholders for unpaid subscriptions. Kelley v. Gill (U. S. Sup. Ct.), 40 Am. B. R. 421, 38 Sup. Ct. 36.

182. *Test of summary jurisdiction.*—In the case of In re Rathman (C. C. A., 8th Cir.), 30 Am. B. R. 246, 186 Fed. 618, the court cited the case of Murphy v. John Hoffman Co., 211 U. S. 552, 21 Am. B. R. 487, 53 L. Ed. 327; Whitney v. Weeman, 195 U. S. 539, 14 Am. B. R. 46, 49 L. Ed. 1187; White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178, 44 L. Ed. 1153, and said: "It is the taking possession of the property as the property of the bankrupt, by the act

of some officer of the bankruptcy court, such as a referee, a receiver or a trustee. This is the touchstone of its summary jurisdiction, unless indeed the declaration of the Supreme Court in Babbitt v. Dutcher, 218 U. S. 102, 28 Am. B. R. 519, 54 L. Ed. 602, deprives it of the power to acquire this summary jurisdiction to determine adverse claims to liens upon and titles to property of the bankrupt, created by mortgages and conveyances made prior to the filing of the petition in bankruptcy, and even by acquiring possession of the property." See also Matter of Mid-Valley Coal Co. (D. C., Pa.), 42 Am. B. R. 301, 261 Fed. 816.

Moneys collected by third person on accounts assigned to him.—Matter of Gottlieb (D. C., N. Y.), 40 Am. B. R. 247, 245 Fed. 139.

183. In re Gutman & Weak (D. C., N. Y.), 8 Am. B. R. 203, 114 Fed. 1,009; In re Granite City Bank (C. C. A., 8th Cir.), 14 Am. B. R. 404, 127 Fed. 518; In re Hobbs (D. C., W. Va.), 16 Am. B. R. 644, 145 Fed. 211; In re Schermerhorn (C. C. A., 8th Cir.), 16 Am. B. R. 807, 145 Fed. 241, where the court said: "Upon the filing of a petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt of which he claims the ownership passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine, by plenary action or summary proceeding, as the nature of the case demands, all adverse or conflicting claims thereto, whether of title or of lien; and that court may, by the process of injunction, protect its jurisdiction against interference." De Fries v. Bryant (D. C., Ky.), 37 Am. B. R. 378, 223 Fed. 253; Spencer Commercial Club v. Hartman (Ind. App. Ct.), 43 Am. B. R. 809, 138 N. E. 430.

184. In re Duncan (D. C., S. Car.), 17 Am. B. R. 223, 298, 148 Fed. 444. In re Granite City Bank (C. C. A., 8th Cir.), 14 Am. B. R. 404, 127 Fed. 518. See also Matter of Leigh (D. C., Ill.), 31 Am. B. R. 379, 204 Fed. 494; Williams v. Noyes & Nutter Mfg. Co. (Sup. Ct., Me.) 112 Me. 408, 23 Am. B. R. 895, 92 Atl. 482; Gavilan v. Lugo (D. C., Porto Rico), 30 Am. B. R. 236, 9 P. R. Fed. 344.

185. Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 234, 46 L. Ed. 405. This declaration has been repeated in a great number of cases with the same effect and purpose; these cases are too numerous to cite. See cases cited in note under section 18.

rupt; as against those who have such claims the filing of the petition is neither a *caveat* nor an attachment. Until the bankruptcy court takes actual possession of the property by some act of one of its officers, or makes such claimants parties to the proceeding by some order or process, or notice of the proceeding comes to them, their liens, titles and remedies are unaffected thereby and they are strangers to the proceeding.¹⁶⁶ A bank may not be required by summary order to turn over to the trustee in bankruptcy of a depositor, the amount paid by it on checks subsequent to the filing of a bankruptcy petition against such depositor, of which it had no actual notice.¹⁶⁷ The principle above declared was never intended to prevent the consummation of legitimate business transactions which were being conducted at the time a petition was filed against one or the other of the parties to such transaction.¹⁶⁸ But where a bankrupt, after the filing of a petition against him, but before the court had come into actual possession of the estate, pays a bona fide debt out of the assets, to a creditor who had no notice of such filing, the court may entertain

166. In re Rathman (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, citing *Jacquith v. Rowley*, 188 U. S. 620, 625, 9 Am. B. R. 525, 47 L. Ed. 620; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 352, 15 Am. B. R. 633, 50 L. Ed. 782; *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 18 Am. B. R. 1, 51 L. Ed. 945.

Effect of proceedings; lienors not parties. — Bankruptcy proceedings do not of themselves operate as an attachment or sequestration in the sense of a judgment or the conferring of a lien, but there is a mere passing by operation of law of the title of the bankrupt to the trustee. Liens and encumbrances against the property not avoided by the bankruptcy act remain unaffected by the proceedings except to the extent to which the remedy of enforcement is limited by the property having passed into the custody of the court. Until such lien creditors or other third persons with rights in the property of the bankrupt come into the bankruptcy court to enforce their rights or are brought in to have the rights of the trustees asserted as against them, they are in no proper sense parties to the bankruptcy proceedings. *Matter of Reading Hat Mfg. Co. (D. C., Pa.)*, 34 Am. B. R. 884, 224 Fed. 786.

Money paid over on execution sale after filing of petition but prior to adjudication, cannot be recovered in summary proceeding. *Matter of Cox-Rackley Co. (D. C., N. Car.)*, 40 Am. B. R. 487, 245 Fed. 367.

167. Application of principle where bank pays check drawn by bankrupt. — In the case of *Matter of Zotti (C. C. A., 2d Cir.)*, 26 Am. B. R. 234, 186 Fed. 84, the court said: "Of course the trustee can after adjudication, and the receiver before, compel the surrender of assets in the possession of the bankrupt, or of the alleged bankrupt, or of any one for him. As to such persons, the filing of the petition may be a caveat, attachment and injunction. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405, was just such a case. The bankrupt had presented to his son the proceeds of substantially all his property immediately before the petition was filed. In summary proceedings, before the referee, to make the son surrender these moneys, he merely denied jurisdiction that

he had received them before the petition was filed." (The court then quoted at length from the opinion of Chief Justice Fuller in such case): "... We think this language was never intended to be applied to a bank which has honestly paid checks to the depositors without notice that any petition in bankruptcy has been filed against him and who may never be adjudicated a bankrupt at all."

168. Legitimate business transactions. — In the case of *Matter of Murtens (C. C. A., 2d Cir.)*, 15 Am. B. R. 362, 142 Fed. 445, 75 C. C. A. 548, the court said: "Under the former act there were many decisions, that a lien previously acquired could not be enforced subsequent to the commencement of the proceeding, except with the permission of the bankruptcy court. The Supreme Court, however, refused to sanction these decisions, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding had been commenced. *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136. The change in the present act, by which the trustee's title is that only which exists at the date of the adjudication, removes any uncertainty which arose under the act of 1867. It was intended, we think, to permit all legitimate business transactions between a debtor and those dealing with him to be carried out and consummated as freely until he has been adjudicated a bankrupt as though no proceedings were pending. In many cases the proceeding against an alleged bankrupt is unfounded, and for this and other reasons never culminates in an adjudication. While the filing of a petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent lienors or pledgees from enforcing their contracts. This is its practical effect if the rights and remedies of all concerned are in suspense until it can be ascertained whether an adjudication is or is not to follow the commencement of the proceeding." Compare *Edison Electric Illum. Co. v. Tibbatts (C. C. A., 1st Cir.)*, 39 Am. B. R. 640, 241 Fed. 468.

summary proceedings to recover such payment.¹⁶⁹ In any event whether the property vests at the time of the filing of the petition or upon the adjudication the possession of the bankrupt becomes that of the court and from either of such times the court may proceed summarily in respect to the property of the bankrupt.¹⁷⁰

(IX) *Claim against bank deposits or securities pledged.*—The claim of a bank to ordinary deposits made by a bankrupt, based on an alleged right to offset notes of the bankrupt, will generally be held to be adverse, and the bank is entitled to a determination of the claim in a plenary suit.¹⁷¹ But a summary proceeding may be maintained against a bank to compel it to turn over funds received from the bankrupt upon deposit after the filing of the petition.^{171a} Where securities are pledged for the payment of a debt owing by the bankrupt, and are in the possession of the pledgee at the time of the adjudication and other parties assert a claim to such securities the claim is adverse, and the referee may not summarily determine the right of the trustee to the possession of the securities. The claimants are entitled to the benefit of a plenary suit.¹⁷²

(X) *Extent of jurisdiction.*—The jurisdiction pertains to the hearing and determination of all adverse claims involving title and possession or control of property which is in possession of the trustee as assets of the estate.¹⁷³ Wherever a receiver in bankruptcy is directed by the court to sell assets in his possession, the parties concerned in the sale are subject to the summary jurisdiction of the court, and the court may direct the manner of the completion of the contract.¹⁷⁴

(4) **EXERCISE OF SUMMARY JURISDICTION.**—If the property proceeded against be not held adversely, that is, if it be either actually or constructively¹⁷⁵ in the possession of the court, summary process may issue in the exercise of the court's lawful jurisdiction in respect thereto. It will thus be noticed that the

169. *Matter of R. & W. Skirt Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 353, 222 Fed. 256.

170. In *re Kleinhans* (D. C., N. Y.), 7 Am. B. R. 605, 113 Fed. 107; *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814; In *re Davis Tailoring Co.* (D. C., N. J.), 16 Am. B. R. 486, 144 Fed. 285, where it appeared that four days prior to the filing of a petition against the bankrupt property was purchased from him and it was held that the question as to the title of the property could not be adjudicated summarily by the district court.

Recovery from third person.—A summary proceeding to recover alleged assets from the possession of a third person cannot be transformed by the bankruptcy court into a suit to set aside several transactions, either as preferences or as fraudulent agreements, and where such alleged assets are in the actual and exclusive possession of such third person, under a claim of title that is supported by a good deal of evidence the sole remedy of the receiver or trustee in bankruptcy is a plenary suit; In *re Glenn* (D. C., Pa.), 35 Am. B. R. 906, 185 Fed. 554.

171. *First National Bank of Thomasville v. Hopkins* (C. C. A., 5th Cir.), 29 Am. B. R. 434, 189 Fed. 873.

171a. *Reed v. Barnett National Bank* (C. C. A., 5th Cir.), 41 Am. B. R. 419, 250 Fed. 983.

172. In *re Baron* (D. C., N. Y.), 23 Am. B. R. 585, 106 Fed. 986, holding that where the evidence in a proceeding brought by the trustee to redeem certain stock, claimed by a bank under a pledge as collateral security

subject to the rights of a prior pledgee who, since the stock was pledged, has had physical possession thereof, as well as the litigation had between the trustee and the bank, disclosed the existence of an adverse claim, the bank was entitled to the benefit of a plenary suit; and the bank which challenged the jurisdiction of the referee upon its appearance, did not waive such objection, nor confer jurisdiction upon the referee by pleading to the merits.

173. *Bear Gulch Placer Mining Co. v. Walsh* (D. C., Mont.), 28 Am. B. R. 724, 198 Fed. 351, holding that a suit in equity seeking to quiet title to an electric power and light plant, erected without consent by bankrupt upon land of the complainant, to the land covered thereby, and also to a water ditch, all of which are in the possession of bankrupt's trustee as assets, will not be treated as independent and original, but as merely ancillary to the bankruptcy proceedings and the bill as merely a petition therein, asserting and seeking determination of a claim to property in the custody of the court; and in such proceedings the bankruptcy court has full jurisdiction to render a final judgment or decree binding the parties.

174. *Mason v. Wolkowich* (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 609.

175. See cases cited under preceding heading "(III) Constructive possession."

question also hinges upon the nature of the claim as adverse and this in turn is controlled by the determination as to where the possession lies. The case of *Bardes v. Bank*¹⁷⁶ effectually limited the exercise of jurisdiction by the district court over plenary suits for the recovery of property adversely held. The amendment of 1903 eliminated this limitation. As we have seen the only change accomplished by this amendment is to give jurisdiction of suits at law and in equity to recover property to the district courts. Beginning with *White v. Schloerb*,¹⁷⁷ where the property was taken in replevin from the custody of the court after an adjudication, and continuing through *Bryan v. Bernheimer*,¹⁷⁸ which held the vendee of a general assignee within four months of the bankruptcy, and with knowledge of its existence, amenable to summary process, to *Mueller v. Nugent*,¹⁷⁹ which declared the bankrupt's son, to whom, just prior to bankruptcy, he had delivered a large amount of property which he refused to restore to the trustee, not an adverse claimant, the Supreme Court has already supplied a chain of precedents which limit its broad doctrine in *Bardes v. Bank*. The case of *Louisville Trust Co. v. Cominger*¹⁸⁰ stands by itself, and, while seeming to limit *Bryan v. Bernheimer*, when carefully read, reaffirms it; the holding of the general assignee there being not strictly as assignee, in other words, as agent for the bankrupt, but rather as an individual having acquired title lawfully and without notice, and thus constructively, if not actually, adverse. Each of these decisions turns on whether the defendant is "an adverse claimant." *Bardes v. Bank* was a lightning flash, like *Eyster v. Gaff* under the other law, and cleared the atmosphere on this puzzling question of summary jurisdiction; but it was not necessary to any of the many recent decisions against summary process, though usually assigned as the reason for the ruling.¹⁸¹ The jurisdiction to proceed summarily doubtless exists as much now as it did before *Bryan v. Bernheimer* was decided. It is not a question of jurisdiction, but rather of comity and discretion.¹⁸² In facts like those in *White v. Schloerb*, *Bryan v. Bernheimer*, and *Mueller v. Nugent*, it should be exercised. In other facts, amounting to an adverse holding under a legal title before the bankruptcy, it usually will not; as where transfers were made by the bankrupt two years prior to filing the petition in bankruptcy, the court has no jurisdiction of an action to set them aside on the ground of fraud against creditors, without the consent of the proposed defendants.¹⁸³ Having now clearly the right to try controversies by plenary suit, the district court will be more apt to assume and retain jurisdiction which rests only on

176. 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175.

177. 178 U. S. 542, 4 Am. B. R. 178, 44 L. Ed. 1175.

178. 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814. Compare *Smith v. Belford* (C. C. A., 6th Cir.), 5 Am. B. R. 291, 106 Fed. 658.

179. 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405, revg. s. c. below (C. C. A., 6th Cir.), 5 Am. B. R. 176, 105 Fed. 581, which revd. *In re Nugent* (D. C., Ky.), 4 Am. B. R. 747, 104 Fed. 530. For referee's decision in same case, see N. B. N. Rep. 714.

180. 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413, affg. *Sinsheimer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898. As to right of bankruptcy court to require assignee to account for property coming into

his hands under an assignment made within four months of the assignor's bankruptcy, see *Matter of Thompson* (D. C., N. Y.), 10 Am. B. R. 242, 122 Fed. 174; *affd.* 11 Am. B. R. 719, 128 Fed. 575.

181. See *In re San Gabriel Sanatorium Co.* (C. C. A., 9th Cir.), 7 Am. B. R. 206, 111 Fed. 892; also *In re Sheinbaum* (D. C., N. Y.), 5 Am. B. R. 187, 107 Fed. 247; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405.

182. See *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906.

183. *Gregory v. Atkinson* (D. C., Mo.), 11 Am. B. R. 495, 127 Fed. 183; *In re Davis Tailoring Co.* (D. C., N. J.), 16 Am. B. R. 486, 144 Fed. 235.

petition or order to show cause and appearances,¹⁸⁴ and, where possible, consider it as a suit between the parties so in court. But the phrasing of any rule generally applicable is impossible.

g. Ancillary jurisdiction.—A district court has only such jurisdiction as is conferred by the act; this section only confers jurisdiction to the extent that suits might have been brought by the bankrupt if proceedings in bankruptcy had not been instituted, and contains no provision for auxiliary or ancillary proceedings in another court of bankruptcy in aid of the bankruptcy court that made the adjudication and has charge of the bankrupt's estate.¹⁸⁵ This question has been already discussed under § 2, *ante*, and it will there be noticed that the weight of authority, prior to the amendment of 1910, favored the exercise of such ancillary jurisdiction in special cases, when necessary to carry into effect the full purpose of the bankruptcy act.¹⁸⁶ The amendment of 1910 expressly authorizes courts of bankruptcy to exercise ancillary jurisdiction over persons or property within their respective territorial limits, in aid of the receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy. This amendment effectively disposes of any

184. *In re Steuer* (D. C., Mass.), 5 Am. B. R. 209, 104 Fed. 976. See *In re Mundle* (D. C., N. Y.), 14 Am. B. R. 680, 159 Fed. 691.

Failure to object to proceedings in time.—*Hollingsworth & Whitney Co., Petitioners* (C. C. A., 1st Cir.), 39 Am. B. R. 678, 242 Fed. 753.

185. *Hull v. Burr* (C. C. A., 5th Cir.), 18 Am. B. R. 641, 153 Fed. 945; *In re Von Hartz* (C. C. A., 2d Cir.), 15 Am. B. R. 747, 142 Fed. 726.

A bankruptcy court in a district other than that in which the bankruptcy proceedings are pending has no jurisdiction to appoint a receiver of the property of the alleged bankrupt, except upon motion in open court upon such notice to the persons in the actual possession of property so located, and to those otherwise interested as will in the circumstances constitute due process of law as required by the Constitution. *Ross-Meeham Foundry Co. v. Southern Car & Foundry Co.* (D. C., Tenn.), 10 Am. B. R. 624, 124 Fed. 403. In the case of *In re Williams* (D. C., Tenn.), 10 Am. B. R. 538, 123 Fed. 321, it was held that a bankruptcy court in a district other than that in which the bankruptcy proceedings are pending may not grant an application for an order for an examination before a referee of persons concerning the acts, conduct and property of the bankrupt of which it is alleged that such persons have knowledge; such an order should be made by the court of bankruptcy having charge of the administration of the estate.

186. See *ante*, p. 32; *In re Nelson & Co.* (D. C., N. Y.), 18 Am. B. R. 66, 149 Fed. 590; *Babbitt v. Dutcher* (Sup. Ct.), 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402. The amendment of § 2 by the act of 1910 makes clear the right to exercise ancillary jurisdiction.

Inherent ancillary jurisdiction.—In the case of *In re Swofford Bros. Dry Goods Co.* (D. C., Mo.), 25 Am. B. R. 232, 287, 180 Fed. 549, the court said: "The jurisdiction of this court would undoubtedly be sustained

upon still broader grounds. We have seen that a proceeding in bankruptcy is a proceeding in equity and that for the purposes of enforcing and protecting its jurisdiction a court of bankruptcy has all the inherent powers of a court of equity. This being the case it may be appealed to by supplemental and ancillary bill to enforce its orders, sustain its jurisdiction and protect parties before it in the enjoyment of rights secured through and under it. This is always true where jurisdiction is reserved or still retained, and even afterwards where the result would be a relitigation of the same subject matter between the same parties. An appeal addressed to this power of the court is essentially supplemental and ancillary in its nature, and inheres in the general equity jurisdiction of the court."

In the case of *Staunton v. Wooden*, 24 Am. B. R. 736, 179 Fed. 61, it was held that the court in which a petition in bankruptcy is filed has plenary jurisdiction in bankruptcy co-extensive with the United States to order and control the disposition of the bankrupt's estate and is vested with jurisdiction to determine all liens thereon and all interest affecting it, but it may not by summary order direct a nonresident to deliver to the trustee property in the possession of such nonresident outside the district. And in the case of *In re Heintz* (C. C. A., 6th Cir.), 29 Am. B. R. 19, 201 Fed. 338, it was held that a summary proceeding to collect property belonging to the estate of a bankrupt, which is in the possession of a stranger residing outside of the territorial limits of the court of the original adjudication, must be determined by the court within whose jurisdiction the property is located and the respondent resides. And see, also, *In re Rathfon Bros.* (D. C., Mich.), 29 Am. B. R. 22, 200 Fed. 108.

conflict which may have arisen in respect to the exercise of ancillary jurisdiction. It makes clear the power of the bankruptcy court in one district, to aid by its process the administration of bankrupt estates, where the proceedings were instituted in another district. The cases cited in the note denying this jurisdiction are nullified. Under the scheme of the bankrupt act the district court of the domicile of the bankrupt takes jurisdiction of the bankrupt and his property wherever situated,^{186a} to administer it and distribute the proceeds among the creditors according to their respective rights and priorities. It thus happens that there is usually no necessity for the exercise of ancillary jurisdiction by a bankruptcy court.¹⁸⁷

h. Auxiliary remedies.—A bankruptcy court, as a court of equity, is competent to grant final and auxiliary reliefs adapted to the circumstances of any case, however peculiar, and, by the bankrupt act, it is charged with the duty to devise such orders and judgments as may be necessary for the enforcement thereof.¹⁸⁸ The amendment of 1903 has not affected the jurisdiction of the court in respect to the different auxiliary remedies. Where the right to stay should have been exercised before *Bardes v. Bank* it should be exercised now,¹⁸⁹ the amendments having accomplished no change here.¹⁹⁰ So also of orders to show cause resulting in contempt.¹⁹¹ The question is not one of jurisdiction, but of comity, of propriety. The court can, but often should not.¹⁹² If the bankrupt had the title at the time of the bankruptcy, it has the jurisdiction and may assert it. If the court, through its officers, had acquired peaceable possession of the property, under such conditions as to place it and the proceeds thereof in *custodia legis*, it may determine the ownership of such property and proceeds,¹⁹³ and the relative priorities of conflicting claims thereto.¹⁹⁴ Likewise, too, of that much mooted question whether a district court can summarily bring in a stranger who has a lien on the bankrupt's property and determine its validity, against his protest.¹⁹⁵ If the bankrupt had not the title,

186a. *Board of Road Comrs. v. Kell* (C. C. A., 6th Cir.), 44 Am. B. R. 259, 259 Fed. 75.

187. In re *Granite City Bank* (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818; *Hartman v. Swiger* (D. C., W. Va.), 33 Am. B. R. 339, 215 Fed. 986, citing *Collier on Bankruptcy* (10th Ed.), 498, 499. Compare *Matter of Einstein* (D. C., N. Y.), 40 Am. B. R. 507, 245 Fed. 189; *Matter of Patterson* (D. C., Tenn.), 40 Am. B. R. 545, 247 Fed. 578.

188. In re *Coffey* (Ref., N. Y.), 19 Am. B. R. 148; *Matter of Ohio Copper Mining Co.* (D. C., N. Y.), 39 Am. B. R. 284, 241 Fed. 711.

Compelling surrender of void bonds.—Where a judgment has been entered in an action by trustee in bankruptcy declaring a trust mortgage securing bonds of the bankrupt illegal, the bankruptcy court may compel the bondholders to surrender such bonds to the trustee in bankruptcy. *Matter of Franklin Brewing Co.* (D. C., N. Y.), 43 Am. B. R. 111, 254 Fed. 910.

189. See In re *Currier* (Ref., N. Y.), 5 Am. B. R. 639. And compare, for an extreme and, since *Bryan v. Bernheimer*, doubtful authority, In re *Seebold* (C. C. A., 5th Cir.), 5 Am. B. R. 358, 105 Fed. 910.

190. As to stays generally, see discussions under Sections Two and Eleven of this work.

191. See discussion under Sections Two and Forty-one of this work.

192. Thus, compare In re *Young* (C. C. A., 8th Cir.), 7 Am. B. R. 14, 111 Fed. 158, reviewing and affg. In re *Bender* (D. C., Ark.), 5 Am. B. R. 632, 106 Fed. 873; also, In re *Green* (D. C., Pa.), 6 Am. B. R. 270, 108 Fed. 616; In re *Sheinbaum* (D. C., N. Y.), 5 Am. B. R. 187, 107 Fed. 247; In re *Moore* (D. C., W. Va.), 5 Am.

B. R. 151, 104 Fed. 899; In re *Macon Bank, etc. Co.* (D. C., Ga.), 7 Am. B. R. 96, 112 Fed. 323, revd. 8 Am. B. R. 29, 113 Fed. 483; *Beach v. Macon Grocery Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 751, 116 Fed. 143, suggests a way to assert a provisional remedy against an adverse claimant indirectly.

193. In re *Rogers* (C. C. A., 7th Cir.), 11 Am. B. R. 79, 125 Fed. 169; *Havens & Goddes Co. v. Pierek* (C. C. A., 7th Cir.), 9 Am. B. R. 509, 129 Fed. 244; In re *Antigo Screen Door Co.* (C. C. A., 7th Cir.), 10 Am. B. R. 359, 123 Fed. 249; *Crosby v. Spear*, 98 Me. 542, 11 Am. B. R. 613, 57 Atl. 881; In re *Leeds Woolen Mills* (D. C., Tenn.), 12 Am. B. R. 136, 129 Fed. 922, holding that the possession once being obtained, the court's authority and control accompanies the property whenever it is, without its consent taken into the possession of another; In re *Kellogg* (C. C. A., 2d Cir.), 10 Am. B. R. 7, 121 Fed. 332; In re *Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 182.

194. *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1.

195. For one of the earliest and most vigorous cases in favor of asserting such jurisdiction, see *Carter v. Hobbs* (D. C. Ind.), 1 Am. B. R. 215, 92 Fed. 594; also, a chain of cases holding the same way, but on differing facts; for one of the best reasoned, see In re *Kellogg* (D. C., N. Y.), 7 Am. B. R. 623, 113 Fed. 120, affg. 6 Am. B. R. 389; as to right to determine contro-

as in the case of chattel mortgages in New York,¹⁹⁶ its jurisdiction is doubtful; and surely not if both title were vested in, and *res* were in the possession of, the mortgagee. Further, if the court has such jurisdiction, the referee has also.¹⁹⁷ Cases will arise where it should be exercised. But, in the long run, unless it is absolutely essential to preserve assets or carry out the purposes of the act, a summary disposition of such controversies in the proceeding, and not by suit, should not be asked.¹⁹⁸ Even a lienor having a lien on property vested in, and in the possession of, the trustee is generally an adverse claimant.¹⁹⁹ The analogies of the statute seem to entitle him, if he desires, to a plenary suit; and the district court will be slow to take it from him. This view is strengthened by the fact that this law, unlike its predecessor,²⁰⁰ contains no clause authorizing the trustee to sell incumbered property free from existing liens. The true test here is the same as that which applies where a stay or order to show cause which may result in contempt is asked; a test sufficiently indicated in the preceding paragraphs. Of course, what goes before does not in any way limit the right of the court to take possession summarily of the property of an alleged bankrupt which is found in his possession or that of his agent.²⁰¹ This section does not authorize a Federal court to entertain a bill in equity at the instance of a simple contract creditor to set aside an alleged fraudulent conveyance.²⁰² But the court may entertain a suit by the trustee to set aside a mortgage on lands in his possession because given within four months prior to bankruptcy.²⁰³ Auxiliary proceedings for the protection of the assets of the bankrupt should be brought in the district court of the district in which the proceedings are pending.²⁰⁴

V. JURISDICTION OF STATE COURTS.

By subsection *b* of this section suit by the trustee must be brought in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by the consent of the proposed defendants, except such suits for the recovery of property as are within the provisions of §§ 60-b, 67-e and 70-e. This provision requires in certain instances suits to be brought by the trustee in respect to the bankrupt's property in a State court and in other instances confers concurrent jurisdiction upon

versaries between lienors holding mechanics' liens, see *In re Hobbs* (D. C., W. Va.), 16 Am. B. R. 544, 145 Fed. 211.

196. *Bank v. Jones*, 4 N. Y. 497; *Blake v. Corbett*, 120 N. Y. 327, 24 N. E. 477.

197. See § 38-a(4) and *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405; *In re Drayton* (D. C., Wis.), 13 Am. B. R. 602, 135 Fed. 883; *In re Platteville Foundry & Machine Co.* (D. C., Wis.), 17 Am. B. R. 291, 147 Fed. 828.

198. *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 182; *In re Moody* (D. C., Iowa), 12 Am. B. R. 718, 131 Fed. 525.

199. *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 182. Compare *Marshall v. Knox*, 83 U. S. 551, 121 L. Ed. 481. See also *Burbank v. Bigelow*, 92 U. S. 179, 23 L. Ed. 542.

200. R. S., § 5075.

201. Compare under §§ 3 and 69.

202. *Viquesney v. Allen* (C. C. A., 4th Cir.), 12 Am. B. R. 402, 131 Fed. 21.

203. *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 685.

204. *In re Williams* (D. C., Ark.), 9 Am. B. R. 741, 120 Fed. 38; *Ross-Meeham Foundry Co. v. Southern Car & F. Co.* (D. C., Tenn.), 10 Am. B. R. 624, 124 Fed. 403. In the case of *Henderson v. Denious*, (C. C. A., 8th Cir.), 26 Am. B. R. 226, 186 Fed. 100, it was held that where the jurisdiction of the district court in respect to a proceeding in bankruptcy had been duly established, the parties therein are concluded by an order made by the court, as to all questions properly considered in such court; that such order possesses all the attributes of finality accorded to domestic judgment, emanating from courts of general, original jurisdiction.

such courts. It has been held that "any State court which would have had jurisdiction had not bankruptcy intervened" now has concurrent jurisdiction²⁰⁵ of any suit which can be brought by the trustee in the district court.²⁰⁶ Thus, such a court has jurisdiction, not only to set aside a preference, to annul a lien other than through legal proceedings, and to recover back property fraudulently transferred,²⁰⁷ by the specific words of the act, but it also has, to the same end, such jurisdiction as may be conferred on it by the State law. The jurisdiction conferred upon a State court is limited to that conferred upon such court by State statutes; reference must be had to such statutes and the cases thereunder to determine such jurisdiction.²⁰⁸ State courts have jurisdiction in suits between a trustee in bankruptcy and third parties asserting rights in property claimed by the trustee as belonging to the estate of the bankrupt.²⁰⁹ It has been held that a State court has jurisdiction of a plenary suit by an adverse claimant to establish a lien on property in the trustee's possession.²¹⁰ If, at the time of the bankruptcy, a suit or proceeding is pending in the State court, of which the Federal court might otherwise have jurisdiction, the adjudication does not oust the State court of jurisdiction.²¹¹ The State court can proceed unless stayed. This is peculiarly true of actions *in rem*. In respect to such actions the court which first takes the property into its custody

^{205.} This has been doubted. See *Lyon v. Clark*, 2 N. B. N. Rep. 792. But consult *French v. Smith* (Sup. Ct. Minn.), 81 Minn. 341, 4 Am. B. R. 785, 84 N. W. 44; *Bindsell v. Smith* (Ch. N. J.), 61 N. J. Eq. 654, 5 Am. B. R. 40, 47 Atl. 456; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123 Iowa 432, 12 Am. B. R. 781; *Breckons v. Snyder*, 211 Pa. St. 176, 15 Am. B. R. 112, 60 Atl. 575; *Linstroth Wagon Co. v. Ballew* (C. C. A., 5th Cir.), 18 Am. B. R. 23, 32, 149 Fed. 980; *Union Banking Co. v. Truscott Boat Mfg. Co.* (Mich. Sup. Ct.), 36 Am. B. R. 175, 155 N. W. 717.

^{206.} Under §§ 60-b, 67-e and 70-e. See *Drew v. Myers*, 81 Neb. 750, 22 Am. B. R. 656, 116 N. W. 781.

^{207.} *Robinson v. White* (D. C., Ind.), 3 Am. B. R. 88, 97 Fed. 33.

^{208.} Section 818 of the Georgia Code (1896) while authorizing a bill in chancery to subject to the payment of his debts property fraudulently conveyed by a debtor, does not authorize the setting aside of a conveyance which operates only as a preference under the bankruptcy act of 1898, and the remedy given by said act authorizing the trustee to pursue property conveyed as a preference in any State court having jurisdiction, in the absence of bankruptcy, affords relief in the State court against those conveyances only, which would be invalid under the laws of the State. *Reed v. Wallace*, 145 Ala. 209, 21 Am. B. R. 839, 40 So. 407.

^{209.} *Lyttle v. National Surety Co.* (Ct. of App., D. C.), 43 D. C. App. 136, 33 Am. B. R. 700; *Gray v. Arnot* (N. Dak. Sup. Ct.), 31 N. Dak. 461, 35 Am. B. R. 704, 154 N. W. 268; *Scott v. Gillespie* (Kan. Sup. Ct.), 42 Am. B. R. 593, 176 Pac. 132.

Where a trustee voluntarily submits himself and his rights to the jurisdiction of a State court having jurisdiction of the subject matter of the controversy, he becomes bound by the adjudication whether the position of the State court is favorable or unfavorable to him. *Commercial Trust Co. v. Drayton* (N. J. Ct. of Err. & App.), 42 Am. B. R. 625, 105 Atl. 241.

^{210.} Partition action.—A proceeding by a trustee against the bankrupt's wife for partition should be brought in a State court. *Harlin v. American Trust Co.* (Ind. App. Ct.), 41 Am. B. R. 401, 119 N. E. 20.

^{211.} Rights of intervener.—In an action by a trustee to recover a sum alleged to be due to the bankrupt brought in the State court that court has, at least, concurrent jurisdiction to determine the right of an intervener to the fund and to apportion the fund, when a part thereof is found to belong to such intervener, between the intervener and the trustee. *Tennyson v. Beggs* (Sup. Ct., Cal.), 41 Am. B. R. 97, 168 Pac. 146. *Skilton v. Codington*, 185 N. Y. 80, 15 Am. B. R. 810, 77 N. E. 790; *Crosby v. Miller* (Ct. App., Col.), 27 App. D. C. 481, 16 Am. B. R. 805, 34 W. L. R. 820.

As to jurisdiction of State court to entertain action to set aside alleged voidable transfer, notwithstanding adjudication of bankruptcy. *Bryan v. Madden*, 109 N. Y. App. Div. 874, 15 Am. B. R. 388, 96 N. Y. Supp. 455.

Controversy between third party and trustee.—The title to real property, claimed in good faith by a third party and also by the trustee in bankruptcy of one holding the mere naked possession but never actually taken possession of by the bankruptcy court, may be determined by a plenary suit in the State court by such third party. *Peters v. Bowers* (Cal. Sup. Ct.), 37 Am. B. R. 486, 158 Pac. 1101.

^{211.} In re *Girdes* (D. C., Ohio), 4 Am. B. R. 340, 102 Fed. 318; In re *English* (C. C. A., 2d Cir.), 11 Am. B. R. 674, 127 Fed. 940; *Matter of Bay City Irrigation Co.* (D. C., Tex.), 14 Am. B. R. 370, 135 Fed. 850; *Pietri v. Wells* (La. Sup. Ct.), 137 La. 1087, 36 Am. B. R. 105, 69 So. 847; *McLoughlin v. Knop* (D. C., La.), 32 Am. B. R. 582, 214 Fed. 260; *Matter of Wilkinsburg, etc.*, District (Sup. Ct., Pa.), 234 Pa. St. 373, 32 Am. B. R. 856, 83 Atl. 410.

Proceeding for enforcement of liens.—A suit in a State court to foreclose a mortgage or to enforce liens against specific property, commenced before a petition in bankruptcy is filed against the mortgagor, may be presented by the State court without interference from the court of bankruptcy. *Tube City Mining & Milling Co. v. Otterson* (Ariz. Sup. Ct.), 16 Ariz. 305, 35 Am. B. R. 500, 146 Pac. 203.

^{212.} In re *Russell* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248; In re *Chambers* (D. C. R. I.), 3 Am. B. R. 537, 98 Fed. 565; *Southern Loan & Trust Co. v. Benbow* (D. C., N. Car.), 3 Am. B. R. 9, 90 Fed. 514; *Keegan v. King*

retains it.²¹³ The rule is that "considering the peculiar character of our government and keeping in view the forbearance which courts of co-ordinant jurisdiction exercise towards each other, it follows that the court which first obtains the lawful jurisdiction over the subject matter of a controversy must by the other courts be permitted to proceed therein to final judgment."²¹³ Where the property in controversy is rightfully in possession of a State court or its officers prior to a period of four months before a petition is filed, the adjudication of bankruptcy does not deprive the State court of a right to continue in possession of such property, or of its jurisdiction to determine the

(D. C., Ind.), 3 Am. B. R. 79, 96 Fed. 758; In re Lemmon (C. C. A., 6th Cir.), 7 Am. B. R. 291, 112 Fed. 296; Crosby v. Spear, 96 Me. 542, 11 Am. B. R. 613, 57 Atl. 881, holding that an action of replevin cannot be commenced and maintained against a trustee to recover property in the possession of the bankrupt at the time of the adjudication; Pietri v. Wells (La. Sup. Ct.), 137 La. 1067, 36 Am. B. R. 105, 60 So. 847; Union Banking Co. v. Truscott Mfg. Co. (Mich. Sup. Ct.), 36 Am. B. R. 176, 155 N. W. 717; Matter of United Grocery Co. (D. C., Fla.), 39 Am. B. R. 501, 239 Fed. 1016; Charak v. Durphee (D. C., Mass.), 42 Am. B. R. 110, 262 Fed. 865.

Foreclosure of mortgage.—The fact that a State court has taken possession of real estate through a receiver appointed by it does not prevent a bankruptcy court from proceeding to foreclose a mortgage on the same property. Brown v. Crawford (D. C., Ore.), 42 Am. B. R. 677, 264 Fed. 148.

Where a suit is pending in a State court at the time of bankruptcy, to secure possession of certain goods, and the trustee is substituted as a party plaintiff for the bankrupt, the State court should not order a sale of the goods under the direction of the bankruptcy court, but if the claim of the trustee is established he is entitled to the goods. Earl v. Jacobs (Mich. Sup. Ct.), 177 Mich. 163, 31 Am. B. R. 90, 142 N. W. 1079.

Recognition of jurisdiction by trustee by intervention.—Where a trustee in bankruptcy intervenes in a foreclosure proceeding pending in a State court, he thereby recognizes the jurisdiction of that court. O'Reilly v. Pietri (Sup. Ct., La.), 135 La. 1, 32 Am. B. R. 274, 64 So. 922.

213. Pickens v. Dent (C. C. A., 4th Cir.), 5 Am. B. R. 644, 106 Fed. 653, aff'd. 137 U. S. 177, 9 Am. B. R. 47, 47 L. Ed. 128; Metcalf v. Barker, 157 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122; Matter of Cameron Currie Co. (Ref., Mich.), 20 Am. B. R. 790; In re English (C. C. A., 2d Cir.), 11 Am. B. R. 674, 127 Fed. 940, in which the court said: "We know of no provision of the bankrupt act, and our attention is called to no authority, which will sustain the proposition that, when a year afterwards one of the parties to an action is adjudicated a bankrupt, the State court is shorn of its jurisdiction to determine the controversy, and must turn over the property to the bankruptcy court." In re Seebold (C. C. A., 5th Cir.), 5 Am. B. R. 353, 105 Fed. 910; In re Tune (D. C., Ala.), 8 Am. B. R. 295, 115 Fed. 906; In re Wells (D. C., Mo.), 8 Am. B. R. 75, 114 Fed. 222; Des Moines Savings Bank v. Morgan Jewelry Co., 123 Iowa 432, 12 Am. B. R. 781, 99 N. W. 121, holding that a trustee in bankruptcy, by intervening in an action to enforce a specific lien pending in a State court, cannot thereby oust the court of jurisdiction; In re Gerdes (D. C., Ohio), 4 Am. B. R. 346, 102 Fed. 318; In re Price (D. C., N. Y.), 1 Am. B. R. 606, 92 Fed. 987; Bank of Andrews v. Gudger (C. C. A., 4th Cir.), 32 Am.

B. R. 11, 212 Fed. 49; Matter of Wilkinsburg, etc., District (Sup. Ct. Pa.), 234 Pa. St. 273, 32 Am. B. R. 856, 83 Atl. 410; McLoughlin v. Knopp (D. C., La.), 32 Am. B. R. 582, 214 Fed. 260; Luxury Fruit Co. v. Harris (Sup. Ct., Ga.), 142 Ga. 866, 33 Am. B. R. 711, 83 S. E. 1093; Martin v. Oliver (C. C. A., 8th Cir.), 43 Am. B. R. 739, 260 Fed. 89; Matthews & Sons v. Webre Co. (D. C., La.), 32 Am. B. R. 180, 213 Fed. 396, in which the court said: "In the exercise of that comity that is always observed by courts it is not likely that the jurisdiction of the State court would be disturbed in the matter of the foreclosure of a mortgage if it had in fact attached first, for the trustee is not bound to take possession of mortgaged property, unless it is for the benefit of all the creditors, and it makes little difference which court shall sell it and administer the proceeds."

Review in bankruptcy court of proceedings in State courts.—The owner of certain property having become insolvent, the contractor erecting buildings for such owner began proceedings in the State court to foreclose a mechanic's lien. After bankruptcy of the owner the trustee was permitted to intervene in the Supreme Court of the State. A judgment in favor of the contractor was therein affirmed. It was held that the proceedings in bankruptcy would not render void the proceedings then pending in the State court, though the bankruptcy court might exercise revisory powers over them; but that in the exercise of such powers the bankruptcy court would not review the judgment of the State courts as to minor amounts involved, or questions whether certain minor portions of the property were or were not parts of the parcel to which the lien attached. Hobbs v. Head & Dowst Co. (C. C. A., 1st Cir.), 26 Am. B. R. 63, 184 Fed. 409.

214. In re English (C. C. A., 2d Cir.), 11 Am. B. R. 674, 127 Fed. 940; In re Heckman (C. C. A., 9th Cir.), 15 Am. B. R. 500, 140 Fed. 859, 72 C. C. A. 8; Griffin v. Lenhart (C. C. A., 4th Cir.), 45 Am. B. R. 221, 266 Fed. 671.

controversy.²¹⁴ A State court has no jurisdiction to foreclose a mortgage on a bankrupt's property after bankruptcy has intervened, without leave of the bankruptcy court and making the trustee a party.²¹⁵ State courts have jurisdiction against marshals, referees and trustees in bankruptcy, to recover damages for wrongful acts entirely beyond the legitimate scope and performance of official duties.²¹⁶ This jurisdiction will not be exercised unless it appears that such officers were in wrongful possession of the property in controversy.²¹⁷ When the possession of a State court amounts to a fraud on the law, as through a general assignment or a preference or an attachment, within the four months' period, the State court, while not, strictly speaking, ousted, in effect ceases to exercise jurisdiction, the assignee, or sheriff, or parties being permanently restrained.²¹⁸ The adjudication vests in the trustee or temporary receiver the

Where a vendor of chattels, upon electing to rescind the sale for fraud, brought an action in a State court to recover the property and immediately seized it under a writ of sequestration, the jurisdiction of the State court is in no way affected because thereafter the buyer was adjudicated bankrupt and his trustee took possession of the property. *Linstroth Wagon Co. v. Ballew* (C. C. A., 5th Cir.), 18 Am. B. R. 23, 149 Fed. 960.

Suit in State court to establish lien.—Where at the adjudication of a corporation there is pending a suit to establish a lien upon its property, the question of the validity of the asserted liens may be left to the determination of the State court, but the bankruptcy court has power to direct the trustee in bankruptcy to appear in the action and present his case and make all reasonable effort to have the issues in the action brought to a judgment. *In re New England Breeders' Club* (D. C., N. H.), 23 Am. B. R. 689, 175 Fed. 501.

Suit in State court by stockholders to protect rights.—The pendency in a State court of a suit instituted against a corporation by its stockholders for the protection of their rights, and the possession of corporate property by a receiver appointed in such suit, although such possession was acquired more than four months prior to the adjudication in bankruptcy, will not deprive the bankruptcy courts of jurisdiction to compel the State receiver to turn over the property of such bankrupt to the receiver in bankruptcy. *Bank of Andrews v. Gudger* (C. C. A., 4th Cir.), 32 Am. B. R. 11, 212 Fed. 49.

²¹⁵ *McLoughlin v. Knopp* (D. C., La.), 32 Am. B. R. 582, 214 Fed. 200; *Charak v. Durphoe* (D. C., Mass.), 42 Am. B. R. 110, 232 Fed. 885. See also *Rhinelander v. Richards* (N. Y. App. Div.), 42 Am. B. R. 9, 184 App. Div. 67.

²¹⁶ *Berman v. Smith* (D. C., Ga.), 22 Am. B. R. 662, 171 Fed. 735; *Smith v. Berman* (Ct. of App., Ga.), 8 Ga. App. 262, 24 Am. B. R. 849, 68 S. E. 1014.

²¹⁷ *Smith v. Berman* (Ct. of App., Ga.), 8 Ga. App. 262, 24 Am. B. R. 849, 68 S. E. 1014.

²¹⁸ See p. 292, *ante*. See *Matter of Hornstein* (D. C., N. Y.), 10 Am. B. R. 308, 123 Fed. 266.

Attachment in State court.—In the case of *Tennessee Producer Marble Co. v. Grant* (C. C. A., 3d Cir.), 14 Am. B. R. 288, 135

Fed. 322, it was held that where, prior to the filing of a petition against an involuntary bankrupt, to enforce an asserted right *in rem*, under the State law, the bankruptcy court is without jurisdiction to stay such suit after the court has acquired jurisdiction of the *res*. This case was followed in the case of *In re Kane* (D. C., Pa.), 18 Am. B. R. 654, 152 Fed. 587, where it was held that if, prior to the filing of a petition in bankruptcy, a fund claimed by the bankrupt and others had been attached in a State court by garnishment, that court is the proper tribunal to settle the controversy, unless all parties in interest submit to the jurisdiction of the bankruptcy court.

Neither of these cases properly consider the effect of § 67-f of the bankruptcy act, nullifying liens obtained by judgment, attachment or otherwise within the four months' period. Where a lien is created by attachment or levy within four months prior to the filing of the petition in bankruptcy, it becomes null and void on the adjudication of bankruptcy. This being the case, the jurisdiction of the State court in respect to the property subject to the lien is terminated. See *Lehman Stern Co. v. Martin & Co.* (La. Sup. Ct.), 132 La. 231, 32 Am. B. R. 681, 61 So. 212. In the case of *In re Oxley & White* (D. C., Wash.), 25 Am. B. R. 656, 182 Fed. 1019, the court quotes and approves this statement as to the effect of the preceding cases and says: "Ordinarily, the superior court would have jurisdiction to enforce the original lien of the mortgage in a suit brought before the initiation of the bankruptcy proceedings, and this court should not interfere unless it be necessary so to do in order to protect some right arising from the bankruptcy statute. It is admitted here that the goods upon which the lien was impressed by confession of judgment are so intermingled with those upon which the mortgage lien really existed that the two classes of goods cannot be distinguished. This rea-

title of the bankrupt's property, and stays all seizures made within four months; it has the force and effect of an attachment and an injunction, and is a *caveat* to all the world. After such adjudication a State court has no jurisdiction to determine any rights affecting the bankrupt's estate, and is powerless to enforce any of its judgments as to such estate.³²⁵ But this does not prevent a State court from exercising such jurisdiction as may be necessary to preserve the property which has been taken into its possession.³²⁶ Where an action is brought by a trustee in a State court to recover an alleged preference, such court cannot determine the validity of their claims against the bankrupt and whether other creditors have not received voidable preference; to hold otherwise would be to transfer in a large measure the administration of the bankrupt's estate from the bankruptcy court to the State court.³²⁷ The possession by the bankrupt court of the proceeds of the sale of mortgaged chattels does not deprive the State court of its conceded jurisdiction to set aside the mortgage as fraudulent.³²⁸ If an assignment or receivership or trusteeship is made or created under a State law for the benefit of creditors within four months prior to the filing of a petition in bankruptcy, and a State court in the exercise of its jurisdiction under such law assumes possession of the property, it may not retain such possession and proceed to a distribution of the property among the creditors, but upon the adjudication the bankruptcy court supercedes the State court and becomes possessed of the property for the purpose of administration.³²⁹ Where a lien on the bankrupt's property antedates the filing of the

where it necessary that the entire sale be enjoined as otherwise the confession of judgment made by the insolvent debtors within four months before the filing of the petition, and resulting in the creation of a lien made void by the bankruptcy statute, would stand unassailable. The peculiar nature of the bankruptcy proceedings is such that in no court except a court of bankruptcy can the appropriate remedy be applied. If an adjudication of bankruptcy takes place in this matter the lien of the mortgage will be upheld here to whatever extent it is valid, and such steps will be taken as will fully recognize the respect due to the superior court and its officers, with proper regard to the harmonious relations which have ever existed between the two courts."

§19. In re Munkoya Lumber Co. (D. C., N. Y.), 11 Am. B. R. 761, 127 Fed. 760; In re Knight (D. C., Ky.), 11 Am. B. R. 1, 125 Fed. 25; In re Kaplan (D. C., Ga.), 16 Am. B. R. 267, 144 Fed. 159; Smith v. Berman (Ct. of App., Ga.), 8 Ga. App. 262, 24 Am. B. R. 849, 68 S. E. 1014, where it was held that an action would not lie in a State court against a trustee for conversion of personal property claimed by the wife of the bankrupt, where it appears that the court of bankruptcy had possession of the property through its trustee; in such a case, the bankruptcy court has exclusive jurisdiction to hear and determine all questions relating to the right of possession and to the title of the property in its custody; Fugh v. Lolsel (C. C. A., 5th Cir.), 23 Am. B. R. 580, 210 Fed. 417. Compare Copard v. Gardner (Tex. Civ. App.), 40 Am. B. R. 777, 199 S. W. 660.

§20. Jones v. Springer, 236 U. S. 143, 29 Am. B. R. 204, 67 L. Ed. 121, in which case

the court said: "It is true that the estate is regarded as in *custodia legis* from the date of the petition. (Citing Acme Harvesting Co. v. Beekman Lumber Co., 222 U. S. 300, 306, 27 Am. B. R. 262, 56 L. Ed. 208.) But in a case like the present, where, under an attachment levied before the petition was filed, the property had been put into the hands of a receiver, without notice of the petition, it is not true that all power and jurisdiction of the local court were ended before notice of the bankruptcy proceedings."

§21. Eau Claire Nat'l Bank v. Jackman, 204 U. S. 622, 17 Am. B. R. 670, 51 L. Ed. 593.

§22. Frank v. Vollkommer, 205 U. S. 521, 17 Am. B. R. 808, 51 L. Ed. 911. In the case of Skilton v. Codrington, 185 N. Y. 80, 15 Am. B. R. 810, 77 N. E. 790, it was held that where a trustee in bankruptcy retains out of the proceeds of the sale of the bankrupt's property a certain sum for the benefit of any liens or claims that might be established against the debtor, the State court has jurisdiction to hear and determine an action against the trustee to enforce a chattel mortgage executed by the bankrupt.

§23. Randolph v. Scruggs, 190 U. S. 521, 19 Am. B. R. 1, 47 L. Ed. 1165; Hooks v. Aldridge (C. C. A., 5th Cir.), 16 Am. B. R. 603, 145 Fed. 893. In re Knight (D. C., Ky.), 11 Am. B. R. 1, 125 Fed. 25; In re Watts, 190 U. S. 1, 10 Am. B. R. 113, 47 L. Ed. 833; Davis v. Bohle (C. C. A., 5th Cir.), 1 Am. B. R. 412, 92 Fed. 235; Matter of Neubarger (C. C. A., 2d Cir.), 39 Am. B. R. 139, 240 Fed. 947; Union Elec. Co. v. Hubbard (C. C. A., 4th Cir.), 39 Am. B. R. 323, 243 Fed. 218; Carter, etc., Transfer Co. v. Robertson (Tex. Ct. of Civ. App.), 40 Am. B. R. 628, 199 S. W. 701; Shannon v. Shepard Mfg. Co. (Mass. Sup. Jud. Ct.), 42 Am. B. R. 12, 119 N. E. 768; Cudahy Packing Co. v. N. J. Dairy Co. (N. J. Ct. of Ch.), 43 Am. B. R. 674, 107 Atl.

47. As to effect of bankruptcy upon assignments for the benefit of creditors under State insolvency acts, see post.

petition in bankruptcy, a receiver appointed by a State court in a suit to enforce such lien may not be deprived of possession of the property by the bankruptcy court, thus drawing to such court jurisdiction to determine summarily the validity of such lien.²²⁴ The right of a State court, through receivers appointed by it, to administer property of one subsequently adjudged bankrupt, brought within its grasp under its process more than four months prior to the filing of the petition in bankruptcy, is not terminated by an adjudi-

A general assignment for the benefit of creditors made within four months prior to the filing of the petition is void as against the trustee in bankruptcy, so far as it interferes with the administration of the bankrupt estate. *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. Ed. 1165. In such case the jurisdiction of the State court in respect to the property assigned is superseded by that of the bankruptcy court. *In re Thompson* (C. C. A., 2d Cir.), 11 Am. B. R. 719, 128 Fed. 575; *In re Knight* (D. C., Ky.), 11 Am. B. R. 6, 125 Fed. 35; *In re Gray*, 47 N. Y. App. Div. 554, 3 Am. B. R. 647, 62 N. Y. Supp. 618; *In re Fellerath* (D. C., Ohio), 2 Am. B. R. 40, 95 Fed. 121; *In re Gutwillig* (C. C. A., 2d Cir.), 1 Am. B. R. 388, 92 Fed. 337; *Davis v. Bohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 92 Fed. 325; *In re Sievers* (D. C., N. Y.), 1 Am. B. R. 117, 91 Fed. 366.

State receivership.—Ordinarily where a State court has obtained jurisdiction over property this jurisdiction is not disturbed by proceedings in bankruptcy, but the exception to the rule is, where the property is in the hands of a receiver, held for the benefit of creditors, and a receivership is created within four months prior to adjudication. *In re Cameron Currie Co.* (Ref., Mich.), 20 Am. B. R. 780. Where a receiver is appointed in behalf of creditors in a proceeding in a State court, based on the debtor's insolvency, within the four months' period, the subsequent adjudication in a bankruptcy court supersedes the jurisdiction of the State court. *In re Watts*, 190 U. S. 1, 10 Am. B. R. 113, 47 L. Ed. 933.

Action by trustee on bond of assignee.—Where the assignee under a general assignment for the benefit of creditors, made within the four months' period, gave a bond to duly account for all moneys received by him as such assignee and voluntarily accounted in the bankruptcy court but failed to comply with its order to turn over the amount in his hands to the trustee, the latter by leave of the State court may maintain an action against the surety upon the assignee's bond to recover the amount which the assignee failed to turn over to the trustee. *Cohen v. American Surety Co.*, 192 N. Y. 227, 20 Am. B. R. 65, 84 N. E. 947.

General assignment.—The bankruptcy court has jurisdiction by summary proceeding to take from assignees and receivers for general creditors in insolvency or winding up pro-

ceedings appointed after four months prior to the filing of petitions in bankruptcy, from officers of courts attaching or replevying within that time, and from others holding for the bankrupt, property claimed to be that of the bankrupt, and then by virtue of the possession thus taken to determine adverse claims to it by a like proceeding. *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913.

State receivership.—Where the receiver of a corporation appointed by a State court, has notice of an order of the bankruptcy court appointing a receiver in bankruptcy proceedings against such corporation, it is his duty to turn over at once to the receiver in bankruptcy, all property of the corporation which is in his possession. *In re Ziegler Co.* (D. C., Conn.), 26 Am. B. R. 761, 189 Fed. 259.

The fact that a receiver of a private banker was appointed by a State court in a suit instituted after the filing of a petition in bankruptcy, and that the property of the bankrupt was previously in charge of an agent of the State bank commissioner, does not render the receiver an adverse claimant, so as to prevent the bankruptcy court from issuing a summary order directing the delivery of the property to the trustee. *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525, in which case the court said: "It is well settled that, where a trustee in bankruptcy is entitled to the possession of property in the possession of a receiver appointed by a State court, the court of bankruptcy will, if necessary, by its own order direct and compel such receiver to deliver such property to the trustee. Such an order can be properly made, notwithstanding that the State court has previously denied an application of the trustee in bankruptcy addressed direct to it."

A receiver appointed *pendente lite* to continue the business of the bankrupt, during a suit instituted by the trustee to set aside fraudulent conveyances by the bankrupt, when a judgment is entered in favor of such trustee, should surrender the property to the trustee upon demand and take a receipt therefor. If the receiver has expended a large sum or involved himself in future liabilities, the court may secure him before directing delivery of possession. *Hull v. Storage House*, 166 N. Y. App. Div. 739, 34 Am. B. R. 376, 152 N. Y. Supp. 363.

²²⁴ *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913.

cation in bankruptcy.²²⁵ A State court which appoints a receiver has jurisdiction on the receiver's accounting over the amount of his compensation, the fees of his counsel and the payment of the surety upon his bond.^{225a} If the controversy arose prior to bankruptcy and concerns property which has passed to the trustee, and is of such a nature that it might have been litigated by a suit at law or in equity in a State court, had bankruptcy not intervened, the State court has jurisdiction of a suit brought by an adverse claimant in respect to such property.²²⁶ If proceedings are brought in a State court for the dissolution and winding up of affairs of an insolvent corporation and subsequently and within four months thereafter a petition in bankruptcy against such corporation is filed the jurisdiction of the State court in respect to the property of the corporation terminates upon adjudication, and the bankruptcy court will thereupon supersede the State court.²²⁷ But a creditor's suit in equity to liquidate the affairs of a corporation, instituted more than six months prior to a voluntary bankruptcy by the corporation, is not necessarily affected thereby.²²⁸ Where a receiver in proceedings in a State court against an insolvent corporation has been directed by order of such court to deliver the assets of such corporation to a receiver or trustee in bankruptcy, such assets may be retained notwithstanding the reversal of such order on appeal, and the bankruptcy court should determine all questions relative to such assets.²²⁹ While the jurisdiction of the Federal courts is essentially exclusive when properly invoked, a State court is not necessarily deprived of jurisdiction to dissolve a corporation on the ground of insolvency; and where the creditors of such a corporation fail to institute bankruptcy proceedings within four months after the appointment of a receiver in the State court upon the ground of insolvency, the jurisdiction of the State court becomes fixed and not subject to interference.²³⁰ It has been held that the refusal of a receiver appointed in a State court upon notice of the appointment of a receiver by the bankruptcy court to turn over property of the bankrupt to the receiver in bankruptcy, upon advice of counsel, will not be treated as a personal disrespect to the bankruptcy court, so as to warrant his punishment as for a contempt.²⁴¹ The above doctrines are all that can be safely stated. The

Enforcement of pledge.—The filing of a petition in bankruptcy against a pledgor does not oust the State court of jurisdiction to entertain an action by the pledgee to foreclose his lien. *Griffin v. Smith* (Cal. Sup. Ct.), 41 Am. B. R. 354, 171 Pac. 92.

Notice to State court.—An order of a bankruptcy court upon the receiver of a State court to deliver property without first causing notice of the bankruptcy proceedings to be given to that court, and without causing a motion or application to be made to it for an order on its receiver to deliver over the property, is erroneous. *Martin v. Oliver* (C. C. A., 8th Cir.), 43 Am. B. R. 739, 260 Fed. 89.

A State court is not bound to take judicial notice of the filing of the petition but must have notice through pleadings filed therein. *Coppard v. Gardner* (Tex. Ct. of Civ. App.), 40 Am. B. R. 777, 199 S. W. 650.

²²⁵ *Blair v. Brailey* (C. C. A., 5th Cir.), 34 Am. B. R. 12, 221 Fed. 1. But see *Matter of Grafton Gas & Elec. Light Co.* (D. C., W. Va.), 42 Am. B. R. 568, 253 Fed. 668.

^{225a} *Shannon v. Shepard Mfg. Co.* (Mass. Sup. Jud. Ct.), 42 Am. B. R. 12, 119 N. E. 768. See also, *Lambert v. National Hog Co.*

(Pa. Sup. Ct.), 43 Am. B. R. 515, 106 Atl. 541.

²²⁶ *George v. Gans* (Pa. Com. Pleas.), 63 Pittsburgh L. J. 37, 34 Am. B. R. 629.

Title to property transferred prior to bankruptcy.—In the case of *Babbitt v. Dutcher*, 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402, the court said: "There are two classes of cases arising under the Act of 1898, and controlled by different principles. The first class is where there is a claim of adverse title to the property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party, or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary action must be brought either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily, and may make an order in a summary proceeding for the delivery of the

whole subject is hopelessly befogged by the fact that each class of courts unconsciously strains for jurisdiction in close cases. Some of the more reliable decisions will be found in the foot-note.²²²

VI. CONCURRENT JURISDICTION OF CIRCUIT COURTS OVER OFFENSES.

Subsection *c* of this section provides that the United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy of the offenses enumerated in the act. As already noticed in a previous paragraph under this section the circuit courts have been abolished, and the jurisdiction of such courts is conferred upon the district courts.²²³ This subsection is therefore made of no effect, since the district courts as courts of bankruptcy are given jurisdiction to arraign, try and punish those who commit any of the offenses enumerated in the act.²²⁴ The jurisdiction of district courts as to bankruptcy offenses is now exclusive. The trial of offenses enumerated in section 29 will be moved like other criminal offenses at a stated term of the district court.

property to the trustee, without the formality of a formal litigation. The former class falls within the ruling which holds that such a suit may be brought only in a court which would have had jurisdiction of a suit by the bankrupt against the adverse claimant, except where the defendant consents to be sued elsewhere."

227. *Cresson & Clearfield Coal & Coke Co. v. Stauffer* (C. C. A., 3d Cir.), 17 Am. B. R. 573, 148 Fed. 981; *In re Storck Lumber Co.* (D. C., Md.), 8 Am. B. R. 86, 114 Fed. 860; *In re Kersten* (D. C., Wis.), 6 Am. B. R. 519, 110 Fed. 929; *Carling v. Seymour Lumber Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 324, 6 Am. B. R. 734, 50 Atl. 331; *In re Salmon & Salmon* (D. C., Mo.), 16 Am. B. R. 132, 143 Fed. 395; *Lyon v. Russell* (Ct. of App., D. C.), 41 D. C. App. 554, 32 Am. B. R. 101; *Matter of United Grocery Co.* (D. C., Fla.), 39 Am. B. R. 501, 239 Fed. 1016; *Matter of Dressler Producing Corp.* (C. C. A., 2d Cir.), 44 Am. B. R. 457, 262 Fed. 257.

228. *Yargan Naval Stores Co. v. Borchardt Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 429, 217 Fed. 758.

229. *Wright v. Harris* (D. C., Ga.), 34 Am. B. R. 574, 221 Fed. 736.

230. *Lyon v. Russell* (Ct. of App., D. C.), 41 D. C., App. 554, 32 Am. B. R. 101.

231. *In re Zeigler Co.* (D. C., Conn.), 26 Am. B. R. 761, 189 Fed. 259.

232. *In re Russell* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248; *In re Woodbury* (D. C., N. Dak.), 3 Am. B. R. 457, 93 Fed. 833; *Robinson v. White* (D. C., Ind.), 3 Am. B. R. 88, 97 Fed. 33; *In re Sievers* (D. C., Mo.), 1 Am. B. R. 117, 91 Fed. 366; *In re Emslie* (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed. 290; *In re Pittlekow* (D. C., Wis.), 1 Am. B. R. 472, 92 Fed. 91; *Heath v. Shaffer* (D. C., Iowa), 2 Am. B. R. 98, 93 Fed. 647; *Small v. Muller*, 67 N. Y. App. Div. 143, 8 Am. B. R. 448, 73 N. Y. Supp. 667; *In re Spitzer* (C. C. A., 2d Cir.), 12 Am. B. R. 346, 130 Fed. 879; *Union Elec. Co. v. Hubbard* (C. C. A., 4th Cir.), 39 Am. B. R. 529, 242 Fed. 248; *Goldsmith v. Winner Shingle Co.* (Wash. Sup. Ct.), 40 Am. B. R. 225, 165 Pac. 392; *Moran & Wilkinson v. Martin* (Ga. Ct. of App.), 41 Am. B. R. 23, 94 S. E. 905; *Tripplihorn v. Cambron* (C. C. A., 6th Cir.), 41 Am. B. R. 334, 255 Fed. 605; *Doolittle v. Mutual Life Ins. Co.* (D. C., N. Y.), 41 Am. B. R. 685, 243 Fed. 491; *Matter of Vadner* (D. C., Nev.), 42 Am. B. R. 465, 259 Fed. 614; *Matter of Briun* (D. C., Ga.), 45 Am. B. R. 74, 262 Fed. 537; *Cook v. Wheeler* (Mo. Ct. of App.), 213 S. W. 929, 45 Am. B. R. 257.

233. See Judicial Code, §§ 289, 291.

234. Bankr. Act, § 2(4).

SECTION TWENTY-FOUR.

JURISDICTION OF APPELLATE COURTS

§ 24. Jurisdiction of Appellate Courts.—*a* The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Analogous provisions: In U. S.: As to appellate jurisdiction, Act of 1867. §§ 9, 24, R. S., §§ 4980, 4981, 4982, 4983, 4984, 4985, 4989; Act of 1841, § 4; As to supervisory jurisdiction, Act of 1867, § 2. R. S., §§ 4986, 4987, 4988; Act of 1841, § 6.
In Eng.: Act of 1883, § 104; General Rules 129-134-a.
In Can.: Act of 1919, §§ 63, 74.

Cross-references: To the law: Appellate courts defined, § 1(3); States include Territories, § 1(24).

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SYNOPSIS OF SECTION.

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II. Appeals to Circuit Court of Appeals and Supreme Court, 567.a. *In general*, 567.b. *Appeals from District Court to Supreme Court*, 568.c. *Appeals to Circuit Court of Appeals*, 568.**III. Appeals to Supreme Court from Higher Court of State, 568.****IV. Supervisory Jurisdiction, 570.****I. APPELLATE JURISDICTION IN GENERAL.**

a. *Appeals under law of 1867.*—The former law was as simple in respect to appeals as the present, at first glance, seems complicated. Appeals as in equity cases and writs of error in those at law were heard in the circuit courts wherever the amount in controversy exceeded \$500; the circuit court had supervisory jurisdiction of all cases and questions arising in a court of bankruptcy within its jurisdiction; appeals and writs of error could be heard in the Supreme Court only when the matter in dispute exceeded \$5,000.¹ There was also the usual review by writ of error in the latter court of certain judgments of the highest courts of the States. Since that law was repealed, the Circuit Courts of Appeals have been vested with the appellate jurisdiction of the circuit court; while, that their calendars might not be congested with a multitude of petty questions, the appellate courts no longer “sit at the elbow”² of the court of bankruptcy, but appeals involving questions of fact are limited to important and vital matters, and superintendence may be asked only of questions of law.³ Thus, the entire system has been radically changed, and the cases under the former law are of little value. Further differences between the old and new system are discussed in detail later under this section and under section twenty-five, *post*.

b. *Scope and meaning of section.*—As explained later, this § 24 is here treated as if its subsection *b* were a part of § 25. It is clear from the caption that the section has to do only with the jurisdiction of appellate courts. Subsection *a* is general in its terms, and makes applicable the general law so far as it confers appellate jurisdiction of controversies in the district court, by giving the courts named a general appellate jurisdiction over questions arising in that court while sitting in bankruptcy.⁴ This subsection has no reference to appeals to the Supreme Court from the Circuit Court of Appeals. Except as expressly specified therein the jurisdiction of the Supreme Court is not broadened in any way.⁵ Manifestly the jurisdiction conferred by this subsection is, so far

1. See “Analogous Provisions,” *ante*.2. *In re Adler* (D. C., Tenn.), 4 Am. B. R. 583, 590, 103 Fed. 444.

3. See Bankr. Act, § 25, and read § 24-b.

4. Thus, see *In re Columbia Real Estate Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 441,112 Fed. 643; *Stelling v. Jones Lumber Co.* (C. C. A. 7th Cir.), 8 Am. B. R. 521, 116 Fed. 261; *Scott & Co. v. Wilson* (C. C. A. 7th Cir.), 8 Am. B. R. 349, 115 Fed. 284.5. *Hutchinson v. Otis* (C. C. A., 1st Cir.), 10 Am. B. R. 275, 123 Fed. 14.

as applicable, that conferred on Circuit Courts of Appeal by the Evarts act, subsequently revised and re-enacted in the Judicial Code.⁶ This act and the limitations suggested by what follows under this section and section twenty-five, should be consulted for an understanding of the broad scope, yet accurate boundaries, of appeals in bankruptcy.

c. Controversies arising in bankruptcy proceedings.—(1) IN GENERAL.—This section is limited to controversies arising in bankruptcy proceedings in the exercise by bankruptcy courts of the jurisdiction vested in them to settle the estates of bankrupts and to determine controversies in relation thereto.⁷

(2) CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.—The words "controversies in bankruptcy proceedings" in subsection *a* of this section, and the words "in bankruptcy proceedings" in the next section refer to different classes of cases; the former referring only to controversies outside of the bankruptcy proceeding proper, as suits between the trustee and adverse claimants.⁸ Nothing can be regarded as a "controversy arising in bankruptcy proceedings" within the purview of subsection *a* where the subject-matter and object of the proceedings are within the power to make a summary order; certainly this is true where plenary action is not sought.⁹ As stated by the Supreme Court: "Section 25-a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect to which special provision thereof was required, while § 24-a relates to controversies arising in bankruptcy proceedings in the exercise of the jurisdiction vested in them at law and in equity by § 2, to settle the estates of bankrupts, and to determine controversies in relation thereto."¹⁰ Controversies arising in the course of bankruptcy proceed-

6. Judicial Code, §§ 128-a, 129, revised from Act of March 3, 1891, § 6. Compare, also, *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839; *Steele v. Buel* (C. C. A., 8th Cir.), 5 Am. B. R. 185, 104 Fed. 968; *In re Columbia Real Estate Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 441, 112 Fed. 643; *Stelling v. Jones Lumber Co.* (C. C. A., 7th Cir.), 8 Am. B. R. 521, 116 Fed. 261.

7. *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1179; *Hewitt v. Berlin Machine Works*, 194 U. S. 300, 11 Am. B. R. 709, 48 L. Ed. 966; *In re First National Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62, holding that an order disallowing the lien of a chattel mortgage is in a controversy arising out of the settlement of the bankrupt estate and is appealable; *Security Warehousing Co. v. Hand* (C. C. A., 7th Cir.), 16 Am. B. R. 49, 143 Fed. 32, holding likewise as to a petition to establish and enforce an alleged warehouse lien. See also *Smith v. Evans* (C. C. A., 7th Cir.), 17 Am. B. R. 433, 148 Fed. 89.

8. *In re Adler* (D. C., Tenn.), 4 Am. B. R. 583, 103 Fed. 444; *Burleigh v. Foreman* (C. C. A., 1st Cir.), 11 Am. B. R. 74, 125 Fed. 217; *Liddon v. Smith* (C. C. A., 5th Cir.), 14 Am. B. R. 204, 135 Fed. 43; *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585; *Matter of Breyer Printing Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 796, 216 Fed. 878.

9. *In re Farrell* (C. C. A., 6th Cir.), 23 Am. B. R. 826, 176 Fed. 506.

10. *Controversies arising in bankruptcy proceedings.*—*Hewitt v. Berlin Machine Co.*, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 966, in which case it was held that where title was asserted to property in the possession of the trustee by an intervention raising a distinct and separate issue, the controversy may be treated as one of those "controversies arising in bankruptcy proceedings" over which the Circuit Court of Appeals could, under section 24-a, exercise appellate jurisdiction as in other cases. See also *In re National Bank of Canton*

(C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62; *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 685; *Dolle v. Cassell* (C. C. A., 6th Cir.), 14 Am. B. R. 52, 135 Fed. 52; *Mason v. Wolkowich* (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 699; *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731; *McCarty v. Coffin* (C. C. A., 5th Cir.), 18 Am. B. R. 148, 150 Fed. 307; *Thompson v. Maury* (C. C. A., 4th Cir.), 23 Am. B. R. 489, 174 Fed. 611; *Morehouse v. Pacific Hardware, etc., Co.* (C. C. A., 9th Cir.), 24 Am. B. R. 178, 177 Fed. 337; *Matter of Creich Bros. Lumber Co.* (C. C. A., 9th Cir.), 39 Am. B. R. 487, 240 Fed. 8; *Jones v. Blair* (C. C. A., 4th Cir.), 39 Am. B. R. 569, 242 Fed. 783; *Bank of Ragland v. Hudson* (C. C. A., 5th Cir.), 41 Am. B. R. 61, 247 Fed. 241; *Baker Ice Machine Co. v. Bailey* (C. C. A., 8th Cir.), 31 Am. B. R. 513, 209 Fed. 844, holding that where a conditional vendor intervenes in a bankruptcy proceeding assenting title to and asking possession of property sold the bankrupt, it is a controversy arising in bankruptcy proceedings. *Aff'd*, 239 U. S. 268, 35 Am. B. R. 814.

A question as to a State court receiver's title and right to possession of bank stock in the hands of the trustee in bankruptcy, gives rise to a "controversy arising in bankruptcy proceedings," which is reviewable by appeal, although there is also a subordinate question involved as to the bank's right to a lien on the stock. *Dalton v. Humphreys* (C. C. A., 4th Cir.), 39 Am. B. R. 360, 242 Fed. 777. See also *Am. B. R. Dig.*, § 1218.

Priority of liens.—Where a trustee in bankruptcy files a petition asking that the lands of the bankrupt be sold free of all encumbrances and that the liens be marshalled and transferred to the proceeds, and a mortgagee files an answer which is in effect an intervening petition in which it asks relief against the trustee and other lien holders, and the real question is as between the lien holders as to the priority of their respective liens, it is a

ings involve questions between the receiver or trustee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants on the other, concerning property in the possession of the trustee or receiver, or of the claimants, to be litigated in appropriate plenary suits, and not affecting directly administrative orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors.¹¹ As where a controversy arises in respect to the claim of an adverse claimant in respect to a fund in the hands of the trustee as a result of a suit in a State court to recover property conveyed by the bankrupt in fraud of his creditors, it is a controversy arising in bankruptcy and is appealable under subsection *a* of this section.¹² Such orders and decrees as are in the nature of independent suits and controversies, arising in the course of bankruptcy proceedings are reviewable on appeal or writ of error, as the case may be, under subsection *a* of this section.¹³

(3) PROCEEDINGS IN BANKRUPTCY.—Subsection *b* relates to proceedings in bankruptcy only, as distinguished from controversies arising in bankruptcy

controversy under section 24a and appeal from the decree of the District Court is the proper remedy. *Century Savings Bank v. Moody* (C. C. A., 8th Cir.), 31 Am. B. R. 586, 209 Fed. 775. See also *Matter of Leterman, Becher & Co.* (C. C. A., 2d Cir.), 44 Am. B. R. 115, 260 Fed. 548.

A petition to revise is the equivalent of an appeal for the purposes of the Act of February 13, 1911, abolishing the supervision fee on appeal to the Circuit Court of Appeals. *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 61, 215 Fed. 898.

Proceedings to establish liens.—Where labor claimants orally call the attention of the district court, acting as an ancillary tribunal, to services rendered to the bankrupt, and to their rights in a fund, held by the ancillary receiver from a State receiver and not derived through direct operation of the adjudication; and a special master is appointed to take testimony, the action by the claimants constitutes an intervention in bankruptcy proceedings, giving rise to a "controversy," within the meaning of section 24a of the bankruptcy act. *Emerson v. Castor* (C. C. A., 6th Cir.), 37 Am. B. R. 719, 236 Fed. 28.

A proceeding to assert a lien on property which, at the time of the bankruptcy, passed into the possession of the bankruptcy court and the avails of which are constructively in the possession of that court, presents a controversy in bankruptcy reviewable by appeal and not by petition to revise. *Matter of Sola* (C. C. A., 1st Cir.), 44 Am. B. R. 372, 261 Fed. 822.

11. *Matter of Breyer Printing Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 706, 216 Fed. 878, citing *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852, 56 L. Ed. 725; *United States Fidelity Co. v. Bray*, 225 U. S. 205, 217, 28 Am. B. R. 207, 56 L. Ed. 1035; see *In re Mueller* (C. C. A., Ky.), 14 Am. B. R. 256, 135 Fed. 711, in which the court says: "By 'controversies arising in bankruptcy proceedings' is meant those independent of plenary suits which concern the bankrupt's estate, and arising by intervention or otherwise between the trustees representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors." See *Kirkpatrick v. Harnesberger* (C. C. A., 5th Cir.), 29 Am. B. R. 459, 189 Fed. 886.

Wherever a third person intervenes in the bankruptcy court and asserts a superior title to property held by the trustee, he institutes a controversy in a bankruptcy proceeding, whether he intervenes by an original petition,

or is brought into court upon the application of the trustee, and his remedy to review a judgment of that court is by an appeal under section 24-a. *Gibbons v. Goldsmith* (C. C. A., 9th Cir.), 35 Am. B. R. 40, 222 Fed. 826; *Matter of Herbert & Co.* (C. C. A., 2d Cir.), 45 Am. B. R. 20, 263 Fed. 351.

Review of order vacating temporary injunction.—The review of an order of the district court, vacating a prior order of the same court directing that an interlocutory injunction issue restraining third parties from proceeding in an action in a State court against the bankrupt, may be had under § 24a, as the question at issue is a controversy arising in bankruptcy proceedings. *Bothwell v. Fitzgerald* (C. C. A., 9th Cir.), 34 Am. B. R. 261, 219 Fed. 408.

Liability for costs of receiver.—The question as to the liability of creditors who petitioned for the appointment of a receiver, for the costs of the receivership, presents a controversy arising in bankruptcy rather than a step in the administration of the estate. *Matter of Veler* (C. C. A., 6th Cir.), 41 Am. B. R. 734, 249 Fed. 633.

Order allowing sale free from liens.—An order of the district court reversing an order of the referee allowing the petition of a trustee in bankruptcy to sell property subject to various liens and free and clear of other liens, constitutes a "controversy in a bankruptcy proceeding," and should be reviewed by appeal and not by petition to revise. *Sauve v. The More Investment Co.* (C. C. A., 8th Cir.), 41 Am. B. R. 281, 248 Fed. 642.

12. *Globe Bank & Trust Co. v. Martin*, 238 U. S. 283, 34 Am. B. R. 162, 89 L. Ed. 583.

13. *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711; *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 140 Fed. 849; *In re McKenzie* (C. C. A., 8th Cir.), 15 Am. B. R. 679, 142 Fed. 383; *In re Friend* (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778; *Smith v. Evans* (C. C. A., 7th Cir.), 17 Am. B. R. 433, 149 Fed. 89; *In re Doran* (C. C. A., 6th Cir.), 18 Am. B. R. 760, 154 Fed. 467; *Loeser v. Savings Deposit Bank & Trust Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 845, 163 Fed. 212; *Coder v. Arts* (Sup. Ct.), 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772; *In re Streater Metal Stamping Co.* (C. C. A., 7th Cir.), 30 Am. B. R. 55, 205 Fed. 280; *Jones v. Blair* (C. C. A., 4th Cir.), 39 Am. B. R. 569, 242 Fed. 733; *Turner v. Schaeffer* (C. C. A., 6th Cir.), 40 Am. B. R. 829, 249 Fed. 654.

and from plenary suits.¹⁴ If the proceeding is summary in its character and object, it is a proceeding in bankruptcy, reviewable under § 24-b.¹⁵ The object of subsection *b* is to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate.¹⁶

(4) **DISTINCTION BETWEEN CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS AND BANKRUPTCY PROCEEDINGS.**—There is a clear distinction between such controversies and "proceedings in bankruptcy" within the meaning of section 25-a; the latter, broadly speaking, covering questions between the alleged bankrupt and his creditors as such, commencing with the filing of the petition, ending with the discharge and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, proof and allowance of claims, and other similar matters to be disposed of summarily, all of which naturally occur in the settlement of the estate.¹⁷ The

14. *United States v. Ruggles* (C. C. A., 6th Cir.), 34 Am. B. R. 91, 221 Fed. 256.

15. *Courtney v. Shea* (C. C. A., 6th Cir.), 34 Am. B. R. 758, 225 Fed. 358, and cases cited.

An appeal from a judgment refusing priority to a claim secured by lien, does not present "a controversy arising in bankruptcy proceedings" under section 24-a of the Bankruptcy Act, but "a proceeding in bankruptcy" under section 25-a. *Matter of Monarch Acetylene Company* (C. C. A., 2d Cir.), 39 Am. B. R. 813, 245 Fed. 741.

16. *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852, 56 L. Ed. 725; *Thomas Co. v. Beharrell* (C. C. A., 9th Cir.), 36 Am. B. R. 688, 229 Fed. 691; *Barton Lumber & Brick Co. v. Prewitt* (C. C. A., 8th Cir.), 36 Am. B. R. 718, 231 Fed. 919.

The proceedings reviewable under § 24-b are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under § 25-a. *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711.

17. **Distinction between "Controversies arising in bankruptcy proceedings" and "Proceedings in bankruptcy."**—In the case of *In re Friend* (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778, the court said: "Section 23 established a clear distinction between 'proceedings in bankruptcy' and 'controversies at law and in equity arising in the course of bankruptcy proceedings;' the former, broadly speaking, covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, allowances and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate; and the latter, broadly speaking, involving questions between the trustee, representing the bankrupt and his creditors, on the one side and adverse claimants on the other, concerning property in the possession of the trustee or of the claimants, to be litigated in appropriate plenary suits and not affecting directly the administrative orders and judgments but only the question of the extent of the estate."

Judge Keller has summarized the conclusions of the several cases involving such dis-

tinction in the following language: "That there is a clear distinction between 'controversies arising in bankruptcy proceedings,' as mentioned in section 24-a and 'the proceedings in bankruptcy,' which, by section 24-b, the Circuit Court of Appeals are given jurisdiction to superintend and revise 'in matter of law;' the former being generally held to embrace questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, and not directly affecting those administrative orders and judgments ordinarily known as 'proceedings in bankruptcy,' and the latter being confined to those questions arising between the bankrupt and his creditors which are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, and including the intermediate administrative steps, and such controversies as arise between parties to the bankruptcy proceedings as are involved in the allowance of claims, fixing their priorities, sales, allowances, and other matters to be disposed of summarily." *Thompson v. Maury* (C. C. A., 4th Cir.), 23 Am. B. R. 489, 174 Fed. 611. See also *Snow v. Dalton* (C. C. A., 4th Cir.), 29 Am. B. R. 240, 203 Fed. 843; *Matter of Weidhorn* (D. C., Mass.), 39 Am. B. R. 338, 243 Fed. 766; *Matter of Dressler Producing Corp.* (C. C. A., 2d Cir.), 44 Am. B. R. 457, 262 Fed. 237.

In the case of *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585, the court in discussing these phrases as used in section 24, said: "In section 24-b, however, the term 'proceedings in bankruptcy,' as construed by the courts, has been given a narrower meaning and has been set over against 'controversies arising in bankruptcy proceedings,' as used in section 24-a. Here it has been thought to mean any of the administrative acts intervening between the filing of the petition and the granting of the discharge, as distinguished from those 'controversies arising in bankruptcy proceedings' on petition, which would have been the subject of plenary suits if the estate had not been in the custody of a court of bankruptcy." In the case of *Morehouse v. Pacific Hardware & Steel Co.* (C. O. A., 9th Cir.), 24 Am. B. R. 178, 177 Fed. 337, the court

great number of authorities upon this branch of bankruptcy practice and the conflict between them has given rise to endless confusion, and it is sometimes difficult to determine within which class a particular order of the bankruptcy court may fall. Each case will necessarily be determined by its own facts, and in each, the important consideration is the object and character of the proceeding sought to be reviewed.¹⁸

(5) **IMPORTANCE OF DISTINCTION.**—If the controversy is one “arising in bankruptcy proceedings,” appellate courts exercise their jurisdiction as in other cases under subsection *a* of this section. If the controversy pertains to the proceedings in bankruptcy, relating to the adjudication and the subsequent steps in bankruptcy, it is one which may be revised in matter of law, upon due notice and petition by any party aggrieved, by a circuit court of appeals. The distinction between a controversy “arising” in bankruptcy proceedings and a decision or order in the bankruptcy proceedings proper, is for the sole purpose of determining whether the review by the appellate court shall be by appeal or by petition to revise in matter of law.¹⁹ It has been deemed advis-

said: “It is conceivable that the line of demarcation between ‘proceedings in bankruptcy,’ and ‘controversies at law and in equity arising in the course of bankruptcy proceedings,’ may in some cases be obscure; but generally speaking, the former include all questions arising in the administration of the bankrupt’s estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt’s voluntary assignees to surrender property of the estate, orders giving priority to the claims of creditors, orders directing a set-off of mutual debts, and orders confirming a composition. These are questions, which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property, as property of the estate, whether the property be in his possession or theirs.” See also *Barnes v. Pampel* (C. C. A., 6th Cir.), 27 Am. B. R. 192, 192 Fed. 525; *Matter of Breyer Printing Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 796, 216 Fed. 878; *Ogden & Jamison v. Gilt Edge Mines Co.* (C. C. A., 8th Cir.), 34 Am. B. R. 893, 225 Fed. 723.

18. In *re Jungman* (C. C. A., 2d Cir.), 26 Am. B. R. 401, 186 Fed. 302, holding that in a case where substantially the only question raised is whether a contract for the purchase of certain property of the bankrupt’s estate has been made between the receiver of the bankrupt and a third party, a “controversy arising in bankruptcy proceedings” exists, and a decision requiring such third party to carry out the terms of the judicial sale which had been ordered in accordance with such alleged contract, is reviewable by appeal.

19. The importance of the distinction is clearly indicated in the case of *Moody & Son*

v. Century Saving Bank, 239 U. S. 374, 36 Am. B. R. 95, 60 L. Ed. 336, in which the court said: “Whether the Circuit Court of Appeals rightly sustained this jurisdiction turns upon whether this is one of those ‘controversies arising in bankruptcy proceedings’ over which the Circuit Courts of Appeals are invested, by § 24a of the Bankruptcy Act, with the same appellate jurisdiction that they possess in other cases under the Judicial Code, § 128, or is a mere step in bankruptcy proceedings, the appellate review of which is regulated by other provisions of the bankruptcy act. If it is a controversy arising in bankruptcy proceedings, the jurisdiction of that court was properly invoked, as is also that of this court. We entertain no doubt that it is such a controversy. It has every attribute of a suit in equity for the marshaling of assets, the sale of the encumbered property, and the application of the proceeds to the liens in the order and mode ultimately fixed by the decree. True, it was begun by the trustee, and not by an adverse claimant, but this is immaterial, for the mortgagees, who claimed adversely to the trustee, not only appeared in response to notice of the trustee’s petition, but asserted their mortgage liens and sought to have them enforced against the proceeds of the property conformably to the contentions before stated. This was equivalent of an affirmative intervention, and, when taken in connection with the trustee’s petition, brought into the bankruptcy proceedings a controversy which was quite apart from the ordinary steps in such proceedings, and well within the letter and spirit of § 24a.” Citing *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 300, 11 Am. B. R. 709, 49 L. Ed. 986, 987; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 553, 24 Am. B. R. 761, 54 L. Ed. 610, 613; *Taft, W. & Co. v. Mun-suri*, 222 U. S. 114, 118, 27 Am. B. R. 338, 56 L. Ed. 118, 119; *Houghton v. Burden*, 229 U. S. 161, 165, 30 Am. B. R. 16, 57 L.

able to consider under section 25 whether the review should be by appeal or petition to revise. It is therefore not essential in this connection to consider the nature and object of particular controversies for the purposes of determining as to the method of review.

II. APPEALS TO CIRCUIT COURT OF APPEALS AND SUPREME COURT.

a. In general.—Subsection a of this section vests the Supreme Court and the circuit court of appeals with appellate jurisdiction of controversies arising in bankruptcy proceedings in the courts of bankruptcy from which they have appellate jurisdiction in other cases. The only matters which can be reviewed are "controversies arising in bankruptcy proceedings." We have already considered the distinction to be made between such controversies and appeals in bankruptcy proceedings generally as authorized by the next section. The only court which may be appealed from is the court of bankruptcy, which phrase, as here used, does not include the referee.²⁰ The only courts which can hear such an appeal are the several courts mentioned. So, also, appeals can be taken only to the proper court in whose territorial jurisdiction the court of bankruptcy appealed from is located.²¹ The appellate courts are given juris-

Ed. 780, 782; *Globe Bank & Trust Co. v. Martin*, 236 U. S. 238, 295, 34 Am. B. R. 162, 59 L. Ed. 583, 587; *Matter of Russell* (C. C. A., 9th Cir.), 41 Am. B. R. 234, 247 Fed. 95.

20. Appeal to Supreme Court in "controversies arising in bankruptcy proceedings." In the case of *Tefft, Weller & Co. v. Mansuri*, 222 U. S. 114, 27 Am. B. R. 333, 341, 56 L. Ed. 118, Mr. Justice White says: "But the entire argument rests upon a misconception of the words 'controversies in bankruptcy proceedings,' as used in the section, since it disregards the authoritative construction affixed, to those words, *Coder v. Arts*, 213 U. S. 234, 22 Am. B. R. 1, 53 L. Ed. 777, 29 Sup. Ct. Rep. 436, 16 A. & E. Ann. Cas. 1008; *Hewitt v. Berlin Mach. Works*, 194 U. S. 296, 300, 11 Am. B. R. 709, 48 L. Ed. 986, 987, 24 Sup. St. Rep. 690. Those cases expressly decide that controversies in bankrupt proceedings, as used in the section, do not include mere steps in proceedings in bankruptcy, but embrace controversies which are not of that inherent character, even though they may arise in the course of proceedings in bankruptcy. The cases referred to, moreover, by necessary implication, determine that the mere allowing or disallowing a claim in bankruptcy is a proceeding in bankruptcy, and not a controversy arising in bankruptcy, within the intentment of the section. Nor is there force in the contention that because the district court of Porto Rico is a court of bankruptcy 'not within an organized circuit of the United States,' therefore authority to review its action in a case like this is conferred on this court by the concluding sentences of section 24-a. This is true, because the proposition really rests upon the misconception of the section, already pointed out. That is to say, as the sentence relied upon only confers upon this court 'a like jurisdiction' to review the acts

of the particular courts of bankruptcy which the sentence designates to that conferred by the immediately preceding provisions of section 24-a, that is, to review controversies in bankruptcy, it follows that the sentence confers no powers to review a mere step in bankruptcy, taken by a bankruptcy court, even though such court be one of those referred to in the last sentence relied upon." And see *James v. Stone & Co.*, 227 U. S. 410, 29 Am. B. R. 476, 57 L. Ed. 573.

Appeals in controversies.—Section 24a of the Bankruptcy Act provides for appeals in controversies arising in bankruptcy proceedings and controls an appeal from the Circuit Court of Appeals in a proceeding by a trustee to restrain a landlord from prosecuting a suit for rent in the State court. *Mitchell Store Building Co. v. Carroll*, 232 U. S. 379, 35 Am. B. R. 197, 58 L. Ed. 650.

Appeal in summary proceedings.—An attempted intervention by attorneys in a summary proceeding in a court of ancillary jurisdiction, basing their claim on alleged assignments made to them after the filing of the petition in the original jurisdiction, does not give jurisdiction over a controversy in bankruptcy appealable under § 128 of the Judicial Code of the Circuit Court of Appeals, and thence to the Supreme Court. *Lazarus v. Prentice*, 234 U. S. 263, 32 Am. B. R. 559, 58 L. Ed. 1305.

From judgment on petition to revise.—The Supreme Court cannot entertain an appeal from a judgment of the Circuit Court of Appeals, upon a petition to revise under section 24b of the Bankruptcy Act. *Mitchell Store Building Co. v. Carroll*, 232 U. S. 379, 35 Am. B. R. 197, 58 L. Ed. 650.

21. In re *Seebold* (C. C. A., 5th Cir.), 5 Am. B. R. 358, 105 Fed. 910. Compare *In re Blair* (C. C. A., 8th Cir.), 5 Am. B. R. 793, 106 Fed. 662.

diction to sit "in vacation in chambers and during their respective terms;" which seems to mean that such courts are always in session for the sake of appeals. In conclusion it may be stated that circuit courts of appeals have jurisdiction to review the final decisions of courts of bankruptcy in controversies arising between the trustees in bankruptcy and third parties over the title to, or over liens upon the alleged property of the bankrupt or its proceeds, and that the general appellate jurisdiction vested by subsection *a* of § 24 is not affected or impaired by the grant of the power of revision and supervision in matter of law contained in subsection *b* of that section.²³

b. Appeals from district court to Supreme Court.—The appellate jurisdiction of the Supreme Court of controversies arising in bankruptcy proceedings from a district court not within any organized circuit of the United States is the same as that of the circuit court of appeals from district courts included in an organized circuit. As to when and how an appeal may be taken direct to the Supreme Court from a district court is discussed under the next section.²³

c. Appeals to circuit court of appeals.—The circuit court of appeals is clothed by subsection *a* of this section with general appellate jurisdiction of controversies arising in bankruptcy proceedings. Section 25-a provides for appeals in bankruptcy proceedings themselves in the specific cases stated. We will consider further the appellate jurisdiction of the circuit court of appeals exercisable as in equity cases, under the next section.²⁴ By subsection *b* of this section the several circuit courts of appeals have jurisdiction in equity either interlocutory or final, to supervise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. A petition to revise is the means by which this jurisdiction is to be exercised. Because of the close relation existing between this method of review and that by appeal it is deemed advisable to consider it in the general discussion of the appellate jurisdiction of Circuit Courts of Appeals under the next section.²⁵

III. APPEALS TO SUPREME COURT FROM HIGHER COURT OF STATE.

The bankruptcy law contains no provisions regulating appeals from the court of last resort in a State to the Supreme Court of the United States. Such law does not in any way affect the right to such appeal given by the Revised Statutes.²⁶ This method of review will be found valuable in proceed-

²³ *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363; *Delta National Bank v. Easterbrook* (C. C. A., 5th Cir.), 13 Am. B. R. 338, 133 Fed. 521; *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711; *In re Friend* (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778; *Smith v. Evans* (C. C. A., 7th Cir.), 17 Am. B. R. 433, 148 Fed. 89; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 685; *In re New England Breeders' Club* (C. C. A., 1st Cir.), 22 Am. B. R. 124, 165 Fed. 217; *Franklin v. Stoughton Wagon Co.* (C. C. A., 8th Cir.), 22 Am. B. R. 63, 168 Fed. 857.

²³ See *Bankr. Act*, § 26, *post*, p. 606. See "Review by Supreme Court."

²⁴ See *post*, p. 591.

²⁵ See *post*, pp. 591-606.

²⁶ Appeal to Supreme Court from State Court.—Judicial Code, section 237, provides

as follows: "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-

ings involving bankruptcy questions in the courts of the States, as, for instance, where a State court has erroneously interpreted a provision in the bankruptcy law,²⁷ or refused to recognize the validity of a discharge duly granted.²⁸ Where, in an action by a trustee to recover assets, the State court of last resort, in affirming a judgment for the plaintiff, construed some of the provisions of the bankruptcy law, its judgment presents a Federal question reviewable by the Supreme Court upon a writ of error.²⁹ The limitation of the Revised Statutes should always be borne in mind. The cases where a writ of error may be asked for may be summarized as follows:

First, where there has been a decision against the validity of any portion of the bankruptcy act; second, where a decision has been had by the State court sustaining a statute of the State claimed to be repugnant to the bankruptcy act; or, third, where the right, title, privilege or immunity of any person claimed under the bankruptcy statute has been denied by a State court.³⁰ So where a trustee in bankruptcy asserts a right in a State court arising under the bankruptcy law, a Federal question is presented which gives rise to the jurisdiction of the Supreme Court under the Revised Statutes.³¹ Where the only question determined in the State court was whether or not the bankrupt was entitled to an exemption under a State statute the judgment of the State court is not reviewable by the Supreme Court.³² The Federal question which is made the basis of review must have been raised in the State court,³³ even if passed on there, if the decision may be affirmed for other reasons, it will not be disturbed.³⁴ The amount in dispute makes no difference; but only questions

examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

"The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

27. *Hill v. Harding*, 107 U. S. 631, 27 L. Ed. 493; *Williams v. Heard*, 140 U. S. 529, 35 L. Ed. 550.

28. *Hennequin v. Clewes*, 111 U. S. 677, 28 L. Ed. 565; *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 248; *Forsyth v. Vehmeyer*, 177 U. S. 177, 3 Am. B. R. 807, 44 L. Ed. 723.

29. *Hennequin v. Clewes*, 111 U. S. 677, 28 L. Ed. 565; *Eau Claire Nat'l Bank v. Jackman*, 204 U. S. 522, 17 Am. B. R. 675, 51 L. Ed. 596; See also *Nutt v. Knutt*, 200 U. S. 12, 50 L. Ed. 348, where the court said: "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of § 709 (Judicial Code, § 237), to assert a right and under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary." Where defendant in an action against it in a State court sets up the issuing of an injunction by a court of bankruptcy, undertaking to stay proceedings in the State

Court, it thereby claims the benefit of a Federal right, so as to bring the case within section 709 (Judicial Code, § 237) of the U. S. Revised Statutes, and lays the foundation for a review in the United States Supreme Court. *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 27 Am. B. R. 262, 56 L. Ed. 208; *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 15 Am. B. R. 336, 50 L. Ed. 527, in which it was held that a judgment of dismissal entered upon a verdict in an action brought by a trustee in bankruptcy in a State court to recover, as a voidable preference, a payment made to a bank within the four months period, presents a Federal question, which is reviewable by the Supreme Court upon a writ of error; *Miller v. New Orleans Acid & Fertilizer Co.* (Sup. Ct.), 211 U. S. 486, 21 Am. B. R. 416, 53 L. Ed. 300, affg. 117 La. 821, 42 S. E. 329.

30. *Collier on Bankruptcy* (3d ed.), p. 243.

31. *Rector v. City Deposit Bank*, 200 U. S. 405, 15 Am. B. R. 336, 50 L. Ed. 527.

32. *Smalley v. Laugenour*, 196 U. S. 93, 13 Am. B. R. 692, 49 L. Ed. 400.

33. *Columbia Water Power Co. v. Street Railway Co.*, 172 U. S. 475, 43 L. Ed. 521; *Pim v. St. Louis*, 165 U. S. 273, 41 L. Ed. 714.

34. *Bausman v. Dixon*, 173 U. S. 113, 43 L. Ed. 633. Compare also *Castillo v. McConico*, 168 U. S. 674, 42 L. Ed. 622, and *Briggs v. Walker*, 171 U. S. 466, 43 L. Ed. 243.

at law will be reviewed.³⁵ Such a writ of error can be directed only to the highest court of the State in which a decision of the matter in controversy could be had.³⁶ Appeals of this character being outside of the bankruptcy law, the practice is identical with that on writs of error from the Supreme Court to such a State court in cases involving Federal questions other than those growing out of the bankruptcy law.³⁷ While the certification of a record by a State court to the Supreme Court may not import a Federal question into the record where otherwise such question does not arise, such certificate may serve to elucidate the determination as to whether a Federal question exists; if the certificate does show that rights under the bankruptcy law were passed upon by the State court the Supreme Court will review the judgment.³⁸ A number of other cases indicating the circumstances under which the appellate jurisdiction to review the judgment of a State court will be exercised are cited in the foot-note.³⁹

IV. SUPERVISORY JURISDICTION.

By subsection *b* of this section the several circuit courts of appeals are given jurisdiction to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power may be exercised on due notice and petition by any party aggrieved. When a petition to revise has been duly filed no further relief is necessary to protect the rights of the petitioner.⁴⁰ The power to revise and superintend should not be exercised to control the discretion of a court of bankruptcy in the matter of the appointment or removal of referees.⁴¹ This method of review of proceedings in courts of bankruptcy should not be separated from the exercise of appellate jurisdiction by Circuit Courts of Appeals under § 25. In so far as the subsection confers jurisdiction it is properly included in this section. But it also indicates the classes of questions which may be revised by petition and somewhat of the practice on revision. This question of jurisdiction should be considered and discussed in connection with the appellate jurisdiction conferred under § 25.⁴²

35. *Egan v. Hart*, 165 U. S. 188, 41 L. Ed. 680.

36. Judicial Code, § 237.

37. See *Foster's Federal Practice*, § 477 *et seq.* See also *Desty's Federal Procedure* (9th ed.), § 536, and Form No. 680.

38. *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 15 Am. B. R. 336, 50 L. Ed. 527.

39. *Linton v. Stanton*, 12 How. 423; *Scott v. Kelly*, 23 Wall. 57; *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. Ed. 994; *McKenna v. Simpson*, 129 U. S. 506, 32 L. Ed. 771; *Backus v. Fort Street Co.*, 160 U. S. 557, 42 L. Ed. 853; *Bellingham Bay v. New Whatcom*, 172 U. S. 314, 43 L. Ed. 460; *McQuade v. Trenton*, 172 U. S. 636, 43 L. Ed. 581.

40. *Matter of Saratoga Gas, Electric Light & Power Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 592.

Scope of review.—The review of an order of the district court, affirming an order of the referee, dismissing a petition charging the trustee with negligence, and also the review of the uncontroverted facts, to determine whether there is any substantial evidence to sustain the order, is a review as to a matter of law within the provisions of section 24b of the Bankruptcy Act. *Matter of Kuhn Bros.* (C. C. A., 7th Cir.), 37 Am. B. R. 97, 234 Fed. 277.

Jurisdiction to review a summary order in bankruptcy proceedings is by original petition under this subdivision. *Matter of Goldstein and Moseson* (C. C. A., 7th Cir.), 38 Am. B. R. 802, 216 Fed. 887.

41. *Birch v. Steele* (C. C. A., 5th Cir.), 21 Am. B. R. 539, 165 Fed. 577.

42. See under § 25, *post*, p. 575.

SECTION TWENTY-FIVE.

APPEALS AND WRITS OF ERROR.

§ 25. **Appeals and Writs of Error.**—*a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of *certiorari* pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Analogous provisions: In U. S.: As to appeals to the circuit courts, Act of 1867, §§ 8, 24, R. S., §§ 4980, 4981, 4982, 4983, 4984, 4985; Act of 1841, § 4; as to appeals to the Supreme Court, Act of 1867, § 9, R. S., § 4989; as to petitions for revision, Act of 1867, § 2, R. S., §§ 4986, 4987; Act of 1841, § 6.

In Eng.: Act of 1883, § 104; General Rules, 129-134A.

In Can.: Act of 1919, §§ 63, 74.

Cross-references: To the law: Appellate courts, definition, § 1 (3); Courts of bankruptcy, definition, § 1 (8).

Jurisdiction of appellate courts, § 24.

To the General Orders: Appeals to Circuit Court of Appeals allowed by judge of court appealed from XXXVI (1).

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* Subsection b superseded in effect by Act of January 28, 1915, 38 stat. L. 803, post, p. 606.

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I. APPEALS AND WRITS OF ERROR GENERALLY.

a. *Scope and meaning of section.*—The object of § 24-a is, as has already been indicated, to confer jurisdiction upon the Supreme Court and circuit courts of appeals as to controversies arising in bankruptcy proceedings. The distinction to be made between controversies arising in bankruptcy proceedings and the words “in bankruptcy proceedings” as used in § 25-a are commented upon under that section. It was there stated that if an appeal be brought in a suit independent of the proceedings proper or which arise in respect to a right asserted by an adverse claimant it must be under § 24-a

rather than under § 25-a. In other respects, however, § 25 both limits and explains the general appellate jurisdiction conferred upon the Supreme Court and the circuit courts of appeals by § 24-a. The jurisdiction to superintend and revise in matter of law the proceedings of bankruptcy courts is conferred by § 24-b; but it is so closely allied with the exercise of jurisdiction under this section that they are more properly treated in the same connection. In practically every case where any question has arisen relative to the review of any matter pertaining to bankruptcy by an appellate court, the court discusses or applies these two sections conjunctively. In any consideration of the subject the sections are necessarily treated in the same connection.

b. **Methods of appeal in bankruptcy.**—The practitioner in State courts, especially in the code states, usually finds the Federal system of appeals complex and difficult to understand. That he may have, as it were, a few landmarks to guide him, the following analysis of methods of appeal in bankruptcy, other than reviews of referees' decisions by the judge, may be found useful. It does not include reviews by the Supreme Court of bankruptcy decisions in the highest courts of the States.¹ The cases cited in the footnotes are referred to only for the purpose of calling attention to the cases in which the method specified has been employed under the present law. They are illustrative merely and are not referred to for the purpose of substantiating the statements made in the text.

(1) IN THE SUPREME COURT OF THE UNITED STATES:

- (a) *By appeal or writ of error*, from a district court not within any organized circuit, or the Supreme Court of the District of Columbia, by a party aggrieved by either of the judgments mentioned in § 25-a, but not otherwise.²
- (b) *By a writ of certiorari*, to a circuit court of appeals, if permitted by general law.³ Under Act of Congress, January 28, 1915. (38 Stat. at L. 804, chap. 22) judgments and decrees of circuit court of appeals in all proceedings under the bankruptcy act are final, save only that the Supreme Court may require that the proceeding be certified to it for review and determination.
- (c) *By certificate*, from either a circuit court of appeals or a district court direct, if permitted by general law.⁴

(2) IN A CIRCUIT COURT OF APPEALS:

- (a) *By appeal or writ of error*, from a district court in its circuit sitting in bankruptcy; if within the limitations of § 25-a, but not otherwise.
- (b) *By a petition to revise* in matters of law any order of a district court in its circuit sitting in bankruptcy.

1. This subject has been considered somewhat at length under the preceding section.

2. *Carson, Pirie, etc. v. Chicago Title & Trust Co.*, 182 U. S. 436, 45 L. Ed. 1171, 5 Am. B. R. 824; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 179; *Audubon v. Schufeldt*, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829.

3. *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623; *Mueller v. Nu-*

gent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

4. *Bardes v. Bank*, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; *Hicks v. Knost*, 178 U. S. 541, 44 L. Ed. 1183, 4 Am. B. R. 178; *Wall v. Cox*, 181 U. S. 244, 45 L. Ed. 945, 5 Am. B. R. 727; *Wilson v. Nelson*, 183 U. S. 191, 7 Am. B. R. 142, 46 L. Ed. 147.

(8) IN THE SUPREME COURT OF A TERRITORY:

- (a) *By appeal or writ of error*, from a district court of the territory sitting in bankruptcy; if within the limitations of § 25-a, but not otherwise.⁵

II. PETITIONS TO REVISE IN MATTER OF LAW.

a. *In general.*—Under § 24-b the several circuit courts of appeals have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. The revisory power here conferred, it will be noticed, extends (1) to matters of law and (2) to proceedings in bankruptcy. This power of revision as so conferred is contrasted with the appellate jurisdiction of the circuit court of appeals to be exercised under § 25-a in the three classes of cases therein specified. This appellate jurisdiction is also to be exercised “in bankruptcy proceedings.”

b. *Comparative legislation.*—The act of 1841 imperfectly granted this revisory power. It depended for its exercise on the order or certificate of the lower court.⁶ Under the act of 1867 it was often availed of and, because summary in its nature and simple in its application, was the usual method of reviewing questions of law.

c. *Distinction between petitions to revise and appeals.*—Petitions to revise in matter of law divides with appeals in equity cases the great majority of reviews heard by the circuit court of appeals. The petition differs from such appeals in two important particulars. (1) Petitions to revise bring up questions of law only; appeals both of law and of facts.⁷ (2) The former calls up any order or judgment or judicial action in bankruptcy proceedings; the latter three classes of final judgments only.⁸ The provisions as to revision in matter of law and appeals were framed and must be construed in view of the distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts.⁹ In other words, if the

5. Compare *In re Blair* (C. C. A., 8th Cir.), 5 Am. B. R. 793, 106 Fed. 662; *In re Stumpf* (Sup. Ct., Okla.), 9 Okla. 639, 4 Am. B. R. 267, 60 Pac. 96.

6. *Ex parte Christy*, 3 How. 292.

7. *Elliott v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200, in which case the court cited §§ 24-b and 25-a so far as they applied to the appellate jurisdiction of circuit courts of appeals and stated that the jurisdiction conferred by the former section was confined to questions of law and did not contemplate a review of the facts. The court said: “The distinction between a writ of error which brings up matters of law only, and an appeal, which, unless expressly restricted brings up both law and fact, has always been observed by this court and been recognized by the legislation of Congress from the foundation of the government.” *In re Blanchard Shingle Co.* (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 811; *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628; *Matter of Russell* (C. C. A., 9th Cir.), 41 Am. B. R. 234, 247 Fed. 85.

8. In the case of *Duryea Power Co. v. Sternbergh*, 218 U. S. 290, 25 Am. B. R. 66, 64 L. Ed. 1047, the court said: “It is argued that an appeal to the circuit court of appeals

may be treated as a petition for revision (*Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786, 48 L. Ed. 115), and that conversely, a petition for revision may be turned into an appeal, or at least treated as one for the purpose of an appeal to this court, if only to establish that the circuit court of appeals exhausted its jurisdiction. There are two answers to this contention. In the first place the converse proposition does not hold. An appeal opens both fact and law and therefore might be regarded as intended to raise questions of law in any way that might be deemed proper. But a petition for revision opens only questions of law and when the foundation of its jurisdiction is thus narrowed, the action of the court cannot enlarge it so as to deal with the facts.”

9. *First Nat'l Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051; *Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786, 48 L. Ed. 116; *Elliott v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200; *Denver First Nat'l Bank v. Klug*, 186 U. S. 202, 8 Am. B. R. 12, 46 L. Ed. 1127; *In re Hecox* (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 823.

question arise in an independent suit to determine a claim necessary for the settlement of the estate, or if it arise in one of the cases specified in § 25-a, review may be had by appeal; if the question pertains to and arises in the bankruptcy proceedings and does not fall within either of the cases specified in § 25-a, review may be had by a petition to revise in matter of law.¹⁰ Confusion may be avoided by bearing in mind that under § 24-a a controversy arising between a trustee and a third party in respect to property either in possession of the trustee or a third party the review in the circuit court of appeals is had on appeal in the same manner as in other cases. In the case of such controversies the revisory power is not available. On the review of judgments in independent suits to recover assets or to determine controversies arising relative to the bankrupt's estate the remedy is by appeal.¹¹ This doctrine does not seem refutable. Whatever conflict there may be among the authorities on this subject pertains to the question as to whether or not appeal as in equity cases taken in bankruptcy proceedings to the circuit court of appeals in the cases specified in § 25-a are exclusive of the right to review under § 24-b. These distinctions are now well settled by the court.¹²

d. Petition and appeal; exclusive or cumulative.—(1) **CONFLICT OF AUTHORITY.**—It has been held that the power to review by appeal conferred by § 25-a and that to supervise granted by § 24-b are cumulative; that the two grants of power are not inconsistent and that in a proper case either may be invoked.¹³

10. *Snow v. Dalton* (C. C. A., 4th Cir.), 29 Am. B. R. 240, 203 Fed. 843; *Kinkead v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362, in which the court held that the review of an order fixing the compensation of a referee, being in a "proceeding in bankruptcy" may only be had on a petition to revise under § 24b.

11. *In re Rusch* (C. C. A., 7th Cir.), 8 Am. B. R. 518, 116 Fed. 270. See also *In re Jacobs* (C. C. A., 8th Cir.), 3 Am. B. R. 671, 96 Fed. 935; *In re Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 701, 142 Fed. 445.

12. *In re Rouse, Hazard & Co.* (C. C. A., 7th Cir.), 1 Am. B. R. 234, 91 Fed. 96; *In re Purvine* (C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192; *In re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935; *In re Jacobs* (C. C. A., 8th Cir.), 3 Am. B. R. 671, 99 Fed. 539; *Courier-Journal, etc. v. Brewing Co.* (C. C. A., 6th Cir.), 4 Am. B. R. 183, 101 Fed. 699; *In re Ives* (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. 911; *Hutchinson v. Le Roy* (C. C. A., 1st Cir.), 8 Am. B. R. 20, 113 Fed. 200; *In re Abraham* (C. C. A., 5th Cir.), 2 Am. B. R. 266, 93 Fed. 767 (in Supreme Court, *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814).

13. **Right to review by appeal or on petition not exclusive.**—In the case of *In re Lee* (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579, the court said: "Undoubtedly there is a controversy here arising in a bankruptcy proceeding, which is reviewable by appeal under section 24-a, but there is no prohibition in the bankruptcy law of the revision in matter of law of such a controversy under section 24-b, and if no controversy arising in bankruptcy proceedings

may be reviewed under the latter section, then nothing may be reviewed under it because where there is no controversy, there is nothing to review or to decide. The fact is that the grant of jurisdiction to the circuit court of appeals, to review by appeal the final decision of a controversy arising in bankruptcy proceedings of which that court would have had appellate jurisdiction if it had arisen in any other case in a federal court under section 24-a, and the grant of jurisdiction to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy under section 24-b are not exclusive of each other, but cumulative or concurrent grants, the former of jurisdiction to review questions of law and of fact, the latter of jurisdiction to review questions of law alone."

Dodge v. Norlin (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363, in which the court said: "Nor is there anything in the grant by § 24-b of the power to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy which in any way affects or limits the general appellate jurisdiction vested by the sections of the law which have been considered. The act of 1898 does not grant the appellate and the revisory jurisdiction in the alternative. It does not give to disappointed litigants the right of appeal or the right to revision in matters of law. It grants the right of appeal and the right of superintendence and revision in matters of law only. It gives both rights freely and without limitation. The two grants are not inconsistent, and on familiar principles both must stand, and in a proper case either may be invoked." The following cases are also to the effect that

There are a number of other cases in which it has been held that where an appeal might be brought under § 25 a review of petition under § 24-b was not available.¹⁴ In many of these cases a distinction is made between "proceedings in bankruptcy" under § 24-b and "controversies arising in bankruptcy proceedings" which are appealable under the general appellate jurisdiction of the court as conferred by § 24-a. Under the principles of these cases if the controversy is one arising in bankruptcy proceedings, review by appeal is exclusive.¹⁵ In view of this conflict of authority it is difficult to declare a rule which will be a safe guide in every case. As has been stated, this contrariety of decision has resulted in such confusion and uncertainty in the practice that

the right to a review by an appeal or upon a petition to revise may be sought at the option of the appellant. In *re Holmes* (C. C. A., 8th Cir.), 15 Am. B. R. 689, 142 Fed. 392; In *re McKenzie* (C. C. A., 8th Cir.), 15 Am. B. R. 679, 142 Fed. 383; *Taft Co. v. Century Savings Bank* (C. C. A., 8th Cir.), 15 Am. B. R. 594, 141 Fed. 369; In *re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000; *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

An order of dismissal of a petition in bankruptcy, on the ground that it does not state facts sufficient to constitute an act of bankruptcy is reviewable by petition to revise under § 24-b, although it is a "judgment refusing to adjudge the defendant a bankrupt" and appealable under § 25-a. *Stevens v. Nave-McCord Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71.

14. Remedies exclusive.—*Union Nat'l Bank v. Neill* (C. C. A., 5th Cir.), 17 Am. B. R. 853, 149 Fed. 720; *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731, where the distinction seems to have been made between "a proceeding in bankruptcy" under § 24-b and "a controversy arising in bankruptcy proceedings" under § 24-a; *Mason v. Wolkowich* (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 699, in which also the distinction is made between an order appealable as a controversy in bankruptcy and one reviewable by petition as in the proceeding itself; In *re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 685; *Davidson & Co. v. Friedman* (C. C. A., 6th Cir.), 15 Am. B. R. 489, 140 Fed. 853, in which the court held that the remedies of appeal and petition for review are exclusive of each other and the court will not treat the one as the other to the confusion of pleading; In *re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711, holding that the supervisory jurisdiction conferred by § 24-b does not include orders or decrees which are appealable and that the provisions for appeal and for petition to revise are mutually exclusive. In *re Kuffler* (C. C. A., 2d Cir.), 11 Am. B. R. 469, 127 Fed. 125, holding that the provisions of § 24-b refer to cases not provided for by appeal so that if § 25-a applies, a petition to revise will not lie. *First Nat'l Bank of Miles City v. State Nat'l Bank* (C. C. A., 9th Cir.), 12 Am. B. R. 440, 131 Fed. 430, to the effect that

§ 25-a having provided a means to review by appeal three kinds of judgment, every other means is excluded. In *re Good* (C. C. A., 8th Cir.), 3 Am. B. R. 605, 99 Fed. 389, holding that a judgment adjudicating a person bankrupt could not be reviewed by petition. In *re Jungman* (C. C. A., 2d Cir.), 26 Am. B. R. 401, 186 Fed. 302, holding that a decision requiring a third party to carry out the terms of a contract for the purchase of certain property of the bankrupt's estate, is reviewable by appeal.

In the case of *Barnes v. Pampel* (C. C. A., 6th Cir.), 27 Am. B. R. 192, 192 Fed. 525, the court said: "The distinction between 'proceedings' in bankruptcy reviewable under section 24-b and the 'controversies arising in bankruptcy proceedings' appealable under section 24-a is clearly defined, the former including 'administrative orders and decrees in the ordinary course of bankruptcy between the filing of the petition and the final settlement of the estate,'—the latter including 'those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustees representing the bankrupt's estate and claimants representing some right or interest adverse to the bankrupt or his general creditors.' The remedies afforded by the two sub-sections referred to are mutually exclusive." Citing *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 986; *Coder v. Arts*, 213 U. S. 223, 233, 235, 22 Am. B. R. 1; *Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 27 Am. B. R. 338, 59 L. Ed. 118; In *re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711, 713, 715; In *re Doran* (C. C. A., 6th Cir.), 18 Am. B. R. 760, 154 Fed. 467; *Brady v. Bernard & Kittinger* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 576.

15. In *re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 685; *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731; *Mason v. Wolkowich* (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 699, holding that an order made upon the petition of a trustee for the payment to him of the proceeds of a sale of assets is appealable only to the circuit court of appeals under § 24-a; *Brady v. Bernard & Kittinger* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 576; In *re Streater Metal Stamping Co.* (C. C. A., 7th Cir.), 30 Am. B. R. 55, 205 Fed. 280.

lawyers have thought it necessary in many cases to take an appeal and file a petition for revision in the same case in order to be sure to obtain a review of the ruling challenged.¹⁶

(2) **PREVAILING RULE.**—The consensus of opinion seems clearly in favor of the principle that if the suit or proceeding is a controversy arising in bankruptcy proceedings it is appealable under § 25-a and not reviewable under § 24-b; the latter refers only to matters in the bankruptcy proceedings itself, that is, any judicial determination, which may be made by a bankruptcy court from the time of the filing of the petition until the estate is closed, pertaining exclusively to the bankruptcy. This distinction is clearly established.¹⁷ As between the power to revise under § 24-b and the exercise of appellate jurisdiction under § 25-a, both of which relate to the review of bankruptcy proceedings, the better rule is that in either of the three cases mentioned in § 25-a the review can only be by appeal;¹⁸ but in respect to any other matters in bankruptcy proceedings the view must be by a petition to revise.¹⁹ The Supreme Court

16. In re Holmes (C. C. A., 8th Cir.), 15 Am. B. R. 689, 142 Fed. 391; In re Hecox (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 823; Matter of Creech Bros. Lumber Co. (C. C. A., 9th Cir.), 39 Am. B. R. 487, 240 Fed. 8.

17. Hewitt v. Berlin Machine Co., 194 U. S. 300, 11 Am. B. R. 709, 48 L. Ed. 986; In re Moore & Bridgman (C. C. A., 5th Cir.), 21 Am. B. R. 651, 166 Fed. 689; Matter of Beyer Printing Co. (C. C. A., 7th Cir.), 32 Am. B. R. 796, 216 Fed. 878; Bothwell v. Fitzgerald (C. C. A., 9th Cir.), 34 Am. B. R. 201, 219 Fed. 408; Matter of Russell (C. C. A., 9th Cir.), 41 Am. B. R. 234, 247 Fed. 96.

Provisions for appeal and revision mutually exclusive.—In the case of Morehouse v. Pacific Hardware Co. (C. C. A., 9th Cir.), 24 Am. B. R. 178, 177 Fed. 337, the court said: "Section 24 of the bankruptcy act of 1898 establishes the appellate jurisdiction of circuit courts of appeals over 'controversies arising in bankruptcy proceedings' and their jurisdiction in equity, 'either interlocutory or final to revise in matter of law proceedings of the inferior courts of bankruptcy.' Section 25-a provides for appeals from judgments in three certain enumerated steps in bankruptcy proceedings; 'in respect to which special provision therefor was required.' (Holden v. Stratton, 191 U. S. 115, 10 Am. B. R. 786, 48 L. Ed. 115.) There is in the language of the act nothing to indicate that the revisory power so given to the circuit court of appeals is more extensive than that which was exercised by the circuit courts under the bankruptcy act of 1867. In Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414, it was held that the appellate jurisdiction conferred on the circuit courts by the act of 1867 was of two classes of cases, one to be exercised under a petition for review, the other by the ordinary appeal or writ of error. The same distinction has been recognized in construing the bankruptcy act of 1898, and it has been held that the provisions for appeal and for review on petition are mutually exclusive, and that the revisory jurisdiction does not include any orders or decrees which are appealable or reviewable on writ of error." In this case the court cited First

Nat. Bank of Chicago v. Chicago Title & Trust Co., 198 U. S. 280, 14 Am. B. R. 102, 43 L. Ed. 1051; Hewitt v. Berlin Machine Works, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 986; Odell v. Boyden (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731, 80 C. C. A. 397; In re Mueller (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 712, 68 C. C. A. 349; In re Friend (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778, 67 C. C. A. 500; Scott & Co. v. Wilson (C. C. A., 7th Cir.), 8 Am. B. R. 349, 115 Fed. 284, 53 C. C. A. 76; In re Rusch (C. C. A., 7th Cir.), 8 Am. B. R. 518, 116 Fed. 270, 53 C. C. A. 631; Kirkpatrick v. Harnesberger (C. C. A., 5th Cir.), 29 Am. B. R. 439, 199 Fed. 886; Kiraner v. Taliaferro (C. C. A., 4th Cir.), 29 Am. B. R. 852, 202 Fed. 51; Henkin v. Fousek (C. C. A., 8th Cir.), 49 Am. B. R. 701, 246 Fed. 285.

The remedies of appeal and petition to revise are mutually exclusive, so that where an appeal is allowable a petition to revise will not lie. In re Martin (C. C. A., 6th Cir.), 29 Am. B. R. 935, 201 Fed. 31, *aff. sub nom.* Globe Bank & Trust Co. v. Martin 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583.

18. In re Good (C. C. A., 8th Cir.), 3 Am. B. R. 606, 99 Fed. 389; In re Friend (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778; In re Worcester County (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808; Smith v. Mason, 14 Wall. 419; Matter of Beyer Printing Co. (C. C. A., 7th Cir.), 32 Am. B. R. 796, 216 Fed. 878; Matter of Russell (C. C. A., 9th Cir.), 41 Am. B. R. 234, 247 Fed. 96; King Lumber Co. v. Nat. Exch. Bank (C. C. A., 4th Cir.), 42 Am. B. R. 651, 253 Fed. 946.

19. Except where an appeal may be had as provided in § 25-a the proper procedure in the Circuit Court of Appeals seems to be by petition to review. Ohio Valley Bank Co. v. Switzer (C. C. A., 6th Cir.), 18 Am. B. R. 639, 153 Fed. 632; Kinkaid v. Bacon & Sons (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362.

In re Groetzinger (C. C. A., 3d Cir.), 11 Am. B. R. 467, 127 Fed. 124, in which case it was held that an order for the distribution of the proceeds of the sale by a trustee of real estate is reviewable only by petition for review; Davidson v. Friedman (C. C. A.,

has sustained this view by declaring that persons who are entitled to an appeal under § 25-a are not entitled to a petition to review under § 24-b.²⁰

(3) **UNITING REMEDIES.**—Where it is sought to combine the two remedies by uniting an appeal with a petition to review the two do not neutralize each other, but the court will proceed to adjudicate on the controversy in the proper proceedings.²¹ If the case is one which should be heard and decided as an appeal, the petition to revise should be dismissed.²²

(4) **APPEAL TREATED AS PETITION TO REVISE.**—So, also, it has been held that in proper cases an appeal may be treated as a petition to revise,²³ as where

6th Cir.), 15 Am. B. R. 490, 140 Fed. 853, 72 C. C. A. 553, where it was held that an order allowing trustee's expenses is subject to review, but is not appealable; *Brady v. Bernard & Kittinger* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 576; *Barnes v. Pampel* (C. C. A., 6th Cir.), 27 Am. B. R. 192, 192 Fed. 526.

20. Remedy by appeal not inclusive of review by petition.—In the case of *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852, 855, 56 L. Ed. 725, Mr. Justice Day says: "The question now propounded is: Was the trustee also entitled to a review in the Circuit Court of Appeals, under section 24b, by petition for review? Under that section authority, either interlocutory or final, is given to the Circuit Court of Appeals to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and, in certain cases, in this court. The proceeding under section 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under section 25. Under section 24b a question of law only is taken to the Circuit Court of Appeals; under the appeal section, controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under section 25 a review by petition under section 24b. The object of section 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate. In our judgment the rule was well stated in *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711, 68 C. C. A. 349, by Mr. Justice Lurton, then circuit judge: "The 'proceedings' reviewable [under § 24b] are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under [§] 25a. This would

include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under [§] 24a." This principle is further substantiated in the case of *Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 27 Am. B. R. 338, 56 L. Ed. 118; *Kirsner v. Taliaferro* (C. C. A., 4th Cir.), 29 Am. B. R. 832, 202 Fed. 51; *Matter of Pindel* (C. C. A., 9th Cir.), 34 Am. B. R. 600, 221 Fed. 342.

21. *Fisher v. Cushman* (C. C. A., 1st Cir.), 4 Am. B. R. 646, 103 Fed. 860; *In re Worcester County* (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808; *Lockman v. Lang* (C. C. A., 8th Cir.), 12 Am. B. R. 497, 132 Fed. 1; *In re Schoenfeld* (C. C. A., 3d Cir.), 25 Am. B. R. 748, 183 Fed. 219, holding that where a review is sought both by a petition to revise under section 24-b and by appeal under section 25-a, and the errors complained of in the petition to revise and the assignment of error on the appeal are identical and present only questions of law, the court will not stop to consider which of the two methods of procedure is the correct one, or whether the two methods may be prosecuted together; *Knapp v. Milwaukee Trust Co.* (C. C. A., 7th Cir.), 20 Am. B. R. 671, 162 Fed. 675; *Matter of Creech Bros. Lumber Co.* (C. C. A., 9th Cir.), 39 Am. B. R. 487, 240 Fed. 8.

Uniting appeal and petition.—In the case of *Fisher v. Cushman* (C. C. A., 1st Cir.), 4 Am. B. R. 646, 103 Fed. 860, an appeal and a petition to revise were brought in the same proceeding, and the court said: "Both relate to the same subject matter. The appeal will not lie because the subject thereof is not within the three specifications of the matters of appeal found in section 25 of the bankrupt act. Nevertheless as was determined by us in the case of *In re Worcester County*, 4 Am. B. R. 496, 102 Fed. 808, the fact that an appeal was taken and a petition also filed, does not defeat the right of the party moving this court to have the merits of the controversy adjudicated by us. They do not neutralize each other and the only result is that the appeal must be dismissed, while the court must proceed to the adjudication of the merits in the matter of the petition, which petition on the record before us involves only a matter of law, as required by section 24-b of the bankrupt act."

22. *Merchants-Laclede Nat. Bank v. Schade* (C. C. A., 8th Cir.), 27 Am. B. R. 687, 195 Fed. 199; *Granger & Co. v. Riley* (C. C. A., 6th Cir.), 29 Am. B. R. 114, 201 Fed. 902.

23. *In re Whitener* (C. C. A., 5th Cir.), 5 Am. B. R. 198, 108 Fed. 180; *In re Blanch-*

an appeal is taken from an order disallowing a claim which presents only a question of law.²⁴ This can only be done where questions of law alone are involved.²⁵ Where questions of fact and law are both involved in the appeal it may not be treated as a petition to revise.²⁶ And it has been held that a writ of error which aims to correct only errors of law arising on the common law or criminal law side of the court may be treated as a petition to revise.²⁷

(5) OBJECTION TO EXERCISE OF JURISDICTION.—In the absence of objection, the circuit court of appeals will not decline jurisdiction of a proceeding before it on petition to revise, although the matter should have come up on appeal.²⁸ If the question as to the propriety of the remedy is not raised by the respondent the court is not bound to consider it.²⁹

ard Shingle Co. (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 31; In re Heacock (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 923, in which case a petition for review and an appeal were taken from an order summarily directing a receiver of the State court to deliver property to the trustee in bankruptcy, and the petition for review was sustained and the appeal was dismissed; Freed v. Central Trust Co. (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873; Graham v. Faith (C. C. A., 1st Cir.), 41 Am. B. R. 500, 253 Fed. 32.

24. Appeal treated as petition to revise.—In the case of *In re Williams' Estate (C. C. A., 9th Cir.), 19 Am. B. R. 389, 156 Fed. 934*, the court said: "The appellant and petitioner, being uncertain in respect to the proper procedure, sought and are by the court below allowed an appeal from the ruling of that court complained of, and also filed therein a petition for the revision of the same order. The two proceedings were by this court consolidated and were heard and submitted on one record. If it be conceded that the petition for revision was filed in the wrong court, the appeal, involving as it does only a question of law, may be treated as a petition for revision." *Chesapeake Shoe Co. v. Seldner (C. C. A., 4th Cir.), 10 Am. B. R. 466, 122 Fed. 593; In re Blair (C. C. A., 8th Cir.), 5 Am. B. R. 793, 106 Fed. 662; In re Jacobs (C. C. A., 8th Cir.), 3 Am. B. R. 671, 99 Fed. 539; In re Abraham (C. C. A., 5th Cir.), 2 Am. B. R. 266, 93 Fed. 767; Rode & Horn v. Phipps (C. C. A., 6th Cir.), 27 Am. B. R. 627, 195 Fed. 414.*

25. *In re Blanchard Shingle Co. (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 311.*

26. *Francis v. McNeal (C. C. A., 3d Cir.), 22 Am. B. R. 337, 170 Fed. 445*, where it appeared that the proceeding was not confined to matters of law but turned on questions of fact, and it was held that it could not be treated as a petition to review but if entertained at all must be as an appeal; *Steiner v. Marshall (C. C. A., 4th Cir.), 15 Am. B. R. 486, 140 Fed. 710; In re Whitener (C. C. A., 5th Cir.), 5 Am. B. R. 198, 105 Fed. 180.*

Consideration of evidence.—Where upon review of a judgment determining priority of liens upon the land of a bankrupt, the court is asked to consider the evidence in the record, it will dismiss the petition for

review and hear the case upon the appeal. *Hendricks v. Webster (C. C. A., 8th Cir.), 20 Am. B. R. 112, 159 Fed. 927; Coder v. McPherson (C. C. A., 8th Cir.), 18 Am. B. R. 523, 152 Fed. 951*, in which the trustee challenged the decree of the court below by an appeal and by a petition to revise, and the court held that as the questions at issue involved the consideration of the facts disclosed by the evidence, the case should be to revise was dismissed; *In re Dunlop (C. C. A., 8th Cir.), 19 Am. B. R. 361, 156 Fed. 545.*

27. Writ of error treated as petition to revise.—In the case of *Freed v. Central Trust Co. (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873*, a writ of error issued for the review of an order adjudging a person in contempt for failing to turn over assets to the bankrupt's trustee; it was held that the order was not reviewable by writ of error or by appeal, but was reviewable by petition. The court said: "If then, an appeal which, as applied to bankruptcy proceedings, aims to correct errors both of law and of fact arising on the equity side of the bankruptcy court (Bankruptcy Act, § 25a), may be treated as a petition to revise which aims to correct only errors of law so arising (section 24b), a writ of error which aims to correct only errors of law arising on the common law or criminal law side of the court may, in our judgment, be similarly dealt with. While the writ and the petition differ in form, in substance they are similar; both begin new proceedings in this court to accomplish substantially the same end. Especially in contempt cases incident to bankruptcy proceedings should a liberal practice in this respect be adopted, in view of the uncertainty that so long prevailed in distinguishing between cases of civil contempt, properly reviewable in bankruptcy proceedings by petition to revise, and criminal contempt, reviewable only by writ of error. *Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.* The motion to dismiss the writ will be denied, and the case will be dealt with as if the petition to revise had been filed when the writ of error issued."

28. *In re Stroum (C. C. A., 1st Cir.), 27 Am. B. R. 721, 192 Fed. 762; Jones v. Blair (C. C. A., 4th Cir.), 39 Am. B. R. 569, 242 Fed. 783.*

29. *Gandia & Stubbe v. Caderno (C. C. A., 1st Cir.), 36 Am. B. R. 789, 233 Fed. 739.*

e. Questions of law only considered.—The supervisory power to review only extends to questions of law. If the petition does not present a matter of law it will not be entertained.³⁰ If questions of fact are alone raised by the petition, the petition should be denied.³¹ As indicated above, an appeal which involves only a question of law may be treated as a petition for revision.³² It was intended by conferring this power of revision to provide a summary method for revising orders and decisions of courts of bankruptcy upon questions of law, and the section does not contemplate any review of facts,³³ except as may be necessary to ascertain whether the order is wholly unsupported by the evidence, is contrary to law, a clear mistake, or generally for any reason for which evidence may be reviewed on writ of error.³⁴ The decision of the court below, on disputed or conflicting facts, as for instance where a determination is made upon testimony presented as to the valuation of property that the sale of such property would be beneficial to the bankrupt estate, is not review-

30. In re Carley (C. C. A., 3d Cir.), 8 Am. B. R. 720, 117 Fed. 130; In re Rosser (C. C. A., 8th Cir.), 4 Am. B. R. 133, 101 Fed. 562; In re Lesser (C. C. A., 2d Cir.), 3 Am. B. R. 758, 99 Fed. 913; Mulford v. Fourth St. Nat'l Bank (C. C. A., 3d Cir.), 19 Am. B. R. 742, 157 Fed. 897, holding that a petition to review an order of a district judge refusing, in the exercise of judicial discretions to approve a certain agreement between the trustees and preferred creditors did not present a "matter of law." In re Blanchard Shingle Co. (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 811; Lessius v. Goodman (C. C. A., 3d Cir.), 21 Am. B. R. 446, 165 Fed. 889; In re Leech (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; B-R Electric & Telephone Mfg. Co. v. Aetna Ins. Co. (C. C. A., 8th Cir.), 30 Am. B. R. 424, 206 Fed. 886; Kinkead v. Bacon & Sons (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362; Olmsted-Stevenson Co. v. Miller (C. C. A., 9th Cir.), 36 Am. B. R. 816, 231 Fed. 69; Whitla & Nelson v. Boyd (C. C. A., 9th Cir.), 32 Am. B. R. 469, 213 Fed. 587 (affg. 30 Am. B. R. 749) Matter of Martin (C. C. A., 3d Cir.), 32 Am. B. R. 29, 210 Fed. 620; Henkin v. Fousek (C. C. A., 8th Cir.), 40 Am. B. R. 701, 246 Fed. 286; Matter of Wood (C. C. A., 6th Cir.), 40 Am. B. R. 810, 248 Fed. 246; Matter of Chavkin (C. C. A., 2d Cir.), 41 Am. B. R. 36, 249 Fed. 342; Matter of Armann (C. C. A., 2d Cir.), 41 Am. B. R. 50, 247 Fed. 954; Matter of Franklin Brewing Co. (C. C. A., 2d Cir.), 41 Am. B. R. 51, 249 Fed. 333; Luck v. Staples (C. C. A., 4th Cir.), 42 Am. B. R. 198, 255 Fed. 637; Matter of Canister Co. (C. C. A., 3d Cir.), 42 Am. B. R. 278, 252 Fed. 70, affg. 41 Am. B. R. 625, 248 Fed. 587, citing Collier on Bankruptcy (11th ed.), 581; Matter of Bologniet & Co. (C. C. A., 2d Cir.), 42 Am. B. R. 548, 254 Fed. 770; Matter of De Ran (C. C. A., 6th Cir.), 44 Am. B. R. 409, 260 Fed. 732.

31. Hall v. Reynolds (C. C. A., 8th Cir.), 34 Am. B. R. 707, 224 Fed. 103, holding that where on a petition to revise an order of the District Court affirming an order of the referee making allowance to attorneys, the only questions involved are as to the reasonableness of the allowance, the petition should be denied; Frederick v. Silverman (C. C. A., 3d Cir.), 42 Am. B. R. 24, 250 Fed. 73; Bassett v. Evans, (C. C. A., 8th Cir.), 42 Am. B. R. 587, 253 Fed. 532.

32. In re Williams' Estate (C. C. A., 9th Cir.), 19 Am. B. R. 389, 156 Fed. 934.

33. In re Grassler (C. C. A., 9th Cir.), 18 Am. B. R. 694, 154 Fed. 478; In re Eggert (C. C. A., 7th Cir.), 4 Am. B. R. 449, 102 Fed. 735; Kenova Loan & Trust Co. v. Graham (C. C. A., 4th Cir.), 14 Am. B. R. 313, 135 Fed. 717; Good v.

Kane (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 956; Matter of Estate of Kinnane Co. (C. C. A., 6th Cir.), 39 Am. B. R. 593, 242 Fed. 769; Moore Dry Goods Co. v. Brooks (C. C. A., 8th Cir.), 39 Am. B. R. 617, 240 Fed. 943; Matter of Wood (C. C. A., 6th Cir.), 40 Am. B. R. 810, 248 Fed. 246; Matter of Stitt (C. C. A., 6th Cir.), 41 Am. B. R. 777, 252 Fed. 1; King Lumber Co. v. Nat. Exch. Bank (C. C. A., 4th Cir.), 42 Am. B. R. 661, 253 Fed. 946.

Questions of law.—In the case of In re Frank (C. C. A., 8th Cir.), 25 Am. B. R. 486, 182 Fed. 794, the court said: "A petition to revise under section 24-b can properly present for determination only questions of law, and not doubtful or disputed questions of fact. But when facts are agreed upon or are proven or admitted that leave nothing for determination but their legal import, such a determination of them by the court of bankruptcy may be reviewed upon a petition to revise. But the review of decisions which require the consideration of conflicting evidence or evidence though not conflicting from which different deductions or conclusions may reasonably be drawn, may not be reviewed upon a petition to revise but upon appeal only."

Matter of Hayes (C. C. A., 6th Cir.), 24 Am. B. R. 601, 179 Fed. 222, in which the court was asked to reverse findings of fact made by a referee, and affirmed by the district court, as to the right of an assignee for the benefit of creditors to an allowance for compensation and disbursements and the court said: "But in a proceeding to revise under section 24-b, this court is limited to a review in matters of law, and only questions of law arising out of the facts found or conceded can be considered. We cannot determine questions of fact involved in the finding or order sought to be reviewed." See also In re Taft (C. C. A., 6th Cir.), 13 Am. B. R. 417, 113 Fed. 511, 66 C. C. A. 385; In re Throckmorton (C. C. A., 6th Cir.), 17 Am. B. R. 856, 149 Fed. 145, 79 C. C. A. 15; In re Smith (C. C. A., 6th Cir.), 29 Am. B. R. 628, 203 Fed. 360.

Where an order refusing to set aside an adjudication upon the ground that the bankrupts did not have their principal place of business within the jurisdiction, is supported by an abundance of evidence consisting not only of direct testimony, but of inferences properly to be drawn from all the evidence, said order involving a controverted question of fact cannot be reviewed by a petition to revise. Hunter, Walton & Co. v. Cherry Co. (C. C. A., 8th Cir.), 40 Am. B. R. 732, 247 Fed. 458.

34. Shea v. Lewis (C. C. A., 8th Cir.), 30 Am.

able on a petition.³⁵ There is no exception to the rule that on petitions for revision, only legal questions may be determined.³⁶ Where the facts are not in dispute a petition for revision should be entertained, as the question remaining must be one of law.³⁷ If the facts are admitted or agreed upon, so that nothing is left for determination but their legal import, such a determination may be reviewed upon petition to revise.³⁸

f. What may be reviewed by petition.—(1) IN GENERAL.—Any final or interlocutory order in bankruptcy proceedings, in matter of law, may be reviewed by petition.³⁹ This method is that usually adopted when a party claims to be aggrieved because of an injunction⁴⁰ or summary order,⁴¹ or where an appeal will not lie under the terms of § 25-a. It will not be possible nor useful to cite all the precedents on this question; they are already so numerous and cover so wide a field as to make the formulation of any number

B. R. 436, 206 Fed. 877; *Good v. Kane* (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 966, holding that whether or not there was any substantial evidence to sustain a decision is a question of law, which may be considered upon a petition to revise.

35. *Clark Hardware Co. v. Sauve* (C. C. A., 8th Cir.), 33 Am. B. R. 674, 220 Fed. 102; *Good v. Kane* (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 966; *Kirsner v. Tallafiero* (C. C. A., 4th Cir.), 29 Am. B. R. 852, 202 Fed. 51; *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 691, 179 Fed. 222; *Schuler v. Hassinger* (C. C. A., 5th Cir.), 24 Am. B. R. 184, 177 Fed. 119; *Elliot v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200; *Sauve v. The More Investment Co.* (C. C. A., 8th Cir.), 41 Am. B. R. 281, 248 Fed. 642; *Whitney Central Trust and Savings Bank v. U. S. Construction Co.* (C. C. A., 5th Cir.), 41 Am. B. R. 381, 250 Fed. 784.

36. *Samuel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68, and cases cited; *Kenova Loan & Trust Co. v. Graham* (C. C. A., 4th Cir.), 14 Am. B. R. 313, 135 Fed. 717; *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 140 Fed. 849; *Ryan v. Hendricks* (C. C. A., 7th Cir.), 21 Am. B. R. 570, 166 Fed. 94; *In re Leech* (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; *Landry v. San Antonio Brewing Ass'n* (C. C. A., 5th Cir.), 20 Am. B. R. 226, 159 Fed. 700; *Lesalins v. Goodman* (C. C. A., 3d Cir.), 21 Am. B. R. 446, 165 Fed. 889; *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628; *In re Leech* (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; *In re Baum* (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410, holding that where the record upon a petition to revise an order that a bankrupt pay into a court a certain amount in cash, does not contain the evidence taken before the referee, it will be presumed that the facts were sufficient to sustain his finding and order, and only matters of law apparent upon the face of the record may be considered; *In re Irwin* (C. C. A., 3d Cir.), 23 Am. B. R. 487, 174 Fed. 642, holding that upon a petition to revise, only questions of law can be considered, and the findings of fact of the court below cannot be disturbed; *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 691, 179 Fed. 222; *In re Lee* (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579; *Williamson v. Richardson* (C. C. A., 9th Cir.), 30 Am. B. R. 559, 205 Fed. 245; *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896; *In re Roger, Brown & Co.* (C. C. A., 8th Cir.), 28 Am. B. R. 336, 196 Fed. 758; *In re Zinner* (C. C. A., 7th Cir.), 29 Am. B. R. 800, 201 Fed. 197; *In re Blum* (C. C. A., 8th Cir.), 29 Am. B. R. 332, 202 Fed. 883; *Stuart v. Rey-*

nolds (C. C. A., 6th Cir.), 29 Am. B. R. 412, 204 Fed. 709; *In re Smith* (C. C. A., 6th Cir.), 29 Am. B. R. 628, 203 Fed. 369; *Hall v. Reynolds* (C. C. A., 8th Cir.), 34 Am. B. R. 707, 234 Fed. 103.

37. *Hutchinson v. LeRoy* (C. C. A., 1st Cir.), 8 Am. B. R. 20, 113 Fed. 209; *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896; *In re Haring* (C. C. A., 6th Cir.), 20 Am. B. R. 387, 203 Fed. 229 (affg. 27 Am. B. R. 285, 193 Fed. 168), holding that upon a petition for revision, only questions of law can be determined; and such questions must arise out of the facts found by the court below or admitted by the parties.

38. *Matter of Sully & Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 124, 152 Fed. 619; *In re Lee* (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579; *In re Frank* (C. C. A., 8th Cir.), 25 Am. B. R. 486, 182 Fed. 794; *In re Judkins Co.* (C. C. A., 1st Cir.), 30 Am. B. R. 529, 205 Fed. 892; *In re Knosher & Co.* (C. C. A., 9th Cir.), 28 Am. B. R. 747, 197 Fed. 136; *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896; *In re Haring* (C. C. A., 6th Cir.), 29 Am. B. R. 387, 203 Fed. 229.

39. *Scott & Co. v. Wilson* (C. C. A., 7th Cir.), 8 Am. B. R. 349, 115 Fed. 284; *Courier-Journal Printing Co. v. Schaefer-Meyer Brewing Co.* (C. C. A., 6th Cir.), 4 Am. B. R. 183, 101 Fed. 699; *Matter of Dressler Producing Corp.* (C. C. A., 2d Cir.), 44 Am. B. R. 457, 262 Fed. 257.

40. *Davis v. Bohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 92 Fed. 325; *In re Kenney* (D. C., N. Y.), 3 Am. B. R. 353, 97 Fed. 554.

41. *In re Abraham* (C. C. A., 5th Cir.), 9 Am. B. R. 266, 93 Fed. 767; *In re Purvine* (C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192; *In re Francis Valentine Co.* (C. C. A., 9th Cir.), 2 Am. B. R. 522, 94 Fed. 793, 98 Fed. 414; *Fisher v. Cushman*

of safe rules impossible. The consensus of opinion is to the effect that the power of the appellate court to review by original petition the rulings of the bankruptcy court extends only to orders made in the bankruptcy proceedings proper and does not embrace proceedings in suits by the trustee in bankruptcy.⁴³

(2) OBJECT AND CHARACTER OF PROCEEDINGS.—In determining the question of remedy the appellate court is to be governed by the object and character of the proceeding.⁴⁴ It becomes essential therefore to determine in each individual case whether the order or decree sought to be reviewed is in the bankruptcy proceedings and not independent thereof, or is a controversy arising in such proceedings and entirely independent thereof. This distinction and its effect upon the power to review by petition has been frequently recognized,⁴⁵ and its bearing upon the nature of the remedy for a review of such order or decree has given rise to the numerous cases in which it has been discussed or commented upon.⁴⁶

(3) ORDERS OR DECREES IN BANKRUPTCY PROCEEDING.—(I) *In general*.—Bearing in mind the provisions of § 24-b which in effect confers jurisdiction upon circuit courts of appeal "to superintend and revise in matter of law the proceedings" of courts of bankruptcy, it becomes apparent that the exercise of the jurisdiction to revise on petition will depend on whether or not the order or decree was granted by the bankruptcy court in the bankruptcy proceeding. Under such subsection the jurisdiction may be either interlocutory or final; but the appellate court is not required to revise every interlocutory order in a bankruptcy proceeding regardless of its nature or scope; a certain degree of definiteness or finality may be insisted upon.⁴⁷ There must be a certain degree of finality to the orders sought to be reviewed; if every order were reviewable as of right, the proceedings could easily be so tied up and prolonged that the situation would become intolerable.⁴⁸ And if the order or decree is not prejudicial to the rights of the petitioners, it need not be revised, although erroneous.⁴⁹ Where the merits of any adverse claim are summarily adjudicated, the

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By controversies arising in bankruptcy proceedings is meant those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors. *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711; *In re Farrell* (C. C. A., 6th Cir.), 23 Am. B. R. 826, 176 Fed. 505; *Morehouse v. Pacific Hardware, etc., Co.* (C. C. A., 9th Cir.), 24 Am. B. R. 178, 177 Fed. 337; *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852, 56 L. Ed. 725; *In re Hamilton Automobile Co.* (C. C. A., 7th Cir.), 29 Am. B. R. 163, 198 Fed. 856.

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45. *Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 784, 48 L. Ed. 116; *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1170; *First Nat'l Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051, holding that a summary proceeding against one in possession of assets alleged to be a part of a bankrupt estate is a proceeding in bankruptcy and the jurisdiction of the Circuit Court of Appeals is confined to revision of the decree.

Determination of jurisdiction of referee.—Where the only question raised is as to the jurisdiction of a referee in proceedings to set aside a conveyance as fraudulent, the question may be raised by a petition to revise. *Matter of Weidhorn* (C. C. A., 1st Cir.), 41 Am. B. R. 592, 253 Fed. 28.

46. See cases cited under § 24, "c. Controversies arising in bankruptcy proceedings," ante.

47. *Matter of Chatner* (C. C. A., 3d Cir.), 33 Am. B. R. 288, 218 Fed. 813; *Matter of Horowitz & Laidhold* (C. C. A., 2d Cir.), 41 Am. B. R. 367, 250 Fed. 106.

48. *Matter of Pechin* (C. C. A., 3d Cir.), 35 Am. B. R. 738, 227 Fed. 853.

49. *Lazarus, Michel & Lazarus v. Harding* (C. C. A., 5th Cir.), 35 Am. B. R. 271, 223 Fed. 50; *In re Boston Dry Goods Co.* (C.

an appeal is taken from an order disallowing a claim which presents only a question of law.²⁴ This can only be done where questions of law alone are involved.²⁵ Where questions of fact and law are both involved in the appeal it may not be treated as a petition to revise.²⁶ And it has been held that a writ of error which aims to correct only errors of law arising on the common law or criminal law side of the court may be treated as a petition to revise.²⁷

(5) OBJECTION TO EXERCISE OF JURISDICTION.—In the absence of objection, the circuit court of appeals will not decline jurisdiction of a proceeding before it on petition to revise, although the matter should have come up on appeal.²⁸ If the question as to the propriety of the remedy is not raised by the respondent the court is not bound to consider it.²⁹

ard Shingle Co. (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 31; *In re Heacock* (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 823, in which case a petition for review and an appeal were taken from an order summarily directing a receiver of the State court to deliver property to the trustee in bankruptcy, and the petition for review was sustained and the appeal was dismissed; *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873; *Graham v. Faith* (C. C. A., 1st Cir.), 41 Am. B. R. 590, 223 Fed. 32.

24. Appeal treated as petition to revise.—In the case of *In re Williams' Estate* (C. C. A., 9th Cir.), 19 Am. B. R. 389, 156 Fed. 934, the court said: "The appellant and petitioner, being uncertain in respect to the proper procedure, sought and are by the court below allowed an appeal from the ruling of that court complained of, and also filed therein a petition for the revision of the same order. The two proceedings were by this court consolidated and were heard and submitted on one record. If it be conceded that the petition for revision was filed in the wrong court, the appeal, involving as it does only a question of law, may be treated as a petition for revision." *Chesapeake Shoe Co. v. Seldner* (C. C. A., 4th Cir.), 10 Am. B. R. 466, 122 Fed. 593; *In re Blair* (C. C. A., 8th Cir.), 5 Am. B. R. 793, 106 Fed. 662; *In re Jacobs* (C. C. A., 8th Cir.), 3 Am. B. R. 671, 99 Fed. 539; *In re Abraham* (C. C. A., 5th Cir.), 2 Am. B. R. 266, 93 Fed. 767; *Rode & Horn v. Phipps* (C. C. A., 6th Cir.), 27 Am. B. R. 627, 195 Fed. 414.

25. *In re Blanchard Shingle Co.* (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 311.

26. *Francis v. McNeal* (C. C. A., 3d Cir.), 22 Am. B. R. 337, 170 Fed. 445, where it appeared that the proceeding was not confined to matters of law but turned on questions of fact, and it was held that it could not be treated as a petition to revise but if entertained at all must be as an appeal; *Steiner v. Marshall* (C. C. A., 4th Cir.), 15 Am. B. R. 486, 140 Fed. 710; *In re Whitener* (C. C. A., 5th Cir.), 5 Am. B. R. 198, 105 Fed. 180.

Consideration of evidence.—Where upon review of a judgment determining priority of liens upon the land of a bankrupt, the court is asked to consider the evidence in the record, it will dismiss the petition for

review and hear the case upon the appeal. *Hendricks v. Webster* (C. C. A., 8th Cir.), 20 Am. B. R. 112, 159 Fed. 927; *Coder v. McPherson* (C. C. A., 8th Cir.), 18 Am. B. R. 523, 152 Fed. 951, in which the trustee challenged the decree of the court below by an appeal and by a petition to revise, and the court held that as the questions at issue involved the consideration of the facts disclosed by the evidence, the case should be to revise was dismissed; *In re Dunlop* (C. C. A., 8th Cir.), 19 Am. B. R. 361, 156 Fed. 545.

27. Writ of error treated as petition to revise.—In the case of *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873, a writ of error issued for the review of an order adjudging a person in contempt for failing to turn over assets to the bankrupt's trustee; it was held that the order was not reviewable by writ of error or by appeal, but was reviewable by petition. The court said: "If then, an appeal which, as applied to bankruptcy proceedings, aims to correct errors both of law and of fact arising on the equity side of the bankruptcy court (Bankruptcy Act, § 25a), may be treated as a petition to revise which aims to correct only errors of law so arising (section 24b), a writ of error which aims to correct only errors of law arising on the common law or criminal law side of the court may, in our judgment, be similarly dealt with. While the writ and the petition differ in form, in substance they are similar; both begin new proceedings in this court to accomplish substantially the same end. Especially in contempt cases incident to bankruptcy proceedings should a liberal practice in this respect be adopted, in view of the uncertainty that so long prevailed in distinguishing between cases of civil contempt, properly reviewable in bankruptcy proceedings by petition to revise, and criminal contempt, reviewable only by writ of error. *Gompers v. Buck's Store & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The motion to dismiss the writ will be denied, and the case will be dealt with as if the petition to revise had been filed when the writ of error issued."

28. *In re Stroum* (C. C. A., 1st Cir.), 27 Am. B. R. 721, 192 Fed. 762; *Jones v. Blair* (C. C. A., 4th Cir.), 39 Am. B. R. 569, 213 Fed. 783.

29. *Gandia & Stubbe v. Caderno* (C. C. A., 1st Cir.), 36 Am. B. R. 739, 233 Fed. 728.

e. Questions of law only considered.—The supervisory power to review only extends to questions of law. If the petition does not present a matter of law it will not be entertained.³⁰ If questions of fact are alone raised by the petition, the petition should be denied.³¹ As indicated above, an appeal which involves only a question of law may be treated as a petition for revision.³² It was intended by conferring this power of revision to provide a summary method for revising orders and decisions of courts of bankruptcy upon questions of law, and the section does not contemplate any review of facts,³³ except as may be necessary to ascertain whether the order is wholly unsupported by the evidence, is contrary to law, a clear mistake, or generally for any reason for which evidence may be reviewed on writ of error.³⁴ The decision of the court below, on disputed or conflicting facts, as for instance where a determination is made upon testimony presented as to the valuation of property that the sale of such property would be beneficial to the bankrupt estate, is not review-

30. In re Carley (C. C. A., 3d Cir.), 8 Am. B. R. 720, 117 Fed. 130; In re Rosser (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562; In re Lesser (C. C. A., 2d Cir.), 3 Am. B. R. 758, 90 Fed. 913; Mulford v. Fourth St. Nat'l Bank (C. C. A., 3d Cir.), 19 Am. B. R. 742, 157 Fed. 897, holding that a petition to review an order of a district judge refusing, in the exercise of judicial discretions to approve a certain agreement between the trustees and preferred creditors did not present a "matter of law." In re Blanchard Shingle Co. (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 311; Lesaus v. Goodman (C. C. A., 3d Cir.), 21 Am. B. R. 446, 166 Fed. 889; In re Leech (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; B-R Electric & Telephone Mfg. Co. v. Aetna Ins. Co. (C. C. A., 8th Cir.), 30 Am. B. R. 424, 206 Fed. 885; Kinkead v. Bacon & Sons (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362; Olmsted-Stevenson Co. v. Miller (C. C. A., 9th Cir.), 36 Am. B. R. 816, 231 Fed. 60; Whitla & Nelson v. Boyd (C. C. A., 9th Cir.), 32 Am. B. R. 460, 213 Fed. 587 (affg. 30 Am. B. R. 749); Matter of Martin (C. C. A., 3d Cir.), 32 Am. B. R. 29, 210 Fed. 620; Henkin v. Fousek (C. C. A., 8th Cir.), 40 Am. B. R. 701, 246 Fed. 285; Matter of Wood (C. C. A., 6th Cir.), 40 Am. B. R. 810, 248 Fed. 246; Matter of Chavkin (C. C. A., 2d Cir.), 41 Am. B. R. 36, 249 Fed. 342; Matter of Armann (C. C. A., 2d Cir.), 41 Am. B. R. 50, 247 Fed. 954; Matter of Franklin Brewing Co. (C. C. A., 2d Cir.), 41 Am. B. R. 51, 249 Fed. 333; Luck v. Staples (C. C. A., 4th Cir.), 42 Am. B. R. 108, 265 Fed. 637; Matter of Canister Co. (C. C. A., 3d Cir.), 42 Am. B. R. 278, 252 Fed. 70, affg. 41 Am. B. R. 625, 248 Fed. 587, citing Collier on Bankruptcy (11th ed.), 581; Matter of Bolognesi & Co. (C. C. A., 2d Cir.), 42 Am. B. R. 548, 254 Fed. 770; Matter of De Ran (C. C. A., 6th Cir.), 44 Am. B. R. 409, 260 Fed. 732.

31. Hall v. Reynolds (C. C. A., 8th Cir.), 34 Am. B. R. 707, 224 Fed. 103, holding that where on a petition to revise an order of the District Court affirming an order of the referee making allowance to attorneys, the only questions involved are as to the reasonableness of the allowance, the petition should be denied; Frederick v. Silverman (C. C. A., 3d Cir.), 42 Am. B. R. 24, 250 Fed. 75; Bassett v. Evans, (C. C. A., 8th Cir.), 42 Am. B. R. 587, 253 Fed. 532.

32. In re Williams' Estate (C. C. A., 9th Cir.), 19 Am. B. R. 389, 156 Fed. 934.

33. In re Grassler (C. C. A., 9th Cir.), 18 Am. B. R. 694, 154 Fed. 478; In re Eggert (C. C. A., 7th Cir.), 4 Am. B. R. 449, 102 Fed. 735; Kenova Loan & Trust Co. v. Graham (C. C. A., 4th Cir.), 14 Am. B. R. 313, 135 Fed. 717; Good v.

Kane (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 956; Matter of Estate of Kinnane Co. (C. C. A., 6th Cir.), 39 Am. B. R. 593, 242 Fed. 760; Moore Dry Goods Co. v. Brooks (C. C. A., 8th Cir.), 39 Am. B. R. 617, 240 Fed. 943; Matter of Wood (C. C. A., 6th Cir.), 40 Am. B. R. 810, 245 Fed. 246; Matter of Stitt (C. C. A., 6th Cir.), 41 Am. B. R. 777, 252 Fed. 1; King Lumber Co. v. Nat. Exch. Bank (C. C. A., 4th Cir.), 42 Am. B. R. 661, 253 Fed. 946.

Questions of law.—In the case of In re Frank (C. C. A., 8th Cir.), 25 Am. B. R. 496, 183 Fed. 794, the court said: "A petition to revise under section 24-b can properly present for determination only questions of law, and not doubtful or disputed questions of fact. But when facts are agreed upon or are proven or admitted that leave nothing for determination but their legal import, such a determination of them by the court of bankruptcy may be reviewed upon a petition to revise. But the review of decisions which require the consideration of conflicting evidence or evidence though not conflicting from which different deductions or conclusions may reasonably be drawn, may not be reviewed upon a petition to revise but upon appeal only."

Matter of Hayes (C. C. A., 6th Cir.), 24 Am. B. R. 601, 179 Fed. 222, in which the court was asked to reverse findings of fact made by a referee, and affirmed by the district court, as to the right of an assignee for the benefit of creditors to an allowance for compensation and disbursements and the court said: "But in a proceeding to revise under section 24-b, this court is limited to a review in matters of law, and only questions of law arising out of the facts found or conceded can be considered. We cannot determine questions of fact involved in the finding or order sought to be reviewed." See also In re Taft (C. C. A., 6th Cir.), 13 Am. B. R. 417, 113 Fed. 511, 60 C. C. A., 385; In re Throckmorton (C. C. A., 6th Cir.), 17 Am. B. R. 856, 149 Fed. 145, 79 C. C. A. 15; In re Smith (C. C. A., 6th Cir.), 29 Am. B. R. 623, 203 Fed. 369.

Where an order refusing to set aside an adjudication upon the ground that the bankrupts did not have their principal place of business within the jurisdiction, is supported by an abundance of evidence consisting not only of direct testimony, but of inferences properly to be drawn from all the evidence, said order involving a controverted question of fact cannot be reviewed by a petition to revise. Hunter, Walton & Co. v. Cherry Co. (C. C. A., 8th Cir.), 40 Am. B. R. 732, 247 Fed. 458.

34. Shea v. Lewis (C. C. A., 8th Cir.), 30 Am.

able on a petition.³⁵ There is no exception to the rule that on petitions for revision, only legal questions may be determined.³⁶ Where the facts are not in dispute a petition for revision should be entertained, as the question remaining must be one of law.³⁷ If the facts are admitted or agreed upon, so that nothing is left for determination but their legal import, such a determination may be reviewed upon petition to revise.³⁸

f. What may be reviewed by petition.—(1) IN GENERAL.—Any final or interlocutory order in bankruptcy proceedings, in matter of law, may be reviewed by petition.³⁹ This method is that usually adopted when a party claims to be aggrieved because of an injunction⁴⁰ or summary order,⁴¹ or where an appeal will not lie under the terms of § 25-a. It will not be possible nor useful to cite all the precedents on this question; they are already so numerous and cover so wide a field as to make the formulation of any number

B. R. 436, 206 Fed. 877; *Good v. Kane* (C. C. A., 8th Cir.), 52 Am. B. R. 19, 211 Fed. 906, holding that whether or not there was any substantial evidence to sustain a decision is a question of law, which may be considered upon a petition to revise.

35. *Clark Hardware Co. v. Sauve* (C. C. A., 8th Cir.), 33 Am. B. R. 674, 220 Fed. 102; *Good v. Kane* (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 906; *Kirsner v. Tallaferrro* (C. C. A., 4th Cir.), 29 Am. B. R. 832, 202 Fed. 51; *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 691, 179 Fed. 222; *Schuler v. Hassinger* (C. C. A., 5th Cir.), 24 Am. B. R. 184, 177 Fed. 119; *Elliot v. Toeppner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200; *Sauve v. The More Investment Co.* (C. C. A., 8th Cir.), 41 Am. B. R. 281, 248 Fed. 642; *Whitney Central Trust and Savings Bank v. U. S. Construction Co.* (C. C. A., 5th Cir.), 41 Am. B. R. 381, 250 Fed. 784.

36. *Samuel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68, and cases cited; *Kenova Loan & Trust Co. v. Graham* (C. C. A., 4th Cir.), 14 Am. B. R. 313, 135 Fed. 717; *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 568, 140 Fed. 849; *Ryan v. Hendricks* (C. C. A., 7th Cir.), 21 Am. B. R. 570, 106 Fed. 94; *In re Leech* (C. C. A., 6th Cir.), 22 Am. B. R. 596, 171 Fed. 622; *Landry v. San Antonio Brewing Ass'n* (C. C. A., 5th Cir.), 20 Am. B. R. 226, 159 Fed. 700; *Lessius v. Goodman* (C. C. A., 3d Cir.), 21 Am. B. R. 446, 165 Fed. 839; *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628; *In re Leech* (C. C. A., 6th Cir.), 22 Am. B. R. 596, 171 Fed. 622; *In re Baum* (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410, holding that where the record upon a petition to revise an order that a bankrupt pay into a court a certain amount in cash, does not contain the evidence taken before the referee, it will be presumed that the facts were sufficient to sustain his finding and order, and only matters of law apparent upon the face of the record may be considered; *In re Irwin* (C. C. A., 3d Cir.), 23 Am. B. R. 487, 174 Fed. 642, holding that upon a petition to revise, only questions of law can be considered, and the findings of fact of the court below cannot be disturbed; *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 691, 179 Fed. 222; *In re Lee* (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579; *Williamson v. Richardson* (C. C. A., 9th Cir.), 30 Am. B. R. 559, 205 Fed. 245; *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896; *In re Roger, Brown & Co.* (C. C. A., 8th Cir.), 28 Am. B. R. 336, 196 Fed. 753; *In re Zinner* (C. C. A., 7th Cir.), 29 Am. B. R. 860, 201 Fed. 197; *In re Blum* (C. C. A., 8th Cir.), 29 Am. B. R. 332, 202 Fed. 883; *Stuart v. Rey-*

nolds (C. C. A., 6th Cir.), 29 Am. B. R. 413, 204 Fed. 709; *In re Smith* (C. C. A., 6th Cir.), 29 Am. B. R. 628, 203 Fed. 369; *Hall v. Reynolds* (C. C. A., 8th Cir.), 34 Am. B. R. 707, 224 Fed. 103.

37. *Hutchinson v. LeRoy* (C. C. A., 1st Cir.), 8 Am. B. R. 20, 113 Fed. 209; *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896; *In re Haring* (C. C. A., 6th Cir.), 20 Am. B. R. 387, 203 Fed. 229 (aff. 27 Am. B. R. 285, 193 Fed. 168), holding that upon a petition for revision, only questions of law can be determined; and such questions must arise out of the facts found by the court below or admitted by the parties.

38. *Matter of Sully & Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 124, 152 Fed. 619; *In re Lee* (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579; *In re Frank* (C. C. A., 8th Cir.), 25 Am. B. R. 486, 182 Fed. 794; *In re Judkins Co.* (C. C. A., 1st Cir.), 30 Am. B. R. 529, 205 Fed. 892; *In re Knosher & Co.* (C. C. A., 9th Cir.), 28 Am. B. R. 747, 197 Fed. 136; *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896; *In re Haring* (C. C. A., 6th Cir.), 29 Am. B. R. 387, 203 Fed. 229.

39. *Scott & Co. v. Wilson* (C. C. A., 7th Cir.), 8 Am. B. R. 349, 115 Fed. 284; *Courier-Journal Printing Co. v. Schaefer-Meyer Brewing Co.* (C. C. A., 6th Cir.), 4 Am. B. R. 183, 101 Fed. 699; *Matter of Dressler Producing Corp.* (C. C. A., 2d Cir.), 44 Am. B. R. 457, 262 Fed. 257.

40. *Davis v. Bohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 92 Fed. 325; *In re Kenney* (D. C., N. Y.), 3 Am. B. R. 353, 97 Fed. 554.

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By controversies arising in bankruptcy proceedings is meant those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors. *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711; *In re Farrell* (C. C. A., 6th Cir.), 23 Am. B. R. 826, 176 Fed. 505; *Morehouse v. Pacific Hardware, etc., Co.* (C. C. A., 9th Cir.), 24 Am. B. R. 178, 177 Fed. 337; *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852, 56 L. Ed. 725; *In re Hamilton Automobile Co.* (C. C. A., 7th Cir.), 29 Am. B. R. 163, 198 Fed. 856.

43. *In re Farrell* (C. C. A., 6th Cir.), 23 Am. B. R. 826, 176 Fed. 505; *Coder v. Arts* (Sup. Ct.), 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772; *Matter of Lane Lumber Co.* (C. C. A., 9th Cir.), 33 Am. B. R. 497, 217 Fed. 546.

44. *Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786, 48 L. Ed. 116; *Hutchinson v. Otis*, 190 U. S. 532, 10 Am. B. R. 135, 47 L. Ed. 1179; *First Nat'l Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051, holding that a summary proceeding against one in possession of assets alleged to be a part of a bankrupt estate is a proceeding in bankruptcy and the jurisdiction of the Circuit Court of Appeals is confined to revision of the decree.

Determination of jurisdiction of referee.—Where the only question raised is as to the jurisdiction of a referee in proceedings to set aside a conveyance as fraudulent, the question may be raised by a petition to revise. *Matter of Weidhorn* (C. C. A., 1st Cir.), 41 Am. B. R. 502, 253 Fed. 28.

45. See cases cited under § 24, "c. Controversies arising in bankruptcy proceedings," ante.

46. *Matter of Chatner* (C. C. A., 3d Cir.), 33 Am. B. R. 238, 218 Fed. 813; *Matter of Horowitz & Laidhold* (C. C. A., 2d Cir.), 41 Am. B. R. 367, 250 Fed. 106.

47. *Matter of Pechin* (C. C. A., 3d Cir.), 35 Am. B. R. 738, 227 Fed. 853.

48. *Lazarus, Michel & Lazarus v. Harding* (C. C. A., 5th Cir.), 35 Am. B. R. 271, 223 Fed. 50; *In re Boston Dry Goods Co.* (C.

order may be reviewed on petition.⁵⁰ A petition to review will not usually be allowed where the granting of the order was discretionary,⁵⁰ or where the rights of the petitioning party were not affected by the order complained of.⁵¹ An action upon a trustee's bond is not a proceeding in bankruptcy, but an ordinary action at law, and the action of the District Court in sustaining a demurrer to plaintiff's petition is not reviewable by petition to revise.⁵²

(II) *Claims as to funds in possession of court.*—Orders determining the rights of claimants to a fund in the possession of a bankruptcy court are being administered by it in the course of bankruptcy proceedings and are reviewable by petition.⁵³ If the proceedings pertain to the ownership of property in the possession of the trustee, claimed by a person not a party to the bankruptcy, and is summarily disposed of by the court or referee, it is reviewable on petition to revise.⁵⁴ The decision of a district court exercising ancillary jurisdiction in bankruptcy that it has no jurisdiction to determine whether the proceeds of goods it seizes and sells as the property of the bankrupt are the property of the bankrupt estate or the property of adverse claimants, is reviewable on petition.⁵⁵

(III) *Lien on bankrupt's property.*—Where a lien is asserted on property included in the bankrupt's estate, the order determining the right to such lien is subject to revision on petition,⁵⁶ and so also as to a decision as to the validity of a trust deed executed by the bankrupt within the four months' period,⁵⁷

C. A., 1st Cir.), 11 Am. B. R. 97, 35 Fed. 229.

49. *Shen v. Lewis* (C. C. A., 8th Cir.), 30 Am. B. R. 439, 306 Fed. 877; *Matter of Dressler Producing Corp.* (C. C. A., 2d Cir.), 44 Am. B. R. 457, 282 Fed. 287.

50. *Mulford v. Fourth St. Nat'l Bank* (C. C. A., 3d Cir.), 19 Am. B. R. 742, 187 Fed. 897; *In re Lesser* (C. C. A., 2d Cir.), 8 Am. B. R. 758, 99 Fed. 912; *Ex parte Perkins*, Fed. Cas. 10,982. This is not so when the exercise of the discretion involves a substantial legal right. *In re Carley* (C. C. A., 3d Cir.), 8 Am. B. R. 720, 117 Fed. 130; *Clark Hardware Co. v. Sauve* (C. C. A., 8th Cir.), 33 Am. B. R. 674, 220 Fed. 102; *Matter of Chotiner* (C. C. A., 3d Cir.), 33 Am. B. R. 288, 218 Fed. 813; *Matter of Horowitz and Laidhold* (C. C. A., 2d Cir.), 41 Am. B. R. 267, 250 Fed. 106; *Matter of Weidenfeld* (C. C. A., 2d Cir.), 42 Am. B. R. 425, 254 Fed. 677.

Where the proceeding is in its nature discretionary, the review is limited to considering whether there was an abuse of discretion. *Matter of Graft and Nevins* (C. C. A., 2d Cir.), 41 Am. B. R. 32, 250 Fed. 907.

51. *In re Madden* (C. C. A., 2d Cir.), 6 Am. B. R. 614, 110 Fed. 848; *Fisher v. Cushman* (C. C. A., 1st Cir.), 4 Am. B. R. 646, 103 Fed. 800; *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 662.

52. *United States v. Ruggles* (C. C. A., 6th Cir.), 34 Am. B. R. 91, 221 Fed. 256.

53. *In re Antigo Screen Door Co.* (C. C. A., 7th Cir.), 10 Am. B. R. 350, 123 Fed. 240, and cases cited; *Samel v. Dodd* (C. C. A., 6th Cir.), 16 Am. B. R. 163, 142 Fed. 68. But see *Coder v. Arta*, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, holding that where a creditor asserts a lien upon property in the possession of a trustee and asks that such lien be declared valid, the decision of the court is appealable; *Rode & Horn v. Philippe* (C. C. A., 6th Cir.), 27 Am. B. R. 827, 195 Fed. 414. See cases digested in Am. Bankr. Digest, § 1250.

Question of jurisdiction.—The question whether the District Court erroneously exercised jurisdiction to determine the merits of an adverse claim to property is a question

of a bankruptcy proceeding, and is reviewable by a petition to revise. *Gibbons v. Goldsmith* (C. C. A., 9th Cir.), 35 Am. B. R. 40, 232 Fed. 836.

Claims to property in possession of receiver.—An order determining the right of various claimants to property in the hands of a receiver is reviewable by a petition to revise. *Matter of Pierson and Fell* (C. C. A., 2d Cir.), 37 Am. B. R. 10, 233 Fed. 513.

54. *Matter of Petronio* (C. C. A., 7th Cir.), 34 Am. B. R. 470, 220 Fed. 269; *In re Goldstein and Moosson* (C. C. A., 7th Cir.), 33 Am. B. R. 803, 216 Fed. 687.

55. *Fidelity Trust Co. v. Gaskall* (C. C. A., 8th Cir.), 38 Am. B. R. 4, 195 Fed. 965.

56. *Coder v. Arta*, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, in which the court recognized the propriety of a resort to a petition to superintend and revise when claimant complains of the court's determination as to the validity of a lien asserted upon property in the hands of the bankrupt's trustee. *Radford Grocery Co. v. Powell* (C. C. A., 5th Cir.), 35 Am. B. R. 790, 227 Fed. 853; *Hutty Saah & Door Co. v. Stitt* (C. C. A., 8th Cir.), 33 Am. B. R. 251, 218 Fed. 1.

57. *Moore v. Green* (C. C. A., 4th Cir.), 16 Am. B. R. 648, 145 Fed. 480; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 684.

Decision as to validity of trust deed.—In the case of *Morgan v. First Nat. Bank* (C. C. A., 1st Cir.), 16 Am. B. R. 639, 145 Fed. 466, it was sought to review a decision of the bankruptcy court as to the valid-

and a decision involving a widow's right of dower in the estate of the bankrupt.⁵³ A decision involving the validity of the claim of a creditor to a lien upon the property of the bankrupt, or its proceeds,⁵⁴ under administration in possession of the court, is reviewable in matter of law upon a petition to revise.⁶⁰ Where the question is as to the validity of a chattel mortgage under which the mortgagee claims priority, there being no contest as to the facts, it is one of law and is properly reviewable on petition to revise.⁶¹

(IV) *Administrative orders*.—An order refusing to vacate an adjudication in bankruptcy is reviewable only on petition, as an administrative order.⁶² And so also is any interlocutory order pertaining to the rights of parties in the proceedings, relating to the several pleadings or granting or denying applications made in the due course of the proceedings;⁶³ and likewise an order granting or refusing to grant leave to a party to intervene for the purpose of contesting the grounds upon which an adjudication in an involuntary bankruptcy proceeding is sought.⁶⁴ An order directing the bankrupt to turn over to his trustee certain property and committing him to prison until he does so, is an order made in a proceeding in bankruptcy and is only reviewable by petition,⁶⁵ and the same is true of an order denying a motion to re-open an estate.^{66a} Proceedings on a motion by a bankrupt after discharge to re-open an estate on the theory that his interest in lands had not been properly scheduled constitute a mere step in the course of administration, and are reviewable by petition to revise.^{66b}

(V) *Sale and distribution of property*.—Orders or proceedings for the sale and disposition of the bankrupt's effects are regular steps or proceedings in

ity of a trust deed, executed by the bankrupt upon its property within the four months' period. The court said: "The deed is not disputed, and the point sought to be reviewed is one of law, arising upon a determination of the validity of a trust deed executed by the bankrupt company, within four months of the institution of bankruptcy proceedings, and hence belongs clearly to the class of cases made subject to review by this court, under its general power to 'superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy.'" See also *Ritchie County Bank v. McFarland* (C. C. A., 4th Cir.), 24 Am. B. R. 893, 183 Fed. 715, affg. 28 Am. B. R. 530, 174 Fed. 860.

58. In re McKenzie (C. C. A., 8th Cir.), 15 Am. B. R. 679, 142 Fed. 383.

59. Dispute as to right to participate in proceeds of security.—The phrase "controversy arising in bankruptcy proceedings" should be limited to cases where third parties claim not in and under the administration of a bankrupt's estate, but on the contrary, assert some right hostile to the title of the trustee or going to the right of the court to administer the particular estate in the bankruptcy case. Hence, where there is a dispute between the holders of claims already proven in the bankruptcy proceedings proper, as to their respective rights to participate in the proceeds of an admittedly valid security, which are in the possession of the bankruptcy court for administration, so that the apportionment thereof is strictly and properly a part of the bankruptcy proceedings, the case comes within the category of "proceedings in bankruptcy" and is not a "controversy arising in bankruptcy proceedings," and is reviewable by petition to revise. *Snow v. Dalton* (C. C. A., 4th Cir.), 29 Am. B. R. 240, 203 Fed. 843.

60. In re Lee (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579.

61. In re Flatland (C. C. A., 9th Cir.), 28 Am. B. R. 476, 196 Fed. 310.

62. *Brady v. Bernard & Kittenger* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 576; *B-E Electric Co. v. Aetna Life Ins. Co.* (C. C. A., 8th Cir.), 30 Am. B. R. 424, 206 Fed. 886; *Matter of Vanoscope Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 778, 233 Fed. 63; *Hart-Parr Co. v. Barkley* (C. C. A., 8th Cir.), 36 Am. B. R. 540, 231 Fed. 913; *Armstrong v. Norris* (C. C. A., 8th Cir.), 40 Am. B. R. 735, 247 Fed. 253.

63. *Clark v. Pidcock* (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745, holding that an order refusing an injunction restraining the further disposition of the bankrupt's assets is reviewable; In re *Groetsinger & Sons* (C. C. A., 3d Cir.), 11 Am. B. R. 467, 127 Fed. 124; In re *Ives* (C. C. A., 6th Cir.), 7 Am. B. R. 602, 113 Fed. 911, holding that an order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication is reviewable on petition. *Board of Road Commissioners v. Kell* (C. C. A., 6th Cir.), 44 Am. B. R. 259, 259 Fed. 76, holding that an order overruling objections to jurisdiction made on an application by the trustee for permission to sue is reviewable by petition.

64. *Ogden & Jamison v. Gilt Edge Mines Co.* (C. C. A., 8th Cir.), 34 Am. B. R. 893, 225 Fed. 723; *Babbitt v. Read* (C. C. A., 2d Cir.), 39 Am. B. R. 508, 240 Fed. 604.

65. *Kiraner v. Tallafero* (C. C. A., 4th Cir.), 29 Am. B. R. 832, 202 Fed. 51; *Matter of Shidlovsky* (C. C. A., 2d Cir.), 34 Am. B. R. 861, 224 Fed. 450; *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873; *Henkin v. Fousek* (C. C. A., 8th Cir.), 40 Am. B. R. 701, 240 Fed. 285; *Horton v. Mendelsohn* (C. C. A., 3d Cir.), 41 Am. B. R. 648, 249 Fed. 186. Compare *Frederick v. Silverman* (C. C. A., 3d Cir.), 42 Am. B. R. 24, 250 Fed. 76; *Galbraith v. Rosenstein* (C. C. A., 8th Cir.), 43 Am. B. R. 91, 250 Fed. 445.

66a. *Matter of Graff & Nevins* (C. C. A., 2d Cir.), 41 Am. B. R. 32, 250 Fed. 907.

66b. *Youtsey v. Newwonger* (C. C. A., 6th Cir.), 44 Am. B. R. 109, 258 Fed. 16.

bankruptcy and are reviewable only on petition.⁶⁶ Such are orders summarily disposing of assets of the bankrupt.⁶⁷ But an order by a district judge reversing an order of a referee that confirmed a sale of the bankrupt's property, thus leaving the property still in the hands of the trustee, is not reviewable.⁶⁸ An order denying the right of partnership creditors to participate in the assets of an individual partner until his individual creditors had been first paid is reviewable upon a petition.⁶⁹

(VI) *Exemption claims.*—An order confirming an order of a referee granting or denying a claim to certain exemptions asserted by the bankrupt may be reviewed upon a petition to revise,⁷⁰ and such an order not being "a final decision, allowing or rejecting a claim," within the intent and meaning of subsection *a*, is not reviewable on appeal.⁷¹ If a determination by the court in respect to the bankrupt's claim of an exemption under a State statute is made in the course of the bankruptcy proceedings it is reviewable on petition.⁷²

(VII) *Claims of creditors generally.*—Ordinarily an order allowing a claim is not reviewable on petition. But where the petition in bankruptcy was because of the claim, and the proceedings are actually dependent upon the validity of such claim, the court may, in reviewing an order confirming the sale of a homestead, review the order allowing the claim.⁷³ An order setting aside the allowance of a secured claim, and requiring the creditor to surrender to the trustee a preferential payment is reviewable on petition.⁷⁴

(VIII) *Allowance of fees and expenses.*—An order confirming a referee's disallowance of a creditor's claim for attorney's fees and expenses incurred in contesting claims and in proceedings to recover assets is reviewable on petition.⁷⁵ An order making an allowance for counsel fees and other expenses incurred by the trustee in the realization of the assets of the estate, is within the supervisory jurisdiction of the circuit court of appeals.⁷⁶ Likewise an order denying compensation and expenses of counsel for the bankrupt and for creditors opposing an offer of composition is reviewable by petition.^{76a}

66. *Schuler v. Hassinger* (C. C. A., 5th Cir.), 24 Am. B. R. 184, 177 Fed. 119. An order of the District Court affirming an order of a referee in bankruptcy, holding that a bidder at an auction sale of the assets obtained no legal rights thereby, constitutes an ordinary step in the bankruptcy proceeding, and no appeal lies therefrom. *Unteriner v. Camors* (C. C. A., 8th Cir.), 36 Am. B. R. 122, 228 Fed. 800.

Sale free from dower.—An order for the sale of the bankrupt's real estate freed and discharged of his wife's inchoate right of dower, is reviewable only by petition. *Kelly v. Minor* (C. C. A., 4th Cir.), 41 Am. B. R. 275, 252 Fed. 115.

67. *In re Farrell* (C. C. A., 6th Cir.), 23 Am. B. R. 826, 176 Fed. 505.

Order disposing of assets of bankrupt.—In the case of *Schweer v. Brown*, 195 U. S. 171, 12 Am. B. R. 673, 49 L. Ed. 144, it was held that the district court has jurisdiction to determine whether an adverse claim to money alleged to be part of the assets of a bankrupt's estate was asserted at the time the petition in bankruptcy was filed, and if the court errs in retaining jurisdiction on the merits, the remedy is by petition to the Circuit Court of Appeals, under § 24-b.

68. *Matter of Chatiner* (C. C. A., 3d Cir.), 33 Am. B. R. 288, 218 Fed. 813.

Order allowing sale free from liens.—An order of the District Court reversing an order of the referee allowing the petition of a trustee in bankruptcy to sell property subject to various liens and free and clear of other liens, constitutes a "controversy in a bankruptcy proceeding" and should be reviewed by appeal and

not by petition to revise. *Sauve v. The More Investment Co.* (C. C. A., 8th Cir.), 41 Am. B. R. 281, 248 Fed. 642.

69. *Euclid Nat'l Bank v. Union Trust Co.* (C. C. A., 4th Cir.), 17 Am. B. R. 834, 149 Fed. 975. *In re Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 701, 142 Fed. 445, holding that an order adjudging that certain policies of insurance upon the life of a member of a bankrupt firm passed to the trustee and directing that they be turned over as assets of the estate, is a mere step in the bankruptcy proceeding and reviewable only on petition to revise.

70. *In re Youngstrom* (C. C. A., 8th Cir.), 15 Am. B. R. 672, 153 Fed. 88; *Steiner v. Marshall* (C. C. A., 4th Cir.), 15 Am. B. R. 486, 140 Fed. 710.

71. *Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 780, 48 L. Ed. 116.

72. *Ingram v. Willson* (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; *Duncan v. Ferguson-McKinney Co.* (C. C. A., 5th Cir.), 18 Am. B. R. 155, 150 Fed. 269.

73. *Matter of Pludel* (C. C. A., 9th Cir.), 34 Am. B. R. 600, 221 Fed. 342.

74. *In re First National Bank of Louisville* (C. C. A., 6th Cir.), 18 Am. B. R. 768, 155 Fed. 100; *Mulford v. Fourth Street National Bank* (C. C. A., 3d Cir.), 19 Am. B. R. 742, 157 Fed. 897.

75. *Ohio Valley Bank Co. v. Switzer* (C. C. A., 6th Cir.), 18 Am. B. R. 689, 153 Fed. 362. See also *Davidson & Co. v. Friedman* (C. C. A., 6th Cir.), 15 Am. B. R. 489, 140 Fed. 853, holding that an order allowing the expenses incurred by a trustee for counsel fees in realization of assets is reviewable by petition.

(IX) *Proceeding regarding discharge or composition.*—It has been held that an order denying a motion to dismiss a bankrupt's application for a discharge, where the facts were undisputed, was reviewable on petition,⁷⁷ and the same has been held in regard to an order denying a motion to set aside a discharge,^{77a} and an order setting aside a discharge.^{77b} An order refusing to allow specifications of objections to the discharge of the bankrupt to be filed or amended may be revised,⁷⁸ but where an amendment is permitted, the order is not of sufficient finality to admit of revision.⁷⁹ An order dismissing a petition for confirmation of a composition, predicated wholly upon the proposition of law that the proposed offer was not a composition, is reviewable by petition.^{79a}

g. *Practice.*—(1) *IN GENERAL.*—The General Orders and Forms are silent as to the practice on petitions to review in matter of law.⁸⁰ The petition should be presented by a party having a substantial interest in the controversy,⁸¹ and usually entitled in, addressed to and filed with the clerk of, the proper circuit court of appeals.⁸²

(2) *WHAT TO RECITE; RECORD.*—It should recite the proceedings below, state specifically the question of law involved and the ruling of the district court thereon, and be accompanied by a certified copy of so much of the record as will show the issue of law and how it arose.⁸³ If it does not, the court may dismiss, with leave to supplement, or may suspend consideration until the record is completed.⁸⁴ If the record does not contain the evidence

Where objections to a trustee's account, seeking to charge him with assets coming into his possession, but not accounted for, raises questions which the bankrupt may summarily determine, its decision thereon is reviewable only upon a petition for review. *In re Moore & Bridgman* (C. C. A., 5th Cir.), 21 Am. B. R. 661, 166 Fed. 669.

78. *Davidson & Co. v. Friedman* (C. C. A., 8th Cir.), 15 Am. B. R. 469, 140 Fed. 853, in which it was held that an order allowing the expenses incurred by a trustee for counsel fees in the realization of assets is reviewable only by petition for review; *Ohio Valley Bank Co. v. Switzer* (C. C. A., 6th Cir.), 18 Am. B. R. 699, 163 Fed. 582.

79a. *Matter of Estate of Kinnane Co.* (C. C. A., 8th Cir.), 39 Am. B. R. 563, 242 Fed. 709.

77. *Lindeke v. Converse* (C. C. A., 8th Cir.), 28 Am. B. R. 598, 196 Fed. 618.

77a. *Matter of White* (C. C. A., 9th Cir.), 41 Am. B. R. 468, 248 Fed. 115.

77b. *Matter of Jacobs* (C. C. A., 8th Cir.), 39 Am. B. R. 885, 241 Fed. 620.

78. *In re Carley* (C. C. A., 3d Cir.), 8 Am. B. R. 730, 117 Fed. 180; *Goodman v. Curtis* (C. C. A., 5th Cir.), 23 Am. B. R. 504, 174 Fed. 644; *Matter of Pechin* (C. C. A., 3d Cir.), 35 Am. B. R. 738, 227 Fed. 863.

79. *Matter of Chotiner* (C. C. A., 3d Cir.), 33 Am. B. R. 288, 215 Fed. 513; *Matter of Pechin* (C. C. A., 3d Cir.), 35 Am. B. R. 738, 227 Fed. 863.

79a. *Matter of Graham & Sons* (C. C. A., 7th Cir.), 42 Am. B. R. 52, 232 Fed. 93.

80. See, however, rules in the First Circuit, 97 Fed., pp. 3, 4; and in the Fourth Circuit, 97 Fed., pp. 3, 4. See also Forms within these rules in "Supplementary Forms," post, and Hagar and Alexander's Bankruptcy Forms (2d Ed.), Forms Nos. 377-379. If the petition is filed in the first instance in the district court, it is heard by the judge *ex parte*, and is followed by an order allowing or declining allowance. If allowed, the clerk prepares, at the expense of the petitioner, a transcript of the record and certifies the same to the proper Circuit Court of Appeals. Thereafter the practice in that court is the same as that outlined in the text and the rules in the First and Fourth Circuits above referred to.

81. *In re Jamison Mercantile Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 599, 112 Fed. 686; *In re Baker* (C. C. A., 1st Cir.), 4 Am. B. R. 779, 104 Fed. 287, holding that where the petitioner has

no longer any such interest the petition must be dismissed.

The bankrupt is not entitled to petition for revision of an order for the examination of his wife. *Matter of Weidenfeld* (C. C. A., 2d Cir.), 42 Am. B. R. 423, 234 Fed. 677.

The trustee may petition for revision of an order of the District Court giving preference to a landlord's claim for rent. *Jones v. Ford* (C. C. A., 8th Cir.), 43 Am. B. R. 83, 254 Fed. 645, 52 A. so called "petition for review" filed in the District Court, reciting the proceedings, and asking that a conclusion of the court erroneous in matter of law be reviewed "by the Circuit Court of Appeals" is wholly ineffectual to bring the case into the Circuit Court of Appeals for any purpose. *Bridgeton Nat. Bank v. Way* (C. C. A., 4th Cir.), 41 Am. B. R. 498, 253 Fed. 41.

Section 24-b provides that "such power shall be exercised on due notice and petition by any party aggrieved." It contemplates that a petition shall be filed as in other cases.

83. *In re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935; *In re Baker* (C. C. A., 1st Cir.), 4 Am. B. R. 778, 104 Fed. 287; *In re Reed*, Fed. Cas. 11,638; *In re Casey*, Fed. Cas. 2,495; *Steiner v. Marshall* (C. C. A., 4th Cir.), 16 Am. B. R. 496, 140 Fed. 710, 72 C. C. A. 103; *In re O'Connell* (C. C. A., 1st Cir.), 14 Am. B. R. 237, 137 Fed. 839; *In re Pettingill & Co.* (C. C. A., 1st Cir.), 14 Am. B. R. 757, 137 Fed. 840, holding that the opinion of the district judge does not take the place of a finding of facts. The certified copy can usually be filed within thirty days. *Jones v. Ford* (C. C. A., 8th Cir.), 43 Am. B. R. 83, 254 Fed. 645.

Specific questions of law to be stated.—In the case of *In re Taft* (C. C. A., 8th Cir.), 18 Am. B. R. 417, 133 Fed. 511, it was held that a petition for review should present the specific decisions of law made by the lower court, by which the petitioner deems himself aggrieved, and set forth the facts upon which such order was made. While neither the bankruptcy act nor the general orders prescribe the practice to be adopted in proceedings on revisory petitions, the matters of law of which revision is sought should in some manner be clearly presented. *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

84. In the case of *Steiner v. Marshall* (C. C. A., 4th Cir.), 15 Am. B. R. 496, 140 Fed. 710, a petition to review was dismissed because of a failure to set out the finding of facts on which the matters of law sought

taken before the referee, it will be presumed that the facts were sufficient to sustain his findings, and only matters of law, apparent upon the face of the record, will be considered.⁸⁵ The petition should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose and its determination.⁸⁶ It has been held that if the record shows that issues of fact and law were raised, but fails to state the testimony or settlement of facts upon which the order was predicated, the petition presents no question of law for review.⁸⁷ If the questions to be reviewed are not plainly and concisely set forth the court may, in its discretion, dismiss the petition.⁸⁸ The opinion of the district judge on review of an order of the referee, not specially made a matter of record, does not take the place of a finding of facts, although it may be referred to for the purpose of ascertaining the principle of law governing the court in making its decision, or for the general purpose of determining whether the case was decided on the facts or the law.⁸⁹

(3) TIME OF FILING PETITION.—The statute or the general orders do not limit the time within which a petition for review should be filed.⁹⁰ So

to be reviewed arose. *Devries v. Shanahan* (C. C. A., 4th Cir.), 10 Am. B. R. 518, 122 Fed. 629; *In re Pettingill & Co.* (C. C. A., 1st Cir.), 14 Am. B. R. 757, 137 Fed. 840, in which case the petition was dismissed because the facts were not set forth.

^{85.} *In re Baum* (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410; *First State Bank of Corinth v. Haswell* (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209.

Only those questions of law that are fairly presented by the petition and record will be considered. *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

Findings of fact by special master.—Upon petition to review in matter of law, under section 24-b of the Bankruptcy Act, an order of the bankruptcy court confirming the report of a referee sitting as special master in a proceeding to establish the ownership of a specific fund, the master's findings of fact so approved by the district judge are not brought up for review. *Matter of Caponigri* (C. C. A., 2d Cir.), 25 Am. B. R. 509, 183 Fed. 307.

^{86.} *In re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935.

Record.—A petition for review must present enough of the record in the district court to enable the Circuit Court of Appeals to perceive the issue of law which is sought to be raised. *In re Baker* (C. C. A., 1st Cir.), 4 Am. B. R. 778, 104 Fed. 287. The record should present clearly and unequivocally the issues of law presented, and in order that it may appear that such issues were presented to the court below, findings of fact which involve distinct propositions of law or something else as a substitute therefor are necessary. *In re O'Connell* (C. C. A., 1st Cir.), 14 Am. B. R. 237, 137 Fed. 838. But see *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896, where the petition to revise did not allege that the error

complained of was in "matter of law," or assign any specific errors of law, but the court held that where it alleges that no proof was taken in the District Court and no opinion filed, and this is admitted by the trustee's answer, the District Court will be regarded as having denied the petition because as matter of law what is set forth did not entitle petitioner to the relief he sought.

Petition to be accompanied by transcript or findings.—The Circuit Court of Appeals upon a petition for review, unaccompanied either by a transcript of the record and proceedings had below or findings of fact, will not consider and pass upon the regularity and validity of proceedings under which lands belonging to the bankrupt were sold free from liens and the proceeds arising therefrom distributed. *In re Throckmorton* (C. C. A., 6th Cir.), 28 Am. B. R. 487, 196 Fed. 656.

^{87.} *Hegner v. American Trust & Savings Bank* (C. C. A., 7th Cir.), 26 Am. B. R. 571, 187 Fed. 599.

^{88.} *In re Boston Dry Goods Co.* (C. C. A., 1st Cir.), 11 Am. B. R. 97, 125 Fed. 226; *Rush v. Lake* (C. C. A., 9th Cir.), 10 Am. B. R. 455, 122 Fed. 561; *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

^{89.} *In re Pettingill & Co.* (C. C. A., 1st Cir.), 14 Am. B. R. 757, 137 Fed. 840; *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68, holding that the opinion of the court below may be looked to for the purpose of determining in a general way the questions of law which were passed on. *Compare Matter of Wood* (C. C. A., 6th Cir.), 29 Am. B. R. 810, 248 Fed. 246.

^{90.} *In re N. Y. Economical Printing Co.* (C. C. A., 2d Cir.), 5 Am. B. R. 697, 106 Fed. 639; *In re Worcester County* (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808; *In re Good* (C. C. A., 8th Cir.), 3 Am. B. R. 605, 99 Fed. 338.

long as the delay is not unreasonable the petition may be entertained.⁹¹ The ten-day limitation made by § 25-a on the taking of an appeal does not apply. But the necessity has been asserted of limiting the time within which such petitions may be filed to the end that a speedy determination of the bankruptcy may be brought about.⁹² In recognition of this principle it has been held that a petition to review should be filed within six months after the order or decree appealed from was granted, in analogy to the practice in circuit courts of appeals in ordinary actions.⁹³ The time within which the

91. In *re* N. Y. Economical Printing Co. (C. C. A., 2d Cir.), 5 Am. B. R. 697, 106 Fed. 839; In *re* Foss (D. C., Me.), 17 Am. B. R. 439, 147 Fed. 390; Matter of Estate of Kinnane Co. (C. C. A., 6th Cir.), 39 Am. B. R. 593, 242 Fed. 769. But see In *re* Worcester County (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808; In *re* Good (C. C. A., 8th Cir.), 3 Am. B. R. 605, 99 Fed. 389; Littlefield v. D., H. & C. Co., Fed. Cas. 8400. This, or a similar, limitation is, however, usually made by the rules of the Circuit Court of Appeals. As to reasonable excuse for delay see In *re* Groetzinger (C. C. A., 3d Cir.), 11 Am. B. R. 467, 127 Fed. 124; Meyer Drug Co. v. Pipkin Drug Co. (C. C. A., 5th Cir.), 14 Am. B. R. 477, 136 Fed. 396; Crim v. Woodford (C. C. A., 4th Cir.), 14 Am. B. R. 302, 136 Fed. 34; In *re* Holmes (C. C. A., 8th Cir.), 15 Am. B. R. 689, 142 Fed. 391.

92. Petition dismissed for failure to file order enlarging the time to file the petition within the time limited by rule 38 of the Circuit Court of Appeals, Second Circuit. In *re* Brown (C. C. A., 2d Cir.), 23 Am. B. R. 93, 174 Fed. 339.

93. Time within which petition must be filed.—In the case of In *re* Holmes (C. C. A., 8th Cir.), 15 Am. B. R. 689, 693, 142 Fed. 391, the court said: "One of the main purposes of the law was to provide a speedy method whereby a bankrupt might be finally discharged from liability to his creditors and his property might be equitably distributed among them. This object would be entirely defeated if the orders and judgments in bankruptcy were forever open, or were open for an uncertain or unknown time to revision and reversal upon petitions under § 24-b, because in that case they would never become or be known to be either final or conclusive. An uncertainty relative to the time within which such petitions may be maintained necessarily leaves the conclusiveness of the orders of the bankruptcy courts in doubt and thus tends to defeat one of the main purposes of the law. There ought, therefore, to be a well known and certain limit to the time within which such judgments and orders may be challenged in matter of law by petition as well as by appeal. A proceeding in bankruptcy is a proceeding in equity. The acts of Congress prescribed no time within which bills of review must be presented in ordinary cases in chancery and yet the rule is well settled that such bills, to correct errors apparent upon the face of the record, may not be successfully maintained unless they are

filed within the times limited for the review by appeal of the decrees they question. . . . This rule is just and salutary. It is an established rule in equity. A petition for revision, like all proceedings in bankruptcy, is a proceeding in equity, and it ought to be and is governed by this rule. A petition to revise or superintend in matter of law under § 24-b, an appealable order or judgment, may not be maintained after the time for the appeal has expired." See also In *re* Tomlinson Co. (C. C. A., 8th Cir.), 18 Am. B. R. 691, 154 Fed. 834, holding that a petition for review of an order must be filed within six months after the order was made and citing the act of March 3, 1891, ch. 517, § 11; In *re* Groetzinger & Sons (C. C. A., 3d Cir.), 11 Am. B. R. 467, 127 Fed. 124; In *re* Worcester County (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808, holding that as there is no statutory limitation fixing the time for review of matters arising on the face of the record, a petition for review is limited by analogy to the six months allowed by statute for taking appeals generally in the Circuit Court of Appeals. *Kenova Loan & Trust Co. v. Graham* (C. C. A., 4th Cir.), 14 Am. B. R. 313, 135 Fed. 717.

Appeal from order of distribution.—Where an action was brought by bankrupt's trustee to set aside the conveyance, and a judgment was recovered directing the trustee to hold the proceeds of a sale of the land subject to the order of the bankruptcy court, an order of the bankruptcy court, subsequently made, decreeing that such creditors were entitled to share in the fund, was an order made in a controversy arising in a bankruptcy proceeding, reviewable by an appeal taken within the six months' period prescribed by section 11 of the Circuit Court of Appeals Act, and not a judgment allowing claims, from which an appeal under section 25a of the Bankruptcy Act must be taken within ten days. In *re* Martin (C. C. A., 6th Cir.), 29 Am. B. R. 935, 201 Fed. 31.

Petition filed within reasonable time.—In the case of *Blanchard v. Ammons* (C. C. A., 9th Cir.), 25 Am. B. R. 590, 592, 183 Fed. 556, the court said: "There is no time fixed in the Bankruptcy Act within which a petition for revision shall be presented, but it is the acknowledged rule that it must be presented within a reasonable time. An appeal from the adjudication of bankruptcy is required to be taken within 10 days, and by analogy it would seem that a petition for

petition must be filed is controlled by rule in some circuits; as for instance by Rule 38 of the Rules of the Second Circuit, it is required that the petition be filed within ten days after the entry of the order. Where such a rule exists the petition must be dismissed unless filed within the prescribed time.⁹⁴

(4) OTHER MATTERS RELATING TO PRACTICE.—If not regulated by the rules of the appellate court, the analogies of the statute and general orders suggest that the petition be signed and verified by the party aggrieved, and not by his attorney. On filing, "due notice" to the opposite party is required,⁹⁵ and the case is proceeded with in accordance with the rules and practice of the court;⁹⁶ the respondent answering, and argument being had with or without briefs. The decision of the circuit court of appeals on such a review is not in turn appealable,⁹⁷ but can be transferred to the Supreme Court on certiorari.⁹⁸ Such a petition for revision does not remove the case or that portion of it on review to the highest court, and if, while there pending, the respondent below dismisses it, he should pay the costs of the review.⁹⁹ Nor should it be dismissed for lack of parties, where the missing parties were represented below by the trustee who is a party in the appellate court.¹⁰⁰ Whether a petition can be filed asking revision of the order of the district court of a territory is yet a question.¹⁰¹ If the district court is not within the territorial jurisdiction of any circuit court of appeals it seems that it cannot, though superintendence may perhaps be had in

revision of the adjudication of bankruptcy ought to be taken within a similar time, unless there are circumstances excusing delay. But the courts have generally held that a petition for revision must be presented within six months. There are no circumstances which excuse the delay in this case. All the rights of the petitioners were determined on December 19, 1905. If the petitioners were aware that their petition as stockholders had not been specifically mentioned in the order of the court then made, it was their duty to bring the matter to the attention of the court. They waited more than three years before suggesting that on the record one of the petitions remained undetermined. In the meantime the property of the bankrupt was sold, and distributed among creditors. The petitioners' position as stockholders to attack the adjudication of bankruptcy upon the facts alleged in their petition was no stronger than their position as creditors upon the facts alleged in their creditors' petition. The order which they seek here to revise must be deemed to have been made at the time when both petitions were heard and determined, December 19, 1905. The Bankruptcy Law contemplates that the bankrupt's estate shall be administered with all convenient dispatch, so that the property may be distributed among the creditors, and the bankrupt discharged from his debts, and to that end parties litigant shall be alert and active to protect their rights, and to proceed with promptness in asserting the same."

^{94.} *Matter of Vanoscope Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 778, 233 Fed. 63; *Matter of Tanenhouse* (C. C. A., 2d Cir.), 33 Am. B. R. 648, 211 Fed. 971; *In re Brown* (C. C. A., 2d

Cir.), 23 Am. B. R. 98, 174 Fed. 339; *Matter of Linck Construction Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 800, holding that the time may not be extended by a motion to resettle the case; *Matter of Armann* (C. C. A., 2d Cir.), 40 Am. B. R. 666, 247 Fed. 483; *Feder v. Goets* (C. C. A., 2d Cir.), 45 Am. B. R. 57, 264 Fed. 619.

^{95.} Suspension of rule.—The court has power to suspend a rule requiring a petition to review an order of the referee to be set down in twenty days and may do so where the application was made as soon as the attorney for the bankrupt became aware of the rule and a more expeditious hearing could not have been had owing to the engagements of the court. *Matter of Libby* (D. C., Fla.), 41 Am. B. R. 630, 233 Fed. 278. See also *Matter of Armann* (C. C. A., 2d Cir.), 41 Am. B. R. 50, 247 Fed. 954.

^{96.} § 24-b. This is usually by a notice or order to show cause issued by the clerk and served by mail or otherwise, with a copy of the petition.

^{97.} *In re Baker* (C. C. A., 1st Cir.), 4 Am. B. R. 778, 104 Fed. 237.

^{98.} Rule 39 of the Rules of the Circuit Court of Appeals, Eighth Circuit, relating to practice upon petition to review in matters of law under section 24-b of the bankruptcy act, provides that the response to the petition shall be filed at least fifteen days before the day set for the hearing. Held, that under such rule a failure of the respondent to deny or otherwise controvert the facts alleged in the petition will be deemed to be an admission that they are true. *In re Frank* (C. C. A., 8th Cir.), 25 Am. B. R. 486, 182 Fed. 794.

^{99.} *Hall v. Allen*, 12 Wall. 452; *Conroe v. Crane*, 94 U. S. 441, 24 L. Ed. 145. Nor is it reviewable on a motion to amend the order appealed from. *In re Henschel* (D. C., N. Y.), 8 Am. B. R. 201, 114 Fed. 968.

^{100.} See in this section, *post*, p. 606.

^{101.} *In re Orman* (C. C. A., 5th Cir.), 5 Am. B. R. 698, 107 Fed. 101.

^{102.} *In re Utt* (D. C., N. Y.), 5 Am. B. R. 83, 105 Fed. 754.

^{103.} *In re Stumpf* (Sup. Ct., Okla.), 9 Okla. 639, 4 Am. B. R. 267, 60 Pac. 94.

another way.¹⁰² A judgment entered upon an appeal from a judgment of a bankruptcy court, which was only reviewable upon a petition to review, is not void, but only erroneous, and may not be expunged upon a motion made at a subsequent term of the court.¹⁰⁸

III. APPEALS AS IN EQUITY CASES.

a. *In general.*—Subsection *a* of this section specifies the appeals that may be taken, as in equity cases in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals. It will be noticed here that the appeals referred to are those “in bankruptcy proceedings” as distinguished from “controversies arising in bankruptcy proceedings.” If a claimant appears in bankruptcy court, recognizes the title and possession of the property by the trustee, asserts his lien upon such property and insists that the validity of such lien be recognized and the assets of the bankrupt estate be administered accordingly he institutes “a proceeding in bankruptcy,” as distinguished from a “controversy arising in the course of bankruptcy proceedings,” and, if in other respects within the statute, an appeal will lie from a decision therein.¹⁰⁴ The general jurisdiction over appeals in controversies arising in bankruptcy proceedings is discussed under § 24.¹⁰⁵ This subsection supplements and explains such general jurisdiction. As to the three classes of judgments mentioned therein it seems now to be well settled that the jurisdiction here conferred is exclusive.¹⁰⁶

b. *As in equity cases.*—Congress by conferring appellate jurisdiction upon circuit courts of appeals as in equity cases only intended to provide thereunder for appeals from judgments when trial by jury is not demanded and the court of bankruptcy proceeds on its own findings of fact. In such a case the facts and the law are reviewable on appeal, but if the judgment is entered on the verdict of a jury it is conclusive as to facts and the judgment is reviewable for error of law.¹⁰⁷

c. *From what judgments.*—(1) *IN GENERAL.*—Subsection *a* of this section contemplates that an appeal may be taken under this subsection only from (1) a judgment granting or refusing an adjudication, (2) granting or denying a discharge or (3) allowing or rejecting a claim of five hundred dollars or over. The subsection thus clearly states the cases in which appeals may be taken in bankruptcy proceedings from courts of bankruptcy to the circuit

102. *In re Blair* (C. C. A., 8th Cir.), 5 Am. B. R. 793, 106 Fed. 662.

103. *Loeser v. Savings Dep. Bank & Trust Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 845, 163 Fed. 212, in which the court further held that upon such a motion every presumption in favor of the judgment which does not contradict the record must be indulged.

104. *Coder v. Arts*, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772.

105. See p. 563, *ante*, and *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839.

106. See cases cited *ante*, pp. 562-569; *Cook Inlet Coal Fields Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475, holding that if the case falls within one or more of the three classes specified it can be reviewed only on appeal.

Not falling within the specified classes the final decree, though rendered in a proceeding in bankruptcy is not appealable. *Bank of Clinton v. Kondert* (C. C. A., 5th Cir.), 20 Am. B. R. 178, 159 Fed. 703; *Matter of Lane Lumber Co.* (C. C. A., 9th Cir.), 33 Am. B. R. 497, 217 Fed. 546; *Ogden & Jamieson v. Gilt Edge Mines Co.* (C. C. A., 8th Cir.), 34 Am. B. R. 893, 225 Fed. 723.

107. *Elliott v. Toeppner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200; *Bower v. Holzworth* (C. C. A., 8th Cir.), 15 Am. B. R. 22, 138 Fed. 28; *Lenox v. Allen Lane Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 648, 167 Fed. 114. See *Bernard v. Lea* (C. C. A., 9th Cir.), 31 Am. B. R. 436, 210 Fed. 583, citing text; *Marine Nat. Bank v. Swigart* (C. C. A., 6th Cir.), 45 Am. B. R. 162, 262 Fed. 854.

court of appeals.¹⁰⁸ The right to an appeal conferred by this subsection may not be taken away by the court; as given by the statute it can neither be enlarged nor restricted by the district court or the circuit court of appeals.¹⁰⁹

(2) ORDER OR DECISION MUST BE FINAL.—Circuit courts of appeals exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts.¹¹⁰ A decision which finally determines the rights of parties to secure in that suit the relief they seek is a final decision, although it does not bar another action or proceeding in the same cause.¹¹¹ If the order or judgment appealed from is interlocutory it is not appealable under this subsection.¹¹²

(3) JUDGMENT GRANTING OR REFUSING AN ADJUDICATION.—(I) *In general*.—It will not usually be difficult to determine whether a judgment is one granting or refusing an adjudication. An appeal from such a judgment is permissible even though the question of jurisdiction was raised.¹¹³ But an order adjudging a person to be a member of a partnership which has been adjudicated a bankrupt is not appealable.¹¹⁴ An order of dismissal of a petition in bankruptcy on the ground that it does not state facts sufficient to constitute an act of bankruptcy is in effect a judgment refusing an adjudication and is appealable.¹¹⁵ An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication is not a judgment from which an appeal will lie under this section.¹¹⁶

(II) *Effect of jury trial*.—When an alleged bankrupt demands a jury trial on an issue of fact as to the evidence of one of the grounds for adjudging him a bankrupt, the trial proceeds according to the course of the common law and a judgment rendered therein is revisable only on writ of error.¹¹⁷

108. The Judicial Code, § 130, states: "The circuit courts of appeals shall have the appellate and supervisory jurisdiction conferred upon them by the act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1st, 1898, and all laws amendatory thereof, and shall exercise the same in the manner and under the regulations therein prescribed."

109. *In re Abraham* (C. C. A., 5th Cir.), 2 Am. B. R. 266, 292, 98 Fed. 787; *In re Whitener* (C. C. A., 5th Cir.), 5 Am. B. R. 198, 105 Fed. 180; *Lockman v. Lang* (C. C. A., 8th Cir.), 12 Am. B. R. 497, 501, 132 Fed. 1.

110. Judicial Code, § 128.

111. *Stevens v. Nave-McCord Mercantile Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71.

112. *Goodman v. Brenner* (C. C. A., 5th Cir.), 6 Am. B. R. 470, 109 Fed. 481, holding that no right of appeal is given under this section from an interlocutory order reversing a ruling of a referee refusing to compel the bankrupt to produce his books for examination; *Board of Road Comrs. v. Keil* (C. C. A., 6th Cir.), 44 Am. B. R. 250, 259 Fed. 76; *Matter of Dressier Producing Corp.* (C. C. A., 2d Cir.), 44 Am. B. R. 457, 262 Fed. 257.

Conditional order not appealable.—*Matter of Sutter Hotel Co.* (C. C. A., 8th Cir.), 39 Am. B. R. 620, 241 Fed. 367.

113. *Columbia Iron Works v. National Lead Co.* (C. C. A., 6th Cir.), 11 Am. B. R. 840, 127 Fed. 90, holding that a court of bankruptcy has jurisdiction to determine whether a corporation is principally engaged in such a business that it could be adjudged

a bankrupt, and the order of adjudication is appealable to the circuit court of appeals. This case was decided on the authority of *First Nat. Bank of Denver v. Klug*, 186 U. S. 202, 8 Am. B. R. 12, 46 L. Ed. 1127.

114. *Francis v. McNeal* (C. C. A., 3d Cir.), 22 Am. B. R. 337, 170 Fed. 445.

115. *Stevens v. Nave-McCord Mercantile Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71.

As to appeals generally from judgments granting or refusing adjudication, see *Taft Co. v. Century Sav. Bank* (C. C. A., 8th Cir.), 15 Am. B. R. 594, 141 Fed. 369; *Cook Inlet Coal Fields Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475, holding that the validity of an order of adjudication entered *nunc pro tunc* can only be considered on an appeal; *Zugalla v. Mercantile Agency* (C. C. A., 3d Cir.), 16 Am. B. R. 67, 142 Fed. 927; *Merchants' Natl. Bank of Toledo v. Code* (C. C. A., 6th Cir.), 18 Am. B. R. 44, 149 Fed. 708; *In re Good* (C. C. A., 8th Cir.), 3 Am. B. R. 605, 99 Fed. 389.

116. *In re Ives* (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. 911; *Armstrong v. Norris* (C. C. A., 8th Cir.), 40 Am. B. R. 735, 247 Fed. 23.

117. *Effect of jury trial*.—In the case of *Elliott v. Toeppner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200, the court said: "The distinction between a writ of error which brings up matter of law only, and an appeal which, unless expressly restricted, brings up both fact and law, has always been

Where the right to trial by jury exists and has been invoked, neither the appellate court nor the court below can review the facts, but can only control in matters of law which a writ of error is peculiarly fitted to raise in the appellate court.¹¹⁸

(4) GRANTING OR DENYING DISCHARGE.—An order dismissing an application for a discharge for want of prosecution, is in substance and effect a judgment denying the discharge, and can only be reviewed on appeal.¹¹⁹ A judgment confirming a composition is a judgment granting a discharge, since, under § 14-c a discharge results from the confirmation of a composition, and is therefore reviewable by appeal and not by a petition to revise.¹²⁰

observed by this court and been recognized by Congress from the foundation of the government. So far from any restriction being imposed by section 25-a, the language used is 'appeals as in equity cases,' and on appeal in equity cases the whole case is open. But Congress did not thereby attempt to empower the appellate court to re-examine the facts determined by a jury under § 19 otherwise than according to the rules of the common law. The provision applies to judgments 'adjudging or refusing to adjudge' the defendant a bankrupt when trial by jury is not demanded, and the court of bankruptcy proceeds on its own findings of fact. In such cases the facts and the law are re-examinable on appeal, while the verdict of a jury on which judgment is entered, concludes the issues of fact, and the judgment is reviewable only for error of law."

In the case of *Grant Shoe Co. v. Laird Co.*, 203 U. S. 502, 17 Am. B. R. 1, 51 L. Ed. 292, the court said: "Section 25-a of the bankruptcy act which authorizes appeals as in equity cases to be taken to the circuit court of appeals among other cases, from a judgment adjudging or refusing to adjudge the defendant a bankrupt, was expressly considered in *Elliott v. Tseppner*, 187 U. S. 227, 9 Am. B. R. 60, 47 L. Ed. 200, and it was held that the provision only applied to judgments adjudging or refusing to adjudge the defendant a bankrupt, 'when a trial by jury had not been demanded and where the court of bankruptcy proceeded on its own findings of fact.' The reasoning upon which the decision was based was in substance that as in the character of proceeding under consideration the right of a trial by jury was absolute, such a trial was a trial according to the course of the common law, and judgments therein rendered are revisable only on writ of error. As in the case at bar a jury was demanded, the trial was before such jury, and their verdict determined the questions at issue; it follows that a record should have been brought to this court by writ of error and not by appeal."

See also *Lennox v. Allen Lane Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 643, 197 Fed. 114; *Bowen v. Holworth* (C. C. A., 8th Cir.), 15 Am. B. R. 23, 138 Fed. 26; *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 619, 106 Fed. 320.

Withdrawal of demand for jury trial.—An appeal lies from an order denying an adjudication, notwithstanding a jury trial was demanded and later withdrawn. *Marine Nat. Bank v. Swigart* (C. C. A., 6th Cir.), 45 Am. B. R. 122, 262 Fed. 254.

118. Writs of error and appeals.—In the case of *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 339, the court said: "The practice of the courts, but especially the act of Congress establishing the court of appeals already referred to (see Judicial Code, § 123), had designated 'writs of error' and 'appeals,' as those terms are used and understood in our jurisprudence, as the appropriate methods for invoking the appellate jurisdiction. The form, scope and peculiar functions of these two several methods for exercising appellate jurisdiction are well understood, and their peculiar and separate functions clearly established by the decisions and practice of the courts. This practice has so shaped itself that the rulings of a trial court in a jury trial can only be reviewed in the appellate court by a writ of error, while an appeal is peculiarly fitted to equity proceedings where it brings up for review to the appellate court both the law and the facts."

119. In *re Kuffler* (C. C. A., 2d Cir.), 11 Am. B. R. 469, 127 Fed. 125; *Matter of Semons* (C. C. A., 2d Cir.), 15 Am. B. R. 332, 140 Fed. 989, 72 C. C. A. 683. As to appeal from order dismissing a petition to revoke a discharge see *Thompson v. Maury* (C. C. A., 4th Cir.), 23 Am. B. R. 489, 174 Fed. 611.

120. Judgment confirming composition.—A judgment confirming a composition is by virtue of § 14-c of the bankruptcy act, a judgment granting a discharge and is only reviewable by appeal to the circuit court of appeals under § 25-a (2), and a petition to revise in matter of law the rulings which culminated in such confirmation will be dismissed for want of jurisdiction. In *re Friends* (C. C. A., 7th Cir.), 13 Am. B. R. 505, 124 Fed. 778; *Matter of Bay State Milling Co.* (C. C. A., 2d Cir.) 35 Am. B. R. 112, 223 Fed. 778; *Matter of Brookstone Mfg. Co.* (C. C. A., 1st Cir.) 39 Am. B. R. 572, 229 Fed. 697; *Matter of Gottlieb* (C. C. A., 2d Cir.), 44 Am. B. R. 464, 262 Fed. 732. In the case of *United States ex rel Adler v. Hammond* (C. C. A., 6th Cir.), 4 Am. B. R. 736, 104 Fed. 802, the single question presented for determination was whether an appeal lies to the circuit court of appeals under § 25-a (2) from an order of the district court refusing confirmation of a composition tendered by the bankrupt and accepted by the requisite number of creditors. The court said: "The act provides an appeal from a judgment which

But a refusal to confirm a composition does not always have the effect of denying a discharge and is not on this account appealable.¹²¹ The question as to whether an order dismissing a petition to review a discharge is appealable under this subsection has not been determined; it would seem, however, that such an order is in effect an order granting a discharge and is therefore appealable.¹²² An order overruling or dismissing objections to a bankrupt's discharge, is not an order granting or refusing a discharge and is in no sense final; an appeal therefrom will not lie to the circuit court of appeals.¹²³ On an appeal from an order granting a discharge the question of abuse of discretion in denying a motion to set aside the discharge is not involved.¹²⁴

(5) ALLOWING OR REJECTING CLAIM.—(1) *In general.*—The judgment or order appealed from may be one allowing or rejecting a claim. In determining whether it be of such a character, its purpose and effect must be given due consideration. The word "claim" has been held limited to a money demand.¹²⁴ An appeal may be taken under this subsection from an order allowing or disallowing a claim as from a judgment,¹²⁵ or from an order

grants or denies a discharge. The meaning of the word discharge is defined by section 1 to be 'the release of a bankrupt from all of his debts which are provable in bankruptcy except such as are excepted by this act.' By section 14 it is declared that a confirmation of the composition shall discharge, i. e., release the bankrupt from his debts except those from which by the other method he was not discharged. But when 'discharge' is the equivalent of the other for the purposes of the act, and both are covered by the same section of the act (§ 14), it relates solely to that subject. Moreover, it is to be observed, that in both methods the procedure is under the control of the judge. In the case of a composition the non-consenting creditors are given the opportunity to contest the confirmation which is to operate as a discharge. It is against that consequence that the contest is directed. It is made because the non-consenting creditors are not satisfied that their claims shall be discharged by the payment of the amount tendered. Questions as important, perhaps, as any that may occur in bankruptcy proceedings may arise upon the hearing. If the composition is confirmed, the contesting creditors are cut off from any further consideration of the facts unless they can appeal; and so of the bankrupt, whichever way the decision goes, it is the end of that endeavor of the debtor and creditors to close the matter. . . It seems to us that the giving effect of a discharge to the order confirming a composition makes it the equivalent of an order in terms discharging the bankrupt; and that the right to appeal is given where either party considers himself aggrieved by granting or refusing, as the case may be, as well where the right accrues by reason of a composition as where the assets of the debtor are taken in hand by the trustee for distribution." In the case of *Ross v. Saunders* (C. C. A., 1st Cir.), 5 Am. B. R. 350, 105 Fed. 915, the court distinguishes the case

last cited on the ground that in that case there was objecting creditors, issue made and proper parties to the appeal, and holds that where upon an application to confirm a composition no creditors appear in opposition an order refusing to confirm was not appealable. From the reasoning applied in the two cases it must be conceded that they are diametrically opposed to each other.

An order, approving a plan for the reorganization of a bankrupt corporation, which plan is, in effect, a scheme of composition, is reviewable by appeal. *Matter of O'Gara Coal Co.* (C. C. A., 7th Cir.) 44 Am. B. R. 206, 200 Fed. 742.

121. In *re McVoy Hardware Co.* (C. C. A., 7th Cir.), 29 Am. B. R. 322, 200 Fed. 949, holding that an order refusing to confirm a composition on the sole ground that it is not for the best interests of creditors is not a bar to a subsequent discharge and, therefore, is not a final order denying a discharge, from which an appeal will lie. *Matter of Graham & Sons* (C. C. A., 7th Cir.), 42 Am. B. R. 52, 232 Fed. 63.

122. *Thompson v. Maury* (C. C. A., 4th Cir.), 23 Am. B. R. 489, 174 Fed. 611.

123. *Ragan, Malone & Co. v. Cotton & Preston* (C. C. A., 5th Cir.), 23 Am. B. R. 344, 195 Fed. 69. See *Walter Scott Co. v. Wilson* (C. C. A., 7th Cir.), 8 Am. B. R. 349, 115 Fed. 284, 53 C. C. A. 76. As to petition to review in case of orders pertaining to specifications in opposition to discharges see f (3) (ix) *Proceedings regarding discharge and composition*, ante, p. 537.

123a. *Matter of White* (C. C. A., 9th Cir.), 41 Am. B. R. 453, 248 Fed. 115.

124. In *re Whitener* (C. C. A., 5th Cir.), 5 Am. B. R. 198, 105 Fed. 180.

125. *Chesapeake Shoe Co. v. Seldner* (C. C. A., 4th Cir.), 10 Am. B. R. 466, 122 Fed. 585; *Rush v. Lake* (C. C. A., 9th Cir.), 10 Am. B. R. 455, 122 Fed. 561, revg. 7 Am. B. R. 96; *Dickson v. Nyman* (C. C. A., 1st Cir.), 7 Am. B. R. 154, 111 Fed. 726; *Postlethwaite v. Hicks* (C. C. A., 4th Cir.), 21 Am. B. R. 70, 165 Fed. 897. In the case of *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1179, it was held that a decree rendered upon a petition asserting a lien on the proceeds of a seat in a stock exchange which formerly belonged to the bankrupt was not "a judgment allowing or rejecting a debt or claim of \$500 or over," within subdivision 3 of subsection 25-a; In *re Mueller* (C. C. A., 8th Cir.), 14 Am. B. R. 265, 135 Fed. 711; *Schall v. Camors* (C. C. A., 5th Cir.), 41 Am. B. R. 78, 230 Fed. 6. See cases digested in Am. Bankr. Dig. § 1226.

reconsidering the allowance of a claim and disallowing a portion thereof, which resulted in the restoration and allowance of the claim as originally allowed.¹²⁶ An order directing a sale of the bankrupt's alleged homestead to satisfy the claim of a creditor thereon is within subdivision 3, and appealable.¹²⁷

An order summarily directing a third person to turn over to the trustee money or property in his possession is not appealable,¹²⁸ nor is a judgment which neither allows nor disallows any sum but only denies priority.^{129a} When a judgment or decree settles two or more distinct controversies, the acceptance of a sum of money, to which appellant is declared to be entitled by one portion of the judgment or decree, does not estop him from appealing from another and independent adjudication therein.¹²⁹

(II) *Amount involved*.—The amount involved is that which will be put in controversy by the appeal, and not the amount of the original claim.¹³⁰ Where the claim upon which the judgment is based amounts to five hundred dollars or over an appeal will lie.¹³¹

(III) *Validity or priority of lien*.—The rule is that where the appeal is from the allowance or disallowance of the claim, the validity of liens or priorities incidental thereto may be considered.¹³² Where a creditor seeks to estab-

Order remanding proceeding without decision on merits.—Where a district judge without passing on the merits of a proceeding before a referee for the allowance of a claim, sends the matter back with instructions to take testimony which had been offered and excluded, such order is not appealable. *Matter of Strauss* (C. C. A., 2d Cir.), 32 Am. B. R. 237, 211 Fed. 123.

126. *Kiskadden v. Steidle* (C. C. A., 6th Cir.), 29 Am. B. R. 346, 303 Fed. 375.

127. *Burrow v. Grand Lodge* (C. C. A., 5th Cir.), 13 Am. B. R. 543, 123 Fed. 708. But see *McCarty v. Coffin* (C. C. A., 5th Cir.), 18 Am. B. R. 148, 150 Fed. 307.

128. *In re Rose Shoe Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 725, 168 Fed. 39.

129a. *Matter of Zeis* (C. C. A., 2d Cir.), 39 Am. B. R. 880, 245 Fed. 737; *Matter of Monarch Acetylene Co.* (C. C. A., 2d Cir.), 39 Am. B. R. 380, 245 Fed. 741.

129. *Peck v. Richter* (C. C. A., 8th Cir.), 33 Am. B. R. 11, 217 Fed. 880, holding that a bankrupt who has filed three separate claims for administering the estate is entitled to a revision of the refusal of the referee to allow him anything on his second and third claim, although he has accepted an allowance under his first claim.

130. *Amount in controversy*.—In the case of *Gray v. Grand Forks Mercantile Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 780, 136 Fed. 344, it was held that the provisions of § 25-a, restricting appeals to the Circuit Court of Appeals from a judgment of the bankruptcy court, "allowing or rejecting a debt or claim of \$500.00 or over," has reference not to the amount of the original claim, but to the amount which will be put in controversy by the appeal. The court said: "The purpose of Congress in restricting the right of appeal was evidently to avoid inconvenience, delay and expense to claimants and bankrupt estates which would be disproportionate to the amount in controversy. When read with due regard to this purpose, the restrictions plainly has reference not to the amount of the original claim but to the amount of the allowance or rejection; that

is to the amount which will be put in controversy by the appeal."

131. *In re Dickson* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726; *In re Jourdan* (C. C. A., 1st Cir.), 7 Am. B. R. 193, 111 Fed. 726; *In re Groelzinger* (C. C. A., 3d Cir.), 11 Am. B. R. 467, 127 Fed. 124; *Cook, etc., Coal Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475; *Union Nat. Bank of Kansas City v. Neill* (C. C. A., 5th Cir.), 17 Am. B. R. 333, 149 Fed. 720; *In re Friend* (C. C. A., 7th Cir.), 13 Am. B. R. 505, 134 Fed. 778; *In re Cosmopolitas Power Co.* (C. C. A., 7th Cir.), 14 Am. B. R. 604, 137 Fed. 858; *Adams v. Deckers Valley Lumber Co.* (C. C. A., 4th Cir.), 29 Am. B. R. 42, 202 Fed. 48; *Matter of Monarch Acetylene Company* (C. C. A., 2d Cir.), 39 Am. B. R. 381, 245 Fed. 741; *Matter of Creech Bros. Lumber Co.* (C. C. A., 9th Cir.), 39 Am. B. R. 487, 240 Fed. 8.

132. *Cunningham v. German Ins. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 192, 103 Fed. 932; *In re Doran* (C. C. A., 6th Cir.), 18 Am. B. R. 760, 154 Fed. 467; *In re First Nat. Bank of Louisville* (C. C. A., 6th Cir.), 18 Am. B. R. 766, 155 Fed. 100; *In re Cosmopolitan Power Co.* (C. C. A., 7th Cir.), 14 Am. B. R. 604, 137 Fed. 858; *Livingston v. Heineman* (C. C. A., 6th Cir.), 10 Am. B. R. 30, 120 Fed. 786; *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711; *In re First Nat. Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62; *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1179.

Presentation of demand and lien.—The presentation for allowance of a demand against a bankrupt's estate is a step in bankruptcy proceedings as to which appeal is specially provided by section 25. If both a demand and a lien to secure it be presented at the same time the procedure for the former dominates, the lien is an incident, and the double presentation is also regarded as a step in the bankruptcy proceeding. *Century Savings Bank v. Robert Moody & Son* (C. C. A., 8th Cir.), 31 Am. B. R. 566, 209 Fed. 775.

lish the validity of a lien against property in the hands of the trustee by a proceeding in a court of bankruptcy, and such property exceeds \$500 in value, an appeal will lie from the decision of the court.¹²³ Whether the assertion of a lien in bankruptcy proceedings is in connection with a claim for a debt which it is alleged it secures, or a lien only upon the property, an appeal lies from a decision of a court of bankruptcy establishing the priority of liens.¹²⁴ But it must appear that the property came into the possession of the court through the direct operation of the adjudication in bankruptcy.¹²⁵ If the question of the lien or priority be involved in the appeal independent of the claim it should not be entertained.¹²⁶ Where a party seeks to intervene to establish an alleged equitable mortgage interest in the bankrupt's real property acquired through transactions with a third person, which interest is not connected in any way with the claim against the bankrupt estate, the order of the court dismissing the petition for intervention is not appealable under this

Order allowing claim and incidentally establishing lien of another.—The fact that a decree of a referee disallowing a claim incidentally established a lien and affected the interests of another claimant does not destroy the essential character of the proceeding, and an order reviewing the decree is reviewable by appeal under section 24a of the Bankruptcy Act. *Sterne v. Merchants' Nat. Bank* (C. C. A., 8th Cir.), 33 Am. B. R. 205, 216 Fed. 802.

Existence of alleged preferences.—An order which distinctly involves both the rejection and allowance of claims and also a controversy of fact, touching bankrupt's financial condition at the time claimant received alleged preferential payments, and the existence or not of reasonable cause on his part to believe that such payments would, if enforced, effect a preference, is reviewable by appeal. *Cooper v. Miller* (C. C. A., 6th Cir.), 30 Am. B. R. 194, 203 Fed. 383.

Decree denying claim to preference based upon levy.—The remedy of a claimant whose claim to a preference, based upon a levy upon the property of the bankrupt within four months before bankruptcy, has been denied, is by appeal and a petition to superintend and revise should be dismissed. *Home Bank for Savings v. Lohm* (C. C. A., 4th Cir.), 34 Am. B. R. 624, 223 Fed. 633.

133. *Coder v. Arts*, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772.

Value of property.—A decision of the district court as to the rights of a landlord and mortgage to priority in the proceeds of the sale of property amounting to \$675, is not an allowance or rejection of a claim over \$500, so as to authorize an appeal under this section, although the landlord claimed \$800 and the mortgagee claimed over \$2,000. *Bank of Hattiesburg v. Carter* (C. C. A., 5th Cir.), 36 Am. B. R. 749, 230 Fed. 127.

Appeal from order establishing priority of liens.—Where it is sought by appeal to review a judgment declaring appellants' mortgage liens to be inferior to mechanics' liens of the appellees, it is the amount of the ap-

pellants' liens respectively that determines their right to appeal, and not the amount of the several liens of the appellees. *New Hamp. Savings Bank v. Wichita Lumber Co.* (C. C. A., 8th Cir.), 33 Am. B. R. 1, 216 Fed. 721.

Claim secured by specific liens of less than \$500 each.—A judgment approving a claim of more than \$500, secured by separate and specific liens, none of which amount to \$500, is appealable. *Stuart v. Britton Lumber Co.* (C. C. A., 5th Cir.), 35 Am. B. R. 719, 227 Fed. 49.

134. *New Hampshire Savings Bank v. Wichita Lumber Co.* (C. C. A., 8th Cir.), 33 Am. B. R. 1, 216 Fed. 721.

135. Property in possession of court.—Where the effect of action taken by claimants in the District Court, as an ancillary tribunal, is to assert priorities, or liens against a fund in the possession of the court, which was not derived through the direct operation of the adjudication in bankruptcy, the action is not to secure a judgment allowing a debt or claim within the meaning of section 25-a(3). *Emerson v. Castor* (C. C. A., 6th Cir.), 37 Am. B. R. 719, 236 Fed. 29.

136. *In re Doran* (C. C. A. 6th Cir.), 18 Am. B. R. 760, 154 Fed. 467, where the claim itself was allowed and only the incident remained and it was held that appeal did not lie under § 25-a. *In re Cosmopolitan Power Co.* (C. C. A., 7th Cir.), 14 Am. B. R. 604, 137 Fed. 858; *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1179; *In re Rouse, Hazard & Co.* (C. C. A., 7th Cir.), 1 Am. B. R. 234, 91 Fed. 96; *In re Richards* (C. C. A., 6th Cir.), 3 Am. B. R. 145, 96 Fed. 935; *Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co.* (C. C. A., 6th Cir.), 4 Am. B. R. 183, 101 Fed. 699.

Claim of lien a priority.—In the case of *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1179, it appeared that a petition was filed asserting a lien on the proceeds of a seat in the New York Stock Exchange which formerly belonged to the bankrupt. This lien had not been insisted

clause.¹³⁷ But the Supreme Court has held that an intervention for the purpose of asserting a claim to property in the possession of the trustee is an intervention in equity, and a decree is reviewable by appeal, as where a claimant submits his claim to accounts in the possession of the trustee which he alleges were assigned to him.¹³⁸ An appeal will also lie from a judgment fixing the amount due on a secured claim.¹³⁹ And a judgment denying the right to file a claim as secured and make substituted proof thereof, after it had been allowed as unsecured in an amount exceeding \$500, is only reviewable by an appeal.¹⁴⁰ A judgment of the bankruptcy court that a chattel mortgage is not a valid lien and does not entitle a creditor to preference of payment out of the proceeds of the estate, is appealable,¹⁴¹ and so, also, is any decision of a bankruptcy court in a proceeding by a trustee to have certain adverse claims against, and liens upon the bankrupt estate declared void, and for a sale of the property free and clear of such liens.¹⁴² Likewise a decree of the District Court, rejecting a claim for rent, and allowing a lien covering a portion thereof, is appealable.¹⁴³

(IV) *Claims for fees and expenses.*—A claim for attorney's fees and expenses incurred by the trustee in the administration of the estate,¹⁴⁴ or by

on by the petitioners because of their impression that they had been effectually paid; no one having changed his position on the faith of their waiver, the District Court allowed the lien; the Circuit Court of Appeals held that this portion of the decree of the District Court was not subject to an appeal to the Circuit Court of Appeals. The court said: "The argument chiefly relied upon by the appellant is that this is an intervening petition to reach a fund in court and is not a proceeding in bankruptcy. Under the circumstances of this case it seems to us that the petition was incident to the claim, and was a bankruptcy proceeding under section 2, clause 7, within the meaning of section 25, regulating appeals in bankruptcy proceedings, and that the decree upon it was not 'a judgment allowing or rejecting a debt or claim of \$500.00 or over,' within § 25-a (3), and was not a ground of appeal." See also *Whitney Central Trust and Savings Bank v. U. S. Construction Co.* (C. C. A., 5th Cir.), 41 Am. B. R. 381, 250 Fed. 784.

¹³⁷ *In re Columbia Real Estate Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 441, 112 Fed. 643.

¹³⁸ *Houghton v. Burden*, 228 U. S. 161, 30 Am. B. R. 16, 57 L. Ed. 780. Followed in *Felck v. Stephens* (C. C. A., 6th Cir.), 41 Am. B. R. 333, 250 Fed. 181.

¹³⁹ *In re Roche* (C. C. A., 5th Cir.), 4 Am. B. R. 369, 101 Fed. 956; *Livingston v. Heineman* (C. C. A., 6th Cir.), 10 Am. B. R. 39, 120 Fed. 756, holding that an order denying a motion by the trustee to expunge a claim unless preferences received thereon are surrendered and directing the return to the creditor of the preferences surrendered is appealable.

¹⁴⁰ *Matter of Lane Lumber Co.* (C. C. A., 9th Cir.), 33 Am. B. R. 497, 217 Fed. 546.

¹⁴¹ *Claim of assets under chattel mortgage.*—A judgment of a bankruptcy court entered upon a claim of a bank under a chattel mortgage to assets in possession of a trustee in bankruptcy is reviewable by appeal. *Loefer v. Savings Deposit Bank & Trust Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 845, 163 Fed. 212; *Dodge v. Norlin* (C. C.

A., 8th Cir.), 13 Am. B. R. 176, 123 Fed. 363; *Matter of Russell* (C. C. A., 9th Cir.), 41 Am. B. R. 234, 247 Fed. 96. Where, in answer to a trustee's petition for leave to sell the bankrupt's stock in trade, a creditor claimed a lien upon part of the assets under chattel mortgages which were held void, the order for leave to sell is reviewable only by appeal. *Knapp v. Milwaukee Trust Co.* (C. C. A., 7th Cir.), 20 Am. B. R. 671, 162 Fed. 675.

A contest in a bankruptcy court over the distribution of a fund in the possession of a trustee in bankruptcy, derived from the sale of property held by a State court to have been conveyed by the bankrupt in fraud of creditors, is a controversy arising in bankruptcy proceedings, and hence is appealable as other cases in equity under the Circuit Court of Appeals Act to the Circuit Court of Appeals. *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583, affg. 27 Am. B. R. 545 and 29 Am. B. R. 935.

¹⁴² *Thomas v. Wood* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585.

Adverse claims.—Decrees of bankruptcy courts in respect to claims against property in the possession of bankrupts at the time of adjudication are appealable. *Mound Mines Co. v. Hawthorne* (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882; *Franklin v. Stoughton Wagon Co.* (C. C. A., 8th Cir.), 22 Am. B. R. 63, 168 Fed. 857; *Rison v. Parham* (C. C. A., 4th Cir.), 33 Am. B. R. 571, 219 Fed. 176. Compare *In re Rose Shoe Mfg. Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 725, 168 Fed. 39.

¹⁴³ *Courtney v. Trust Co.* (C. C. A., 6th Cir.), 33 Am. B. R. 400, 219 Fed. 57.

¹⁴⁴ *Davidson v. Friedman* (C. C. A., 6th Cir.), 15 Am. B. R. 489, 140 Fed. 853; *In re Blanchard Shingle Co.* (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 311. *Contra: In re Curtis* (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784.

creditors in contesting claims of others, to the benefit of the estate, is not appealable;¹⁴⁵ although it may be otherwise where the claim was for services rendered to the bankrupt either before or after adjudication.¹⁴⁶ So, also, the rejection of charges against a receiver for expenses incurred under his orders or contracts looking to the care or preservation of the bankrupt estate, is within the discretion of the bankruptcy court, and is not appealable.¹⁴⁷

d. Time of taking appeal.—(1) **IN APPEALS IN BANKRUPTCY PROCEEDINGS.**—An appeal under this subsection in a bankruptcy proceeding, as distinguished from an appeal in a controversy arising in bankruptcy proceedings as provided in § 24-a, can be taken only from a district court sitting in bankruptcy to the circuit court of appeals of its circuit. Such an appeal must be taken, as expressly provided in subsection *a*, within ten days after the judgment was rendered.¹⁴⁸ But, if the time has expired, the district court may in a meritorious case grant a reargument, so that the ten days may run from the second order.¹⁴⁹ But a rehearing for the purpose of allowing an appeal should not be granted unless clearly warranted by the facts,¹⁵⁰ nor unless the motion for a rehearing is made within the required time.¹⁵¹ It has been held that it should not be granted if the sole purpose is to extend the time of taking an appeal.¹⁵² The time may not be extended by the subsequent entry of an alias adjudication;¹⁵³ nor by any other subsequent proceeding in the case.¹⁵⁴ The time begins

145. *Ohio Valley Bank Co. v. Switzer* (C. C. A., 6th Cir.), 18 Am. B. R. 669, 153 Fed. 362.

146. *Pratt v. Bothe* (C. C. A., 6th Cir.), 12 Am. B. R. 529, 130 Fed. 670.

147. *O'Brien v. Ely* (C. C. A., 5th Cir.), 28 Am. B. R. 247, 195 Fed. 64.

148. Compare, for time under the former law, *Sedgwick v. Fridenberg*, Fed. Cas. 12,611; *Wood v. Bailey*, 21 Wall. 640. See cases cited Am. Bank. Dig., §§ 1235, 1236.

Time limit.—An appeal from a judgment allowing a claim must, under section 25a of the Bankruptcy Act, be taken within ten days after the judgment is rendered, the limitation contained in said section being both distinct and imperative. In *re Martin* (C. C. A., 6th Cir.), 29 Am. B. R. 935, 201 Fed. 31, *affd. sub nom. Globe Bank & Trust Co. v. Martin*, 226 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583; *Massachusetts Bonding & Ins. Co. v. Kemper* (C. C. A., 6th Cir.), 34 Am. B. R. 80, 220 Fed. 847; *Southern Cotton Oil Co. v. Elliott* (C. C. A., 6th Cir.), 33 Am. B. R. 375, 218 Fed. 567; *Rhame v. Southern Cotton Oil Co.* (C. C. A., 4th Cir.), 35 Am. B. R. 732, 230 Fed. 403; *Barton Lumber & Brick Co. v. Prewitt* (C. C. A., 8th Cir.), 36 Am. B. R. 718, 231 Fed. 919; *Matter of Zels* (C. C. A., 2d Cir.), 39 Am. B. R. 380, 245 Fed. 737; *Matter of Stafford* (D. C., Conn.), 39 Am. B. R. 469, 240 Fed. 155; *Matter of Monarch Acetylene Company* (C. C. A., 2d Cir.), 39 Am. B. R. 818, 245 Fed. 741; *Yontsey v. Niswonger* (C. C. A., 6th Cir.), 44 Am. B. R. 109, 258 Fed. 16.

When last day falls on Sunday it is not counted. *Grafton v. Meikleham* (C. C. A., 5th Cir.), 40 Am. B. R. 433, 246 Fed. 737.

149. In *re Wright* (D. C., Mass.), 3 Am. B. R. 184, 96 Fed. 820; *s. c.* on appeal, In *re Worcester County* (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808; In *re McCall* (C. C. A., 6th Cir.), 16 Am. B. R. 670, 141 Fed. 898; *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897; *Stickney v. Will*, 23 Wall. 150; *Todd v. Alden* (C. C. A., 8th Cir.), 40 Am. B. R. 823, 245 Fed. 462.

150. In *re Hudson Clothing Co.* (D. C., Me.), 15 Am. B. R. 254, 140 Fed. 49. It has been held that a rehearing will not be granted upon the pretense of reconsidering the merits for the

purpose of reviving the petitioners' right of appeal. In *re Girard Glazed Kid Co.* (D. C. Pa.), 12 Am. B. R. 295, 129 Fed. 841.

151. *Conboy v. Nat. Bank*, 203 U. S. 141, 16 Am. B. R. 775, 51 L. Ed. 128; In *re Alden Mac Co.* (C. C. A., 7th Cir.), 10 Am. B. R. 378, 13 Fed. 415. In the case of *Morgan v. Benedict* (C. C. A., 4th Cir.), 19 Am. B. R. 601, 157 Fed. 232, the time for taking an appeal had expired and it was held that such time could not be extended by a petition for a rehearing filed a month later; *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897, holding that the time to appeal from an order sustaining a demurrer to a petition for an involuntary adjudication does not begin to run until the determination of a petition for a rehearing filed in time, which makes the judgment dismissing the bankruptcy proceedings final; *Rode v. Horn & Phipps* (C. C. A., 6th Cir.), 37 Am. B. R. 827, 195 Fed. 414.

152. *West v. McLaughlin Co.* (C. C. A., 8th Cir.), 20 Am. B. R. 654, 162 Fed. 124.

153. In *re Berkebile* (C. C. A., 2d Cir.), 19 Am. B. R. 277, 144 Fed. 577.

154. *Brady v. Bernard & Kittinger* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 576.

A petition by objecting creditors, asking that an order of discharge be opened so that they may appeal therefrom, filed after the period for appeal has expired, does not extend the time for taking the appeal. *Matter of Stafford* (D. C., Conn.), 39 Am. B. R. 469, 240 Fed. 155.

Judgment entered nunc pro tunc.—The period within which an appeal may be taken dates from the actual entry of the judgment or order. Hence, when a judgment has been filed *nunc pro tunc* as of the date of the opinion of the court, the time to appeal dates from the entry and not from the date on which the judgment is ordered to take effect. *Matter of Stafford* (D. C., Conn.), 39 Am. B. R. 469, 240 Fed. 155.

Motion to vacate.—The time to appeal from an order of adjudication may not be indirectly extended by a motion to vacate the adjudication. In *re Goldberg* (C. C. A., 2d Cir.), 31 Am. B. R. 828, 167 Fed. 808.

A request for an extension of time within which to file notice of appeal to the Circuit

from the actual entry of the judgment by delivering the same to the clerk,¹⁵⁵ or in the case of the denial of a motion for a rehearing from the time of the entry of the order upon the records of the court.¹⁵⁶ It is the time of the presentation of the application or petition which controls, and the appeal may not be dismissed because the order allowing it was made more than ten days subsequent to making and filing the decree.¹⁵⁷

(2) IN APPEALS IN CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.—Appeals in "controversies arising in bankruptcy proceedings" under § 24-a must be taken as in other cases in equity under the circuit court of appeals act.¹⁵⁸ The ten-day limitation prescribed in § 25-a does not therefore affect appeals in independent suits to recover assets.¹⁵⁹ The ten-day limit, although applicable when a reversal of an order disallowing a general claim is sought, does not apply to an appeal from a denial of a lien on the property of the bankrupt, for the assertion of a lien may be regarded as presenting a controversy over the title to or rights in specific property, and the appeal is entitled to be considered as taken under § 24-a.¹⁶⁰

c. Parties to appeal.—An appeal must be taken by a party aggrieved.¹⁶¹ All the parties interested in the proceeding should be made parties to the appeal and should be given notice of its pendency and hearing.¹⁶² On an appeal from an order of adjudication the bankrupt should be made a party, but where it appears that, after a motion to dismiss the appeal on the ground that the bankrupt was not a party, the bankrupt voluntarily entered his appearance waiving notice of appeal and other proceedings the appeal should not be dismissed.¹⁶³ Where an appeal is taken from a decree denying an adjudication and dismissing the petition, all creditors who joined in the petition, including those who have intervened under § 59-f, must unite in the appeal, unless an order of reverence has been made as to them, otherwise the appellate court has no jurisdiction.¹⁶⁴ On an appeal from an order confirming a composition, neither consenting creditors nor a representative part of them are necessary parties.^{164a} Where separate judgments are rendered at the same time an appeal from one of them may be brought without making the persons interested in the other judgments parties to the appeal.¹⁶⁵ Where the creditors as a body are aggrieved, the trustee only should appeal.¹⁶⁶ But this right

Court of Appeals should not be granted, although made within ten days after judgment. *Rhame v. Southern Cotton Oil Co.* (C. C. A., 4th Cir.), 35 Am. B. R. 732, 230 Fed. 403.

155. *Peterson v. Nash Bros.* (C. C. A., 8th Cir.), 7 Am. B. R. 181, 112 Fed. 311.

156. *In re McCall* (C. C. A., 6th Cir.), 16 Am. B. R. 670, 145 Fed. 898.

157. *Robertson Banking Co. v. Chamberlain* (C. C. A., 5th Cir.), 36 Am. B. R. 193, 228 Fed. 580.

158. *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583 *In re Gold* (C. C. A., 7th Cir.), 31 Am. B. R. 18, 210 Fed. 410; *Youtsey v. Niswonger* (C. C. A., 6th Cir.), 44 Am. B. R. 109, 258 Fed. 16.

159. *Boonville, etc., v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 391; *Steele v. Buel* (C. C. A., 8th Cir.), 5 Am. B. R. 165, 104 Fed. 368; *Stelling v. Jones Lumber Co.* (C. C. A., 7th Cir.), 8 Am. B. R. 521, 116 Fed. 261; *Southern Cotton Oil Co. v. Ellotte* (C. C. A., 6th Cir.), 33 Am. B. R. 375, 218 Fed. 567; *Massachusetts Bonding & Insurance Co. v. Kemper* (C. C. A., 6th Cir.), 34 Am. B. R. 80, 220 Fed. 847.

160. *Massachusetts Bonding & Ins. Co. v. Kemper* (C. C. A., 6th Cir.), 34 Am. B. R. 80, 220 Fed. 847; *Bank of Ragland v. Hudson* (C. C. A., 5th Cir.), 41 Am. B. R. 61, 247 Fed. 241.

161. *In re Roche* (C. C. A., 5th Cir.), 4 Am. B. R. 369, 101 Fed. 956; *Stevens v. Nave-McCord Mercantile Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71.

Cross-Appeal.—Where a trustee in bankruptcy does not appeal from the order of the court below he cannot raise any independent question on the appeal. *Sanborn Cutting Co. v. Paine* (C. C. A., 9th Cir.), 40 Am. B. R. 525, 244 Fed. 672.

162. *Stevens v. Nave-McCord Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71, holding that all parties aggrieved by a final decision, whereby a petition in bankruptcy is dismissed, may join in an appeal although some complain of one alleged error and some of another, because on such an appeal all prior rulings are reviewable.

163. *Hill v. Western Electric Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 332, 214 Fed. 243.

164. *Matter of Dandridge & Pugh* (C. C. A., 7th Cir.), 31 Am. B. R. 15, 209 Fed. 838.

164a. *Matter of Gottlieb* (C. C. A., 2d Cir.), 45 Am. B. R. 180, 262 Fed. 730.

165. *Love v. Export Storage Co.* (C. C. A., 6th Cir.), 16 Am. B. R. 171, 143 Fed. 1.

166. *Foreman v. Burleigh* (C. C. A., 1st Cir.), 6 Am. B. R. 230, 109 Fed. 313.

is not, strictly speaking, limited to him. It seems that a creditor may appeal,¹⁶⁷ and, if the trustee refuses to do so, the district court has the power, on a proper application, either to order him to take the appeal, or to direct that a creditor be permitted to do so.¹⁶⁸

f. Practice.—(1) **IN GENERAL.**—The practice on appeals under subsection a conforms in all respects to other appeals in equity to a circuit court of appeals.¹⁶⁹ General Order XXXVI should be consulted; also the rules of each circuit.¹⁷⁰ The appeal is instituted by a petition, accompanied by an assignment of errors, presented to and allowed “by a judge of the court appealed from or the court appealed to.” Section 997 of the Revised Statutes makes an assignment of errors, a prayer for reversal, and a citation to the adverse party essential parts of the record upon which the rulings of a trial court may be invoked in the appellate courts of the United States.

(2) **ASSIGNMENT OF ERRORS.**—The filing of an assignment of errors is indispensable to the perfection of the appeal.¹⁷¹ If the assignment of errors is

167. *In re Roche* (C. C. A., 5th Cir.), 4 Am. B. R. 369, 101 Fed. 956; *Chatfield v. O'Dwyer* (C. C. A., 8th Cir.), 4 Am. B. R. 313, 101 Fed. 797; *Matter of National Pressed Brick Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 224, 212 Fed. 878.

Right of creditor in opposition to be heard.—An objecting creditor who has filed objections against discharge and not withdrawn them is entitled to be heard by the Circuit Court of Appeals on their merits; his rights cannot be prejudiced by the vote of a majority of the other creditors expressing satisfaction with a proposed compromise of conflicting claims. *Matter of Doyle* (C. C. A., 2d Cir.), 34 Am. B. R. 28, 220 Fed. 434.

168. *McDaniel v. Stroud* (C. C. A., 4th Cir.), 5 Am. B. R. 685, 106 Fed. 486; *Foreman v. Burleigh* (C. C. A., 1st Cir.), 6 Am. B. R. 230, 109 Fed. 313.

Where a trustee, though requested, refuses to appeal from an order which affirmed an order of a referee allowing a contested claim, the court in its discretion may allow a dissatisfied creditor to appeal, though the better practice would be to order the trustee to appeal or to allow the dissatisfied creditor to appeal in his name, being indemnified in either case against costs by such creditor. *Ohio Valley Bank Co. v. Mack et al.* (U. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155; *Matter of National Pressed Brick Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 224, 212 Fed. 878.

169. Gen. Order XXXVI (1) provides that “Appeals from a court of bankruptcy to a circuit court of appeals shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided by the act, by the rules governing appeals in equity in the courts of the United States.” See also *In re Baker* (C. C. A., 1st Cir.), 4 Am. B. R. 778, 104 Fed. 287; *In re Robertshaw Co.* (D. C., Pa.), 14 Am. B. R. 341, 135 Fed. 220; *Board of Commissioners v. Hurley* (C. C. A., 8th Cir.), 22 Am. B. R. 209, 160 Fed.

92; *In re Quality Shop* (C. C. A., 7th Cir.), 29 Am. B. R. 854, 202 Fed. 196. Such general order does not apply to appeals in controversies in bankruptcy proceedings under § 24a. *Baker Ice Machine Co. v. Bailey*, 31 Am. B. R. 513, 209 Fed. 844.

It is the practice in the eighth circuit not to anticipate a further appeal but to await requests for findings and conclusions under General Order XXXVI, and if the decree has then been entered, to vacate it so that the order may be observed. *Century Savings Bank v. Robert Moody & Son* (C. C. A., 8th Cir.), 31 Am. B. R. 586, 209 Fed. 775.

170. No forms are suggested in “Supplementary Forms,” *post*, for the reason that the customary forms on appeals and writs of error under the Federal practice are available and should be used. For forms to be used on appeals to the Circuit Court of Appeals see *Hagar & Alexander's Bankruptcy Forms* (2d ed.) Nos. 358-376.

171. Filing of assignment of errors.—In the case of *Lockman v. Lang* (C. C. A., 8th Cir.), 11 Am. B. R. 597, 128 Fed. 279, the court said: “Section 997 of the Revised Statutes makes the assignment of errors, a prayer for reversal and the citation to the adverse party essential parts of the record upon which a review of the rulings of a trial court may be invoked in the appellate courts of the United States. When an appeal is prayed for and allowed in open court the prayer for reversal and the citation may be waived, but the assignment of errors is indispensable to the perfection of the appeal. Rule 11 of this court provides that ‘The plaintiff in error or appellant shall file with the clerk of the court below with his petition for a writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed.’ The reasons for this rule and the importance of compliance with it have been stated in numer-

so defective as not to indicate the error complained of, the court may not take cognizance of them,¹⁷² but it is competent for the court to notice a plain error in the absence of any assignment.^{172a} A single assignment which is party good and partly bad may not be sustained.¹⁷³ An amendment will be allowed when the special circumstances justify it, and the application is promptly made on discovery of the mistake.¹⁷⁴

(3) BOND.—If the appellant is not the trustee,¹⁷⁵ an appeal bond is properly executed either then or on the perfection of the appeal in the appellate court, and must be approved by the judge and filed.¹⁷⁶ It has been held that since the practice on appeals in bankruptcy proceedings under § 25-a are controlled by the rules in equity proceedings, the giving of a bond is not a jurisdictional requisite.¹⁷⁷ A bond on appeal from an order of involuntary adjudication is sufficient although it does not run to all the petitioning creditors.¹⁷⁸ Where an appeal is allowed within the prescribed time, it will not be dismissed because of a delay of a few days in filing the bond.¹⁷⁹ Permission may be given to a bankrupt to appeal *in forma pauperis* when necessary to safeguard his rights.^{179a}

(4) CITATION.—When the appeal is allowed, a citation is issued to and served on the opposite party,¹⁸⁰ although this is not a jurisdictional

ous opinions of this court. In *Frame v. Portland Gold Min. Co.*, 47 C. C. A. 664, 108 Fed. 750, this court dismissed a writ of error because the assignment of errors was not filed until two days after the issue of the writ. In *Webber v. Mihills*, 124 Fed. 64, we dismissed an appeal because the assignment of errors was not filed until seven days after the appeal was allowed. . . . The assignment of errors in this case was not filed until the seventh day after the appeal was allowed, and under Rule 11 and the uniform decisions of this court the appeal must be dismissed."

Failure to file assignment of error under Rule 11.—Under Rule 11 of the Circuit Court of Appeals a failure to file assignment of error in cases in which a writ of error is the prescribed statutory method of securing a review of the judgment below, or in an appeal, does not invalidate the writ, or appeal, or prevent the court, into which it is returnable, from acquiring jurisdiction. Where a trustee in open court gives notice of his intention to appeal to the Circuit Court of Appeals, which follows the judge's signature to the decree, but does not file assignments of error until four days later when he presents a formal petition for appeal and files his assignments of error, the appeal will be deemed to have been taken and allowed on the date of the notice in open court, and the assignments of error, if necessary, properly in the record, and a motion to dismiss will not be allowed. *Bernard v. Lea* (C. C. A., 9th Cir.), 31 Am. B. R. 436, 210 Fed. 583.

172. *Flickinger v. First Nat. Bank* (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162, holding that in special circumstances an amendment will be allowed. A defective writ of error is amendable. *Long v. Farmers' State Bank* (C. C. A., 8th Cir.), 17 Am. B. R. 108, 147 Fed. 360.

172a. *Grafton v. Meckleham* (C. C. A., 5th Cir.), 40 Am. B. R. 433, 246 Fed. 737.

173. In the case of *Acme Food Co. v. Meier* (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74, the court said: "The eleventh rule of this court requires that each error intended to be assigned shall be separately and particularly set out, and when it is to the charge, the assignment shall set out the part referred to *totidem verbis*. We have already ruled that this assignment, so far as it covers the questions last alluded to, is not well taken. We cannot sustain a single assignment as partly good and partly bad without violating our rules."

174. *Flickinger v. First Nat. Bank* (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162.

175. *Bankr. Act*, § 25-a.

176. R. S., §§ 1000, 1001; *Peugh v. Davis*, 110 U. S. 227, 28 L. Ed. 127; *Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144. See *Williams Bros. v. Savage* (C. C. A., 4th Cir.), 9 Am. B. R. 720, 120 Fed. 497.

177. *In re Quality Shop* (C. C. A., 7th Cir.), 29 Am. B. R. 854, 202 Fed. 196; *In re Hill Co.* (C. C. A., 7th Cir.), 17 Am. B. R. 517, 148 Fed. 832.

Security for costs.—There is no statute, rule or settled practice giving a respondent or appellee the right to apply for security for costs on a petition to review in matter of law the proceedings of the District Court for Porto Rico in a bankruptcy case. *Matter of Vidal* (C. C. A., 1st Cir.), 35 Am. B. R. 806; 230 Fed. 603.

178. *Flickinger v. First Nat. Bank* (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162.

179. *Columbia Iron Works v. National Lead Co.* (C. C. A., 6th Cir.), 11 Am. B. R. 340, 127 Fed. 99; *In re Hill Co.* (C. C. A., 7th Cir.), 17 Am. B. R. 517, 148 Fed. 832.

179a. *Henkin v. Fousek* (C. C. A., 8th Cir.), 45 Am. B. R. 172, 262 Fed. 957.

180. R. S., §§ 998, 999. Compare also *Jacobs v. George*, 150 U. S. 415, 37 L. Ed. 1127.

requisite.¹⁸¹ It has been held that the citation may be waived.¹⁸² The citation should give the names of all the applicants for the writ.¹⁸³ Citations should issue to all parties having an interest in the controversy; if parties are omitted the court may direct the issuance of an alias citation to them, and time for its service will be allowed if application be made in due time.¹⁸⁴ Defects in citations may be cured after the time limited for taking an appeal.¹⁸⁵

(5) **PERFECTING APPEAL.—(I) In general.**—The appeal is perfected by the giving and approval of the bond, and the issue of citation. The authorities are conflicting as to whether this must be done within ten days. There are a number of cases holding positively that the appeal is not taken within the prescribed time unless so perfected within the ten days.¹⁸⁶ On the other hand it has been held that the failure to perfect the bond and issue citation within the time prescribed for the appeal does not furnish ground for a dismissal of the appeal.¹⁸⁷ The time to appeal begins to run from the date of the entry of the order upon the records of the court.¹⁸⁸

(II) **Record to be certified; contents.**—After the filing of the bond and issue of citation the record is certified to the court and printed; the case is then brought on and argued in the usual way.¹⁸⁹ The rule of the circuit court of appeals provides that "no case will be heard until a complete record, containing in itself and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed."¹⁹⁰ There should be a substantial compliance with this require-

181. *In re Quality Shop* (C. C. A., 7th Cir.), 29 Am. B. R. 854, 202 Fed. 196; *In re Hill Co.* (C. C. A., 7th Cir.), 17 Am. B. R. 517, 148 Fed. 832.

182. *Lockman v. Lang* (C. C. A., 8th Cir.), 11 Am. B. R. 597, 128 Fed. 279.

183. *Kerch v. United States* (C. C. A., 1st Cir.), 22 Am. B. R. 544, 171 Fed. 366.

184. *Gray v. Grand Forks Mercantile Co.*, (C. C. A., 8th Cir.), 14 Am. B. R. 780, 138 Fed. 344, 70 C. C. A., 634; *Lockman v. Lang* (C. C. A., 8th Cir.), 11 Am. B. R. 597, 128 Fed. 279.

185. *In re Hill Co.* (C. C. A., 7th Cir.), 17 Am. B. R. 517, 148 Fed. 832.

186. *Norcross v. Nave* (C. C. A., 8th Cir.), 4 Am. B. R. 317, 101 Fed. 796; *Kenova Loan & Trust Co. v. Graham* (C. C. A., 4th Cir.), 14 Am. B. R. 313, 135 Fed. 717; *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711; *In re McCall* (C. C. A., 6th Cir.), 16 Am. B. R. 670, 145 Fed. 898.

187. *Lockman v. Lang* (C. C. A., 8th Cir.), 12 Am. B. R. 497, 132 Fed. 1; *Gray v. Mercantile Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 780, 138 Fed. 344; *In re Quality Shop* (C. C. A., 7th Cir.), 29 Am. B. R. 854, 202 Fed. 196; *Robertson Banking Co. v. Chamberlain* (C. C. A., 5th Cir.), 36 Am. B. R. 198, 228 Fed. 500, holding in effect that the filing of the petition for an appeal within the prescribed time is sufficient.

Curing defects in bond and citation.—In the case of *Columbia Iron Works v. National Lead Co.* (C. C. A., 6th Cir.), 11 Am. B. R. 340, 127 Fed. 99, the court said: "It appears that the appeal was prayed and allowed within ten days as prescribed by the act, but that the bond was not filed nor the

citation issued and served until a few days after the expiration of the ten days. But the general rule is that when an appeal is allowed within the time prescribed by law, it is sufficient for the purpose of moving the case though it is necessary in order to perfect the appeal, that a bond should be filed and that a citation should be issued and served where, as in this case, the appeal is not prayed in open court. The filing of the bond and the service of the citation are steps to be taken in perfecting the appeal, and if these steps are taken before the motion to dismiss the appeal is made, the court will ordinarily decline to dismiss the appeal because of the delay in filing the bond and serving the citation. In the present case the delay was for a few days only and we do not think the interests of the opposite party were to any appreciable extent impaired thereby. The motion to dismiss upon that ground is therefore denied." See also *In re Hill* (C. C. A., 7th Cir.), 17 Am. B. R. 517, 148 Fed. 832, holding that a citation and bond are not jurisdictional requisites, and defects therein may be cured after the time limited for taking an appeal.

188. So held in respect to an appeal from an order confirming a composition. *In re McCall* (C. C. A., 6th Cir.), 16 Am. B. R. 670, 145 Fed. 898.

189. As to practice on certification of record see *In re Robertshaw Mfg. Co.* (D. C., Pa.), 14 Am. B. R. 341, 135 Fed. 220; *Cook, etc., Coal Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475.

Delay excused.—Where both parties and the district judge appear to have acted under a misapprehension as to the return day of a citation, and the appellant was prompt in docking the case and filing the record after the statement of the evidence was signed by the district judge, the appeal should not be dismissed under court rule for the delay, although the time was not properly enlarged as prescribed by said rule. *Grafton v. Melkiesham* (C. C. A., 5th Cir.), 40 Am. B. R. 433, 246 Fed. 737.

190. Rules of Circuit Court of Appeals, No. 14.

ment.¹⁹¹ It is a common practice for the parties to stipulate that certain portions of the record should be certified to the appellate court; where such a stipulation is entered into parts of the record may be certified, although of course the record must be sufficient to enable the appellate court to pass upon the questions submitted.¹⁹² The bankruptcy court is not required to find as to the facts and the record need not contain findings of facts. It is preferable, however, to include such findings as an aid to the appellate court.¹⁹³ It is sufficient if all the evidence on which the district court determined the question is contained in the record.¹⁹⁴ A proceeding in bankruptcy is a proceeding in equity and the taking of testimony therein and the review by appeal are governed by the practice which obtains in suits in equity except where otherwise specified; all the evidence offered by either party should be taken and recorded and, in case of an appeal, be returned to the appellate court. The evidence which is held by the referee or district court to be incompetent, irrelevant or immaterial should be included so that the appellate court may render its opinion as to whether the evidence rejected should or should not have been received.¹⁹⁵ The appellate court need not consider errors not specifically assigned,¹⁹⁶ though this is, of course, discretionary. The record should show when the appeal was perfected.¹⁹⁷ The court from which an appeal is taken may not interfere in the discretion allowed to the appellant in designating the record to be certified.¹⁹⁸ The record should disclose the

191. *Cook, etc., Coal Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475; *In re Robertshaw Mfg. Co.* (D. C., Pa.), 14 Am. B. R. 341, 135 Fed. 220; *Flickinger v. First Nat. Bank* (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162; *Devries v. Shanahan* (C. C. A., 4th Cir.), 10 Am. B. R. 518, 122 Fed. 629; *In re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935.

192. *In re Robertshaw Mfg. Co.* (D. C., Pa.), 14 Am. B. R. 341, 135 Fed. 220; *Cunningham v. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 192, 103 Fed. 932.

Record containing no evidence.—An appeal to the Circuit Court of Appeals from an order or decree denying an adjudication and dismissing an involuntary petition cannot be entertained where the record contains none of the testimony, either in form or substance, returned by the referee and passed upon by the District Court. *Matter of Murphy* (C. C. A., 9th Cir.), 36 Am. B. R. 712, 229 Fed. 988.

193. *In re Meyers* (D. C., N. Y.), 5 Am. B. R. 4, 105 Fed. 353.

Necessity of special finding.—The circuit court of appeals in the second circuit has pointed out that in the absence of special findings the court cannot tell except by inference what facts were or were not found, but must examine all the evidence and determine whether the decree of the court below was right. *Van Iderstine v. National Discount Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 345, 174 Fed. 518, *affd.* 227 U. S. 575, 29 Am. B. R. 478, 57 L. Ed. 652.

194. *Cunningham v. German Ins. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 192, 103 Fed. 932.

195. Evidence objected to and ruled out.—*In the case of First National Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21

Am. B. R. 436, 165 Fed. 852, the court said: "If evidence is objected to and ruled out it must nevertheless be written down and preserved in the record, subject to the objection, or the ruling cannot be considered in the appellate court. From the general rule that all evidence offered must be taken and preserved, the evidence of a privileged witness, evidence plainly privileged and evidence which clearly and affirmatively appears to be so incompetent, irrelevant or immaterial that it would be an abuse of the process or power of the court to compel its production or to permit its introduction, are excepted. Referees, other officers taking testimony and the district court, are governed by the same rule of practice in the taking of evidence and the hearing of controversies in bankruptcy, where the reason for the rule is much stronger than in ordinary suits in equity, because many of the orders and decrees in bankruptcy are reviewable, first in the district court and again in the court of appeals, and the delays would be intolerable if it were necessary for each court to remand for further testimony whenever it found that excluded evidence should have been received."

196. *Boonville, etc., v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891; *In re Guttererson* (D. C., Mass.), 14 Am. B. R. 495, 136 Fed. 698.

197. *Williams Bros. v. Savage* (C. C. A., 4th Cir.), 9 Am. B. R. 720, 120 Fed. 497.

198. Designation of parts of record.—*In the case of In re Robertshaw Mfg. Co.* (D. C., Pa.), 14 Am. B. R. 341, 135 Fed. 220, the court said: "The petition of the Imperial Woolen Co. upon which this rule was granted, sets forth such parts of the record as they regard sufficient for a full and com-

appearances by the parties, but it will be presumed that the appearances required to be entered by objecting creditors under General Order XXXII were duly and properly entered where no objection thereto had been urged in the court below.¹⁹⁹ Where the record is incomplete the appeal should not be dismissed but the record should be completed upon motion by the appellee to compel the appellant to file a transcript of such other papers and evidence as are deemed necessary.²⁰⁰ If it appears that books and other exhibits cannot be transcribed or represented by photographic copies, an order may be made to present such books and exhibits to the appellate court as a part of the return.²⁰¹ The certification must be made by the clerk of the district court and not by the referee.²⁰²

(6) **FORCE AND EFFECT OF FINDINGS OF FACT.**—In conformity with the rule in equity the circuit court of appeals will not interfere with findings of facts by the district judge, or by a referee, affirmed by a district court, unless the findings are clearly erroneous, or, as it is sometimes expressed, manifestly against the weight of evidence.²⁰³ When the court has considered conflicting

plete understanding of the case in the appellate court, and we are of the opinion that their judgment is right in this respect, but we know of no law which authorizes the court from which an appeal is taken, to designate what records in the court below shall be certified upon which the appellate court shall determine the appeal; in fact, the judge of the court from which the appeal is taken ought not in the least to interfere in the discretion allowed by the general terms used in the act of Congress and rules of court in designating the record to be certified in cases of appeal, as his judgment is to be reviewed and his opinion of the importance and relevancy of matters contained in the record might in the estimation of counsel for one side or the other be as faulty as it is claimed his judgment is from which an appeal is taken; and if an order of the court from which the appeal is taken should have the effect of restricting the record in all cases where such a defect had been made, there would be the possibility of a feeling upon the one side or the other that they had not secured a fair hearing on the full record."

199. *Shaffer v. Koblegard Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 898, 183 Fed. 71.

200. *Flickinger v. First Nat. Bank* (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162.

Cost of supplying additional matter.—Where on the appeal by the debtor from an adjudication in involuntary proceedings it appears that an alleged amount of evidence in the case has not been inserted in the record because claimed by the appellant to be immaterial on the appeal, a motion of the appellee to include such evidence in the record will be allowed, with the reservation of power in the appellate court to ultimately determine who shall pay the cost incident to the supplying of such additional matter. *Herman Keck Mfg. Co. v. Lorsch* (C. C. A., 6th Cir.), 24 Am. B. R. 705, 179 Fed. 485.

Remedy for incomplete record.—When the certificate of the clerk of the district court does not show that the record is a full and complete record of the entire proceedings, the appeal should not be dismissed, but if it does not appear by stipulation or otherwise that the record contains all that is necessary to the determination of the matters involved in an appeal, and if the appellee is not content with the transcript as filed, he should promptly move the court to require the appellant to complete the record by filing a transcript of such other papers in evidence as he deems necessary and points out. The motion papers should show that the documents and proofs desired constitute a part of the record upon which the judgment of the district court was rendered, and not simply that such documents and proofs constitute the original evidence upon which the referee made the findings which were subsequently reviewed by the district judge. *Cunningham v. German Insurance Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 192, 103 Fed. 932.

201. *Herman Keck Mfg. Co. v. Lorsch* (C. C. A., 6th Cir.), 24 Am. B. R. 705, 179 Fed. 485.

202. *Cook, etc., Coal Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475.

203. *In re Noyes* (C. C. A., 1st Cir.), 11 Am. B. R. 506, 127 Fed. 286; *Burleigh v. Foreman* (C. C. A., 1st Cir.), 12 Am. B. R. 88, 139 Fed. 13; *Barton Bros. v. Texas Produce Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 502, 136 Fed. 355; *In re Cole* (C. C. A., 1st Cir.), 16 Am. B. R. 302, 144 Fed. 392; *In re Lawrence* (C. C. A., 2d Cir.), 13 Am. B. R. 798, 134 Fed. 843; *Edinburg Coal Co. v. Humphreys* (C. C. A., 7th Cir.), 13 Am. B. R. 593, 134 Fed. 839; *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363; *Canner v. Webster Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R.

evidence and made a finding or decree it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made the finding or decree must be permitted to stand.³⁰⁴ But if the finding of the District Judge be a deduction from established facts or uncontradicted evidence, the Circuit Court of Appeals is at liberty to draw its own inferences and deduce its own conclusion.³⁰⁵ An order of adjudication will be reversed on appeal where a stipulation, in which all proved or provable claims against the bankrupt are represented, is filed, asking that the order be reversed and the appeal dismissed.³⁰⁶

372, 108 Fed. 519; *In re Sweeney* (C. C. A., 8th Cir.), 21 Am. B. R. 501, 189 Fed. 612; *Matter of Schmid* (C. C. A., 8d Cir.), 30 Am. B. R. 840, 200 Fed. 618; *Owens v. Farmers' Bank of Abbeville* (C. C. A., 4th Cir.), 30 Am. B. R. 234, 200 Fed. 608; *Matter of Brown Commercial Car Co.* (C. C. A., 7th Cir.), 30 Am. B. R. 45, 227 Fed. 357; *Wilson v. Continental Building & Loan Association* (C. C. A., 9th Cir.), 37 Am. B. R. 444, 232 Fed. 324; *Matter of Perrell* (C. C. A., 3d Cir.), 32 Am. B. R. 241, 215 Fed. 397; *Daupree v. Watson* (C. C. A., 9th Cir.), 32 Am. B. R. 407, 216 Fed. 483; *Matter of Pierce, Butler & Pierce Mfg. Co.* (C. C. A., 2d Cir.), 40 Am. B. R. 445, 240 Fed. 314; *Farmers' State Bk. v. Freeman* (C. C. A., 8th Cir.), 41 Am. B. R. 280, 240 Fed. 579; *Luck v. Staples* (C. C. A., 4th Cir.), 42 Am. B. R. 108, 255 Fed. 697; *Matter of Graf and Nevins* (C. C. A., 2d Cir.), 43 Am. B. R. 743, 255 Fed. 211; *Manson v. Meisner* (C. C. A., 3d Cir.), 43 Am. B. R. 110, 254 Fed. 800; *Watchmaker v. Barnes* (C. C. A., 1st Cir.), 43 Am. B. R. 632, 250 Fed. 733; *Rosenberg v. Sempie* (C. C. A., 2d Cir.), 43 Am. B. R. 671, 257 Fed. 72; *Matter of Lake Chelan Land Co.* (C. C. A., 9th Cir.), 44 Am. B. R. 14, 267 Fed. 407; *Matter of Morrison* (C. C. A., 7th Cir.), 44 Am. B. R. 321, 261 Fed. 305. See also Am. B. R. Dig., § 1222.

Review of findings of fact.—Where the testimony is conflicting and the findings of fact of the referee and district judge are the same, the facts will not be inquired into by an appellate court unless there is plain error. *In re Dorr* (C. C. A., 8th Cir.), 28 Am. B. R. 804, 108 Fed. 293; *Matter of National Pressed Brick Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 324, 212 Fed. 573.

Where findings of a district judge, that a bill of sale and a chattel mortgage executed by the bankrupt effected a preference, are based on inferences drawn from undisputed facts and the statements of bank officials and representatives, they will not be reversed merely because the answer is verified and a denial therein is supported by an oath. *Lake View State Bank v. Jones* (C. C. A., 7th Cir.), 40 Am. B. R. 148, 242 Fed. 321.

Mistake of fact.—Where both the master and district court have agreed upon findings and conclusions from conflicting evidence, they are presumptively correct and must be sustained unless an obvious error of law or some serious mistake of fact appears. *Aller-Wilmes Jewelry Co. v. Osborn* (C. C. A., 8th Cir.), 30 Am. B. R. 714, 231 Fed. 907; *Wood Mowing and Reaping Machine Co. v. Croll* (C. C. A., 6th Cir.), 30 Am. B. R. 610, 221 Fed. 670.

304. *Coder v. Arts* (C. C. A., 5th Cir.), 19 Am. B. R. 512, 162 Fed. 843; *Hoek v. City* (C. C. A., 1st Cir.), 22 Am. B. R. 1, 68 L. Ed. 772; *Hoek v. City* (C. C. A., 8th Cir.), 18 Am. B. R. 329, 152 Fed. 673; *Merchants' Nat. Bank v. City* (C. C. A., 6th Cir.), 18 Am. B. R. 44, 149 Fed. 708; *Hussey v. Richardson-Roberts Dry Goods Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 211, 118 Fed. 308; *Brady v. Bernard & Kitting* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 578; *Carroll v. Stern & Goldsmith* (C. C. A., 6th Cir.), 34 Am. B. R. 570, 239 Fed. 720; *Dothan Nat. Bank v.*

Jones (C. C. A., 5th Cir.), 43 Am. B. R. 251, 255 Fed. 222; *Marine Nat. Bank v. Swigart* (C. C. A., 6th Cir.), 45 Am. B. R. 182, 262 Fed. 804. See cases digested Am. Bankr. Dig., § 1221.

Review of discretionary rulings.—In the case of *Gold v. South Side Trust Co.* (C. C. A., 3d Cir.), 24 Am. B. R. 578, 179 Fed. 219, it was held that where a ruling concurred in by both referee and district judge in an administrative matter involves the exercise of discretionary power, the court's action should not be reversed upon appeal unless it clearly appears wrong was done. This case was an appeal from an order of the bankruptcy court confirming a report of the referee which rejected a claim of a real estate broker for commissions, and the court said: "No legal liability existed and while it may be that under the facts here disclosed the referee might have allowed compensation, such allowance would be an exercise of discretionary power and not an enforcement of legal right. Indeed, the counsel for the defense conceded at the argument in this court that the allowance of this claim by the court and referee was discretionary. Such being the case and although there may be merit in the appellant's contention, we are strongly averse unless it clearly appears wrong was done, to reverse a ruling concurred in by both referee and district judge in any administrative matter. If abuses threaten to creep into bankruptcy procedure, those charged with local administration are in better position to prevent such abuses than are appellate tribunals. It follows therefore that in such matters the court's action should not be reversed unless unmistakably wrong."

Findings of fact, dependent upon conflicting testimony.—By a judge, master or referee, who have seen and heard the witnesses testify, have every reasonable presumption in their favor, and should not be set aside or modified, unless it clearly appears that there was error or mistake on their part. *Finlayson v. Barrows* (C. C. A., 5th Cir.), 34 Am. B. R. 420, 231 Fed. 906.

When findings of district court not to be disturbed.—An appeal "as is equity," under section 25a of the Bankruptcy Act, presents the controversy for determination *de novo* under the new rules as under the old rules; but where the trial judge has heard the testimony in open court his finding of fact should not be disturbed unless the record very clearly discloses either a misapprehension of the testimony or a mistaken application of the law. *Matter of Kaplan* (C. C. A., 7th Cir.), 37 Am. B. R. 101, 234 Fed. 803.

Conflicting evidence.—When a trial court has considered conflicting evidence, made his findings and decrees thereon, they will be held by appellate courts to be presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, the findings must stand. *Nichols v. Elken et al.* (C. C. A., 8th Cir.), 35 Am. B. R. 305, 225 Fed. 660.

304a. *Walter v. Atha* (C. C. A., 8d Cir.), 45 Am. B. R. 180, 262 Fed. 73.

305. *Matter of Donnelly* (C. C. A., 6th Cir.), 38 Am. B. R. 232, 211 Fed. 110.

(7) **EFFECT OF APPEAL AND DECISION.**—Whether an appeal acts as a stay on proceedings in the court below is a question not often important. It may be obviated by an application to the judge below for a *supersedeas*.³⁰⁶ When the appellate court confirms or reverses an order of the court below and remands the same to such court, the court below is bound to obey the mandate and carry it into effect without any change or limitation.³⁰⁷

(8) **COSTS OF APPEAL.**—Costs follow the practice and rules of the court, but where, in an appeal against a trustee, the order below is reversed on a proposition brought forward by the appellate court itself, no costs will be allowed.³⁰⁸ The bankrupt is not entitled to have the cost of the transcript and the printing of the record paid out of the funds of the estate because he is without the necessary means to defray the expense.³⁰⁹

IV. REVIEWS BY SUPREME COURT.

a. From a circuit court of appeals.—(1) **EFFECT OF ACT OF 1915 LIMITING APPEALS.**—All decrees and judgments of the circuit courts of appeal in cases arising under the bankruptcy act are made final by Act of Congress of January 28, 1915 (38 Stat. at Large, 804, ch. 22), as amended by Act of Congress, approved September 6, 1916, (ch. 448 of Laws of 1916), as follows: "That judgments and decrees of the circuit courts of appeals in all proceedings and causes arising under 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July first, eighteen hundred and ninety-eight, and in all controversies arising in such proceedings and causes; also, in all causes arising under 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight; also, in all causes arising under 'An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,' approved March fourth, nineteen hundred and seven; also, in all causes arising under 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three; and, also, in all causes arising under any amendment or supplement to any one of the aforementioned Acts which has been heretofore or may hereafter be enacted, shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority and with like effect as if taken to that court by appeal or writ of error."

The language of this act is very comprehensive, and embraces proceedings and cases arising under the bankruptcy act and controversies arising in such proceedings, and provides that the judgments and decrees of the Circuit Court of Appeals in such controversies, proceedings, and cases shall be final.^{309a}

The purpose of the act is obvious. It is to relieve the Supreme Court from the necessity of considering cases in bankruptcy, where a determination is made by a circuit court of appeal, except when brought to the Supreme Court by writ of certiorari.^{309b} It will be observed that the Supreme Court may require the case

306. See R. S., § 1007; *Covington Stock Yards v. Keith*, 121 U. S. 248, 30 L. Ed. 914; *Adams v. Lane*, 16 How. 148; *French v. Shoemaker*, 12 Wall. 86; *Hunt v. Oliver*, 109 U. S. 177; *Texas, etc., Co. v. Murphy*, 111 U. S. 483, 28 L. Ed. 492.

Without a *supersedeas* an appeal never suspends the execution of an order nor stops its enforcements. *Matter of Brady* (D. C., Ky.), 21 Am. B. R. 364, 169 Fed. 152.

307. In re *Hudson River Electric Power*

Co. (D. C., N. Y.), 25 Am. B. R. 873, 184 Fed. 970.

308. In re *Jourdan* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726.

309. *Herman Keck Mfg. Co. v. Lorsch* (C. C. A., 6th Cir.), 24 Am. B. R. 705, 179 Fed. 485.

309a. *Staats Co. v. Security Trust and Sav. Bank* (U. S. Sup. Ct.), 39 Am. B. R. 335.

309b. *Central Trust Co. v. Lueders*, 229 U. S. 11, 35 Am. B. R. 730.

"to be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error." It would appear that the intent was to limit the right of review under this act to the cases in which an appeal might be brought under § 25-b of the bankruptcy act. In this view, many of the determinations of the Supreme Court under that section are now applicable. The practice on review will be that prescribed where writs of certiorari are issued out of the Supreme Court. It may be useful to retain references to former cases on appeal to the Supreme Court, and for that reason we have included the following paragraph as to appeals to the Supreme Court.

(2) **FORMER APPEALS TO SUPREME COURT.**—Under the law as it existed prior to the act of January 28, 1915, above referred to, appeals to the Supreme Court of the United States were, in bankruptcy, limited by § 25-b of the act to controversies on claims of over \$2,000,²¹⁰ where a Federal question, so-called, is involved, or, if no such question is involved, where a justice of that court has certified that the decision of the question in controversy "is essential to the uniform construction of the act throughout the United States."²¹¹ In the absence of a certificate an appeal from a decision of a circuit court of appeals allowing or rejecting a claim where the amount in controversy exceeds \$2,000, may not be taken unless a Federal question of the kind described in § 237 of the Judicial Code is involved.²¹² Sections 239-241 of the Judicial Code, providing for appeals and writs of error from circuit court of appeals to the Supreme Court have no relation to the revisory power conferred by § 24-b of the bankruptcy act and parties having elected to litigate in such court under these sections, the proceedings terminate there unless the case is one arising under § 25-b and is properly certified to the Supreme Court as therein required.²¹³ Under the Judicial Code the jurisdictional amount is \$1,000; under § 25-b it is \$2,000; of course the two cannot stand together. If the case relates to establishing a lien on real property, and involves a question which might arise independently of a proceeding in bankruptcy, it is appealable to the Supreme Court under the above sections of the Judicial Code.²¹⁴ If the appeal is from a decision allowing or rejecting a claim offered in proof in bankruptcy the jurisdiction conferred by the bankruptcy act is exclusive.²¹⁵ Authority to appeal from an order disallowing a claim in bankruptcy proceedings must be found in the provisions of the bankruptcy act, since the modes

^{210.} The plain purport of the act seems to limit an appeal by a certificate of a justice of the Supreme Court to a claim in controversy which exceeds the sum of \$2,000. See *Hutchinson v. Otis* (C. C. A., 1st Cir.), 10 Am. B. R. 275, 123 Fed. 14; *Barrie v. Barrie*, 5 How. (U. S.) 103; *Gordon v. Ogden*, 3 Pet. (U. S.) 33.

^{211.} Federal question involved.—Where the appellant insisted upon a construction of the bankruptcy act which would defeat the lien, and the construction contended for by appellee would give it validity, a construction of the bankruptcy act was directly involved in the determination of the question as to the validity of said lien, and the judgment of the Circuit Court of Appeals was appealable to this court under section 25-b. *Coder v. Arts* (Sup. Ct.), 22 Am. B. R. 1, 213 U. S. 223, 53 L. Ed. 772.

Determination of question.—The question whether a case arises under the laws of the United States, so as to permit an appeal to the Supreme Court from a judgment of the Circuit Court of Appeals, must be determined, not on questions which may have arisen or which might arise in the subsequent progress of the case, but upon the grounds of jurisdiction set forth in the petition. *Lovell v.*

Newman & Son, 227 U. S. 412, 29 Am. B. R. 482, 57 L. Ed. 577.

Claim for damages on breach of contract.—A decision of the Circuit Court of Appeals that a claim for damages for an anticipatory breach of contract caused by bankruptcy is provable but that the damages should be limited to six months after filing the petition because the contract was mutually obligatory for that period only, does not involve a Federal question, and is not appealable under section 25-b (1) of the Bankruptcy Act. *Central Trust Co. of Ill. v. Chicago Auditorium Assoc.*, 240 U. S. 581, 36 Am. B. R. 679.

^{212.} *Central Trust Co. of Illinois v. Chicago Auditorium Assoc.*, 240 U. S. 581, 36 Am. B. R. 679.

^{213.} *Hutchinson v. Otis* (C. C. A., 1st Cir.), 10 Am. B. R. 275, 123 Fed. 14; *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 13 Am. B. R. 447, 49 L. Ed. 571; *Lucius v. Cawthorn-Coleman Co.*, 196 U. S. 149, 13 Am. B. R. 696, 49 L. Ed. 425.

^{214.} *Hobbs v. Head & Dowst Co.* (C. C. A., 1st Cir.), 27 Am. B. R. 484, 191 Fed. 811.

^{215.} *Hutchinson v. Otis* (C. C. A., 1st Cir.), 10 Am. B. R. 275, 123 Fed. 14.

of review of questions arising in steps in bankruptcy proceedings, therein specifically provided for, are exclusive.²¹⁶ An order of the district court allowing an exemption in bankruptcy proceedings is not a "final decision allowing or rejecting a claim," within the meaning of subsection *b*, and an appeal from a decision of the circuit court of appeals in respect thereto does not lie to the Supreme Court.²¹⁷ No appeal lies from a judgment of the circuit court of appeals, affirming a judgment refusing to grant a discharge.²¹⁸ The decision allowing or rejecting the claim must be final. A referee's order disallowing a claim "for the present" so as to permit the claimant to vote for a trustee without prejudice to the claimant's right to present the claim thereafter is not a final decision allowing or rejecting a claim so as to permit an appeal to be taken to the Supreme Court.²¹⁹ An objection to the want of proof of an act of bankruptcy which was not raised in the court below may not be raised for the first time on appeal.²²⁰

b. Practice.—The practice on appeal to the Supreme Court, as regulated by General Order XXXVI (2) (3),²²¹ is now abrogated by the act of January 28, 1915, which prohibits appeals from determination of circuit courts of appeals, and authorizes reviews of such determination under writs of certiorari. An appeal from a final order of the circuit court of appeals affirming an order allowing a claim was required to be taken within 30 days after the making of the order, as required by General Order XXXVI, and such time cannot be extended by filing a petition for a rehearing.²²² The record must contain

²¹⁶ *Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 27 Am. B. R. 338, 56 L. Ed. 118.

²¹⁷ *Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786, 48 L. Ed. 116; *Smalley v. Langemour*, 196 U. S. 93, 13 Am. B. R. 692, 49 L. Ed. 400.

²¹⁸ *James v. Stone & Co.*, 227 U. S. 410, 29 Am. B. R. 476, 57 L. Ed. 573.

²¹⁹ *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, 25 Am. B. R. 66, 54 L. Ed. 1047.

²²⁰ Order allowing or rejecting a claim.—Where the district court made an order, which was not appealed from, directing that the claim of bankrupt's president should be postponed to the claim of intervener, and, subsequently, an order was made that the dividend on said claim be paid to the intervener, which order was reviewed by the Circuit Court of Appeals where the controversy was limited to a complaint as to the mode of distribution, no issue being raised or contention made as to the prior order, held that the question whether the prior order was correctly interpreted by the referee and district court in the distribution directed by the subsequent administrative order was not one concerning the allowance or rejection of a claim but was a matter arising in the administration of the bankrupt estate, which the Supreme Court was not empowered to review. *Wynkoop, Hallenbeck, Crawford Co. v. Gaines* (U. S. Sup. Ct.), 227 U. S. 4, 29 Am. B. R. 369, 57 L. Ed. 391.

²²⁰ *Armstrong v. Fernandez*, 208 U. S. 324, 19 Am. B. R. 746, 52 L. Ed. 514, holding that where the only question contested below was whether or not the alleged bankrupt was a person engaged chiefly in agriculture, and

the opposing creditors make no objection to the want of proof of the act of bankruptcy alleged, an objection first raised on appeal that other findings should have been made in respect to the act of bankruptcy comes too late. As to objections first raised on appeal, see *Frank v. Volkommer*, 205 U. S. 521, 17 Am. B. R. 806, 51 L. Ed. 911. See also *Wood v. Wilbert's Sons Shingle & Lumber Co.*, 226 U. S. 384, 29 Am. B. R. 220, 57 L. Ed. 264, holding that an objection not made in the court below and not assigned as error on appeal to the United States Supreme Court, will not be passed upon by the latter court.

²²¹ See *Mueller v. Nugent*, 184 U. S. 1, 17 Am. B. R. 224, 46 L. Ed. 405, for meaning of this general order. For forms, see any of works on Federal practice, for instance, *Desty's Federal Procedure*, 9th Ed., Vol. IV.

²²² *Conboy v. First Nat'l Bank*, 203 U. S. 141, 16 Am. B. R. 773, 51 L. Ed. 128. In the case of *Hobbs v. Head & Dowst Co.* (C. C. A., 1st Cir.), 27 Am. B. R. 484, 191 Fed. 811, it was held that the limit of 30 days prescribed in the General Order only applies to appeals taken expressly under the Bankruptcy Act.

Time for taking appeal.—The time within which an appeal to the United States Supreme Court, under section 7 of the Act of March 3, 1891, must be taken, is one year, the thirty-day limitation contained in section 7 being applicable only to appeals thereunder to the Circuit Court of Appeals. *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, 28 Am. B. R. 207, 56 L. Ed. 1053.

the findings of fact and conclusions of law of the court below as required by General Order XXXVI (3), otherwise the appeal will be dismissed; the omission may not be supplied by reference to the opinion of the court below.²²³ One who contemplates an appeal to the Supreme Court should make a request for findings of facts before the decree of the circuit court of appeals is entered.²²⁴ The rule that where two courts have concurred in findings of fact the Supreme Court will accept those findings unless clear error is shown, will always be applied.²²⁵ The general order is limited to cases where either party is entitled to take an appeal to the Supreme Court under the bankruptcy act; it is therefore limited in its application to appeals in respect to claims of the required amount; it has no reference to appeals and controversies arising in bankruptcy proceedings which are appealable to the Supreme Court under the Judicial Code; in such a case the requirement as to special findings of fact and conclusions of law does not apply.²²⁶ A judgment that a person is not a bankrupt on a verdict by the jury in the trial of the cause, is reviewable in the Supreme Court only by writ of error.²²⁷ This method of reviewing the judgment of a circuit court of appeals is, because of the limitations hedging it in, very rare.

V. NO APPEAL BOND REQUIRED OF TRUSTEE WHO APPEALS.

The words of the statute are clear. Appeal bonds are required from all appellants save trustees. Appeal bonds are not required on petitions to revise. It would seem that this subsection applies also to writs of error from the highest courts of the State. It does not, however, relieve a trustee from the obligation to give such a bond as is required by the Revised Statutes of any litigant where supersedeas is desired.^{227a}

VI. CERTIFICATE AND CERTIORARI.

a. *Certificates to the Supreme Court.*—The reference as to certification to the Supreme Court is clearly to the Evarts act (now Judicial Code, §§ 239–241).²²⁸ This power may be exercised by either a circuit court of appeals or a district court. If from the district court, the question certified must be

²²³ *Chapman v. Bowen*, 207 U. S. 89, 18 Am. B. R. 844, 52 L. Ed. 116. As to practice in eighth circuit, see *Century Savings Bank v. Robert Moody & Son* (C. C. A., 8th Cir.), 31 Am. B. R. 586, 209 Fed. 775.

Request for findings.—Where an appeal to the United State Supreme Court is contemplated, a suggestion of such intention should be made to the Circuit Court of Appeals at the argument, so that such court may render separate findings of fact and conclusions of law thereon, as provided in General Order No. 36. *Lumpkin v. Foley* (C. C. A., 5th Cir.), 29 Am. B. R. 673, 204 Fed. 372. See also *Knapp v. Milwaukee Trust Co.* (C. C. A., 7th Cir.), 20 Am. B. R. 671, 162 Fed. 675.

²²⁴ *Washington v. Tearney* (C. C. A., 4th Cir.), 28 Am. B. R. 633, 197 Fed. 307.

²²⁵ *Page v. Rogers*, 211 U. S. 575, 21 Am. B. R. 496, 53 L. Ed. 332; *Greedy v. Dockendorff*, 231 U. S. 513, 31 Am. B. R. 407, 58 L. Ed. 339.

²²⁶ In re *Standard Telephone & Electric*

Co., 216 U. S. 545, 24 Am. B. R. 761, 54 L. Ed. 610, in which case it appeared that a trustee in bankruptcy had filed a petition to sell all the stock-in-trade and other property of the bankrupt and the appellant had intervened to establish the lien of a chattel mortgage on such property to be satisfied out of the proceeds of sale and the validity of such a mortgage had been attacked by the trustee; it was held that the controversy was one arising in a bankruptcy proceeding, and the procedure upon appeal was the same as in like cases under the court of appeals act of 1891 (Judicial Code, §§ 239–241), and no special findings of fact and conclusions of law are required since General Order XXXVI does not apply to such a case.

²²⁷ *Grant Shoe Co. v. Laird Co.*, 203 U. S. 502, 17 Am. B. R. 1, 52 L. Ed. 292; *Elliott v. Toepfner*, 187 U. S. 327, 334, 9 Am. B. R. 50, 47 L. Ed. 200.

^{227a} *Pacific Coast Casualty Co. v. Harvey* (C. C. A., 9th Cir.), 42 Am. B. R. 193, 250 Fed. 952.

²²⁸ The act of March 3, 1891, was revised in Judicial Code, in effect January 1, 1912.

after final judgment,²²⁹ and one of judisdiction.²³⁰ The certificate is a matter of right, provided a jurisdictional question has been decided. If from the circuit court of appeals, any question on which the court desires instruction may be certified up; but the certificate is discretionary. It seems also that here a final judgment is not necessary.²³¹ Such certificates bring up only questions of law.²³² The practice and precedents are already numerous,²³³ though there are few cases which originated in bankruptcy.

b. *Writs of certiorari from the Supreme Court.*—Here again the reference is to the Evarts act. Such a writ (a) can be directed to the circuit court of appeals only, and (b) may be asked only in those cases where the ultimate decision of that court is final. While the Supreme Court has often disclaimed an intention to use this writ,²³⁴ it has grown quite common. The statute gives the court a wide discretion as to time,²³⁵ but, as a rule, such a writ should not be asked until a final decision is had below. The application is by petition to the Supreme Court, accompanied by a printed record of the case, and the question on which the writ is desired is, after due notice, moved on a motion day and submitted by written briefs. The effect of the writ if granted, is to remove the question to the Supreme Court; and it is thereafter proceeded with there, as if brought up on an appeal.²³⁶ The precedents on certiorari under the Evarts act (now Judicial Code, §§ 239-241) are already numerous and may be consulted with profit.²³⁷ Where a mandate has issued from the Supreme Court directing the district court to modify its decree in accordance with the Supreme Court's opinion, a peremptory mandamus may issue from the circuit court of appeals enforcing obedience of such mandate.²³⁸ But a writ of mandamus is no proper substitute for a writ of error, and mandamus will not lie to compel a court of bankruptcy to dismiss proceedings in bankruptcy against an alleged bankrupt on the ground that the petition in bankruptcy failed to show that the alleged bankrupt was subject to the jurisdiction of the court.²³⁹

²²⁹. *Bardes v. Bank*, 175 U. S. 526, 3 Am. B. R. 680, 44 L. Ed. 261; *Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 27 Am. B. R. 338, 56 L. Ed. 118.

²³⁰. *First Nat'l Bank of Denver v. Klug*, 186 U. S. 202, 8 Am. B. R. 12, 46 L. Ed. 1127; *Columbia Iron Works v. National Lead Co.* (C. C. A., 6th Cir.), 11 Am. B. R. 340, 127 Fed. 99. See also *Van Wagenen v. Sewall*, 160 U. S. 369, 40 L. Ed. 460; *Maynard v. Hecht*, 151 U. S. 324; *McLish v. Roff*, 141 U. S. 661, 35 L. Ed. 893.

²³¹. *Duff v. Carrier*, 55 Fed. 433.

²³². *Warner v. New Orleans*, 167 U. S. 467, 42 L. Ed. 239; *Cross v. Evans*, 167 U. S. 60, 42 L. Ed. 77.

²³³. For instance, *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 37 L. Ed. 443. For forms, see *Desty's Federal Procedure*, 9th ed., Vol. IV.

²³⁴. See *Forsyth v. Hammond*, 166 U. S. 506, 41 L. Ed. 1095.

²³⁵. Compare *The Conqueror*, 166 U. S. 110, 41 L. Ed. 937.

²³⁶. *Hubbard v. Todd*, 171 U. S. 474, 43 L. Ed. 246.

²³⁷. *American Const. Co. v. Jacksonville, etc.*, 148 U. S. 372, 37 L. Ed. 486; *Lav Os Bew v. U. S.*, 144 U. S. 47, 36 L. Ed. 340; *Chicago, etc., v. Osborne*, 146 U. S. 354, 36 L. Ed. 1002. For forms see *Desty's Federal Procedure*, 9th ed., Vol. IV.

²³⁸. *Ex parte Chicago Title & Trust Co.* (C. C. A., 7th Cir.), 16 Am. B. R. 848, 146 Fed. 742. See *Kyle v. Hammond* (C. C. A., 1st Cir.), 34 Am. B. R. 547, 192 Fed. 538, in which it was held that where a petition to review a decision in bankruptcy is dismissed by the Circuit Court of Appeals for want of jurisdiction the remedy of the petitioner is by application to the Supreme Court for writ of mandamus or certiorari, and not by application for leave to appeal to the Supreme Court.

²³⁹. *Matter of Riggs*, 214 U. S. 9, 28 Am. B. R. 720, 53 L. Ed. 887.

SECTION TWENTY-SIX.

ARBITRATION OF CONTROVERSIES.

§ 26. **Arbitration of Controversies.**—*a* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Analogous provisions: In U. S.: Act of 1867, § 17, R. S., § 5061; Act of 1800, § 43.

In Eng.: Act of 1883, § 57 (6).

In Can.: None.

Cross-References: To the law: Jurisdiction of court of bankruptcy to determine controversies, §§ 2 (7), 23.

Compromise of controversies, § 27.

To the General Orders: Application to submit controversies to arbitrators, XXXIII.

SYNOPSIS OF SECTION.

ARBITRATION OF CONTROVERSIES.

I. Arbitration, 611.

a. In general, 611.

b. Scope and practice, 612.

II. Arbitrators, How Chosen, 612.

III. Effect of Arbitration, 612.

I. ARBITRATION.

a. In general.— Under subsection *a* of this section, "any controversy arising in the settlement of the estate," may be submitted to arbitration. General Order XXXIII controls as to the application for the submission of such a controversy to arbitration.

b. **Scope and practice.**— This section provides a means to judgment by lay judges. It resembles a similar practice in most of the States; and is availed of as rarely. Under the English law, no application to court is necessary: the trustee may submit to arbitration, if the committee of inspection consent.¹ With us, the direction of the court must first be obtained. The proceeding is initiated by a petition, which should specify "the subject-matter of the controversy and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise."² Both the law and general orders are silent as to what notice is required; the analogies of the statute suggest the same notice as that required on the settlement of controversies.³ The notice should, however, take the form of an order to show cause. The granting of the order is discretionary. Under the former law, it could not be addressed to the register.⁴ Now it can, and almost invariably will be, to the referee.⁵

II. ARBITRATORS, HOW CHOSEN.

Subsection b provides the method of choosing arbitrators. The statute requires no elucidation. It is construed strictly. The arbitrators must be chosen in one of the ways indicated, or their finding will be set aside.⁶ Once chosen, the practice thereafter should conform to that on arbitrations in the State courts. The inquiry is necessarily somewhat informal, but the findings must be reduced to writing and signed by the arbitrators, or a majority of them.⁷ It should be filed, not with the referee, but in the district court clerk's office.

III. EFFECT OF ARBITRATION.

The findings when filed become in effect the verdict of a jury. They need not be formally approved by the court. But they may be set aside by the district judge;⁸ they are also subject to review in the same way a verdict is. If not set aside by the judge or on appeal, the findings are *res adjudicata* on all parties to the proceeding, even in a collateral action.⁹

1. Eng. Act of 1883, § 57(6).

2. General Order XXXIII.

3. See Bankr. Act, § 58-a(7). Note, also, *In re Hoole*, 3 Fed. 496.

4. *In re Graves*, Fed. Cas. 5,709.

5. Bankr. Act, § 38-a(4).

6. *In re McLam* (D. C., Vt.), 3 Am. B. R.

245, 97 Fed. 922. See also *In re Dibble*, Fed. Cas. 3,885.

7. Bankr. Act, § 26-c.

8. *In re McLam* (D. C., Vt.), 3 Am. B. R. 245, 97 Fed. 922.

9. *Johnson v. Worden*, 19 N. B. R. 355.

SECTION TWENTY-SEVEN.

COMPROMISES.

§ 27. **Compromises.**—*a* The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Analogous provisions: In U. S.: Act of 1867, § 14, R. S., § 5061; Act of 1841, § 11.

In Eng.: Act of 1883, § 57 (7).

In Can.: Act of 1919, § 20.

Cross-references: To the law: Power of bankruptcy court to determine controversies, § 2 (7).

Compositions, confirmation and setting aside, §§ 12, 13.

Arbitration of controversies, § 26.

Notice to creditors of proposed compromise, § 58-a(7).

To the General Orders: Compounding or settlement of claims or debts, XXVIII.

Application by trustee to settle or compound claims or debts, XXXIII.

SYNOPSIS OF SECTION.

COMPROMISES.

I. Compromises, 613

a. *Scope of section*, 613

b. *Practice*, 614

c. *Approval of court*, 614

I. COMPROMISES.

a. *Scope of section.*—This section should not be confused with § 12 on compositions. It is intended to supply a summary and inexpensive way of settling questions arising in the administration of bankrupt estates. It is most often used in connection with contests on claims filed against the estate, or the contested collections of claims due the estate. It cannot, of course, be resorted to where the matter in controversy is the right to a discharge. But any controversy arising in the administration of the estate may be compromised.¹ There is no authority to compel dissenting creditors of a bankrupt corporation to give up their existing claims and in their stead to accept stock in a new corporation to be formed to take over all the assets of the bankrupt, and to assent to many other provisions such as are usually contained in a contract of reorganization, even though such a plan may seem desirable and the usual course of administration is certain to result in a heavy loss.²

1. In re Northampton Portland Cement Co. (D. C., Pa.), 25 Am. B. R. 565, 179 Fed. 726.

It is an unsettled question whether the term "controversy" has any application to a voluntary offer by the bankrupt to pay a sum of money to the trustee in satisfaction of a larger amount due, the trustee being willing to accept such voluntary payment in full satisfaction.

Matter of Goldman Brothers (D. C., Pa.), 30 Am. B. R. 55, 241 Fed. 886.

2. In re Northampton Portland Cement Co. (D. C., Pa.), 25 Am. B. R. 565, 179 Fed. 726; In re Woodend (D. C., N. Y.), 12 Am. B. R. 784, 133 Fed. 593; Matter of Prudential Outfitting Co. (D. C., N. Y.), 41 Am. B. R. 621, 250 Fed. 504.

b. **Practice.**—Here also the proceeding is initiated by a petition, which may be made by the trustee, the bankrupt, or a creditor.³ It should be filed with the referee, if the case has been referred. The subject-matter of the controversy and the reasons why there should be a compromise must be clearly and distinctly set forth.⁴ The referee, on the filing of such a petition, sets a day and place for the hearing and gives notice to all creditors and persons interested, in the usual way.⁵ The notice should also contain a direction to show cause why the proposed compromise should not be allowed. The hearing is before the referee, not the judge, and conforms to like hearings on similar notice or order.

c. **Approval of court.**—The compromise must be "with the approval of the court," which means that even the action of the creditors on the proposition is not final.⁶ The court will ordinarily approve a compromise which results in an increase of the assets of the estate and will prove beneficial to the creditors, but it will not sanction such compromise if coupled with an agreement not to furnish evidence in a criminal prosecution against the bankrupt, or in any way to stifle such prosecution.⁷ A minority of the creditors will not be permitted to prevent a compromise of an action against the estate, where it appears that the defense would probably be unsuccessful, delay the settlement of the estate and add materially to the cost of administration, unless such creditors indemnify the estate.⁸ The referee may disapprove the action of creditors. His decision may be reviewed by the district judge, on proper and timely application.⁹ Compromises are often agreed to informally at

3. General Order XXVIII.

4. Compare General Order XXXIII.

5. Though the general order seems to leave the kind and duration of the notice to the referee, it should be by publication and mailing and a ten days' notice. See Bankr. Act, § 58-a(7)-b-c.

6. Note the reasons for this in *In re Heyman* (D. C., N. Y.), 5 Am. B. R. 808, 104 Fed. 677; *In re Kranich* (D. C., Pa.), 23 Am. B. R. 550, 553, 174 Fed. 908, citing *Collier on Bankruptcy* (4th ed.), p. 275.

Approval by the court; compromise proposed by debtor.—In the case of *In re Heyman* (D. C., N. Y.), 5 Am. B. R. 808, 104 Fed. 677, Brown, District Judge, said: "I am of the opinion that section 27, and section 58(7) and section 56-a, so far as the latter affect settlements of claims or controversies between the trustees and others, are to be construed together; that any compromise proposed by the trustees under section 27 should be submitted to the creditors in accordance with section 58(7), and that the action of the creditors thereon under section 56 is not absolutely conclusive, but may for good cause be disallowed by the court under section 27; and that a compromise in like manner proposed to creditors by the debtor is equally subject to the judgment of the court under section 27. There is no specific provision as to what shall be the consequence of the mere approval by the creditors at a creditors' meeting of a proposed compromise submitted to it by the debtor. The case, as it seems to me, must necessarily come ultimately under section 27, from the fact that no compromise with the debtor, and no release to him can possibly be effected except through the trustee. Notwithstanding any previous vote by creditors, the compromise must still be carried out and

executed by the trustee. It becomes, therefore, a compromise by and through the trustee, and hence falls under section 27, and must therefore have the 'approval of the court.'"

7. *In re Rosenblatt* (D. C., Pa.), 19 Am. B. R. 663, 153 Fed. 335.

8. *In re Kearney Bros.* (D. C., N. Y.), 34 Am. B. R. 757, 184 Fed. 190.

As to indemnity against expenses of suit by or against estate, by creditors opposing compromise, see *In re Meadows, Williams & Co.* (D. C., N. Y.), 25 Am. B. R. 100, 131 Fed. 911.

9. See General Order XXVII.

Compromise of claims by trustee; approval by court.—Where it appeared that the schedules of a bankrupt included among the assets a steam shovel valued at \$2,500, that upon the sale of the assets, at which \$1,500 had been offered for the shovel, the receiver withdrew it claiming title in his own right, and subsequently sold it for \$1,200, and that there was doubt as to the validity of his title, the court should, under this section, withhold approval of an order of the referee permitting the trustee to accept an offer of the receiver for \$500 in settlement of all claims of the bankrupt estate "upon or by reason of a certain steam shovel." *Matter of Stier March Contracting Co.* (D. C., Pa.), 38 Am. B. R. 74.

meetings of creditors where more than a majority in number and amount are present. This practice is, however, unsafe, as the section is construed strictly.¹⁰ The reported cases are few and, other than those previously referred to, are set out in the foot-note.¹¹

10. Compare *In re Dibblee*, Fed. Cas. 3,885; *Duff v. Hopkins*, 33 Fed. 599.

11. *In re Phelps* (Ref., N. Y.), 3 Am. B. R. 396; *Blight v. Ashley*, Fed. Cas. 1,541; *In re Franklin Fund, etc.*, Fed. Cas. 5,058; *In re Rowe*, Fed. Cas. 12,092; *In re Firemen's*

Ins. Co., Fed. Cas. 4,796; *In re Furbish*, Fed. Cas. 5,159; *In re Hoole*, 3 Fed. 496; *In re Linderman* (D. C., Pa.), 22 Am. B. R. 131, 166 Fed. 593. See also Am. B. R. Dig., § 575.

SECTION TWENTY-EIGHT.

DESIGNATION OF NEWSPAPERS.

§ 28. *Designation of Newspapers.*—*a.* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Analogous provisions: In U. S.: Act of 1867, § 11, as amended, R. S., § 5019; Act of 1841, § 7.

In Eng.: None.

In Can.: Act of 1919, § 11.

Cross-references: To the law: Publication of notices to creditors, § 58-b.

SYNOPSIS OF SECTION.

DESIGNATION OF NEWSPAPERS.

I. Newspapers, 616

a. Comparative legislation, 616

b. Result of section, 616

I. NEWSPAPERS.

a. Comparative legislation.—All bankruptcy notices in England are officially gazetted by the Board of Trade, and published, if in London, in the London "Gazette;" if elsewhere, in a local paper.¹ In Canada they must be published in a local paper and the Canada Gazette.^{1a} Under our law of 1867, the marshal attended to the publication, the paper being fixed by the judge before the amendment of 1874, and the papers, one or more, being designated by the marshal thereafter.² The present provision is, therefore, new. It makes for uniformity.

b. Result of section.—The result of this section has been a standing order in each district, specifying the newspaper in each county in which bankruptcy

1. Eng. Act of Bankruptcy, 1883, §§ 13, 20, etc., General Rules 280, 281, etc.

1a. Can. Banks. Act of 1919, § 11.

2. Act of 1867, § 11, R. S., § 5019.

notices are required to be published. This general designation is in practice made by the judge. A referee, being also a court of bankruptcy in each case referred to him, can designate the paper in which the notice in that case shall be published, provided the judge shall not already have designated one for that county. It sometimes becomes wise to designate an additional newspaper in a particular case, as where partnership bankrupts reside in different districts. The judge or the referee is empowered so to do by the statute. The only notice which must be published is that of the first meeting.³ After that, there is no publication, unless "the court shall direct."

3. See Bankr. Act, § 58-b. For effect of publication under law of 1898, see under failure to publish, under the old law, see § 58, *post*, and compare *Smith v. Brinkerhoff*, 6 N. Y. 305. In *re Hall*, Fed. Cas. 5,922. For effect of

SECTION TWENTY-NINE.

OFFENSES

§ 29. **Offenses.**— *a* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of estates in his charge by parties in interest when directed by the court so to do.

d A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Analogous provisions: In U. S.: As to offenses by the bankrupt, Act of 1867, § 44, R. S., § 5132; As to offenses by officers or others, Act of 1867, §§ 45, 46, R. S., § 5012.

In Eng.: Debtors Act of 1869, Part II.

In Can.: Act of 1919, §§ 89 to 97, inc.

Cross-References: To the law: "Conceal," term defined, § 1(22).

Jurisdiction to arraign, try and punish bankrupts and others for violations of act, § 2(4).

Duties of bankrupt specified, § 7.

Discharge barred by commission of offense punishable under this section, § 14-b.

Jurisdiction to try offenses, § 23-c.

Duties of referees prescribed, § 39.

Duties of trustees prescribed, § 47.

SYNOPSIS OF SECTION.

OFFENSES.

I. Bankruptcy Crimes in General, 620.

a. *Comparative legislation*, 620.

b. *How section is construed; application*, 620.

c. *Offenses knowingly and fraudulently committed*, 621.

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(1) IN GENERAL, 621.

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(4) CONSPIRACY TO CONCEAL PROPERTY; INDICTMENT, 623.

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e. Offenses by others, 631.

- (1) IN GENERAL, 631.
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- (6) PUNISHMENT, 633.
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IV. Offenses by a Referee and Punishment, 633.

a. In general, 633.

b. Punishment, 633.

V. No Prosecution After One Year, 633.

I. BANKRUPTCY CRIMES IN GENERAL.¹

a. Comparative legislation.—An enumeration of offenses is properly no part of a bankruptcy law. The debtors act of 1869 in England gives a long catalogue of acts or omissions on the part of the bankrupt which constitute crimes punishable by imprisonment at hard labor for from one to two years.² Officers and other persons, indeed, even the bankrupt, may also be punished for other offenses, such as malfeasance in office or false swearing, under general statutes or the common law. This seems to have been the rule in this country prior to the act of 1867. That statute³ made many wrongful acts on the part of the bankrupt—some covered and some not by the present law—misdemeanors punishable by not to exceed three years' imprisonment; while any officer who intentionally took excessive fees⁴ was liable to a like imprisonment, as well as a fine and the forfeiture of his office. But offenses against the law by others were not made crimes or misdemeanors by the statute. The present section differs greatly from those in the former law, and the older cases are comparatively of little value. The new Canadian act enumerates a number of offenses by bankrupts and others which are punishable by fine or imprisonment or both.^{4a}

b. How section is construed; application.—Being highly penal in its effect the section must be strictly construed.⁵ This is a familiar rule of statutory interpretation and is specially applicable to a provision like this where new offenses are created and denounced.⁶ This section does not make criminal an act of the bankrupt committed before the bankruptcy;⁷ although the offense

1. See also Am. B. R. Dig., §§ 1179-1201.

2. See Baldwin on Bankruptcy (8th ed.), p. 490, *et seq.*

3. Act of 1867, § 44, R. S., § 5132.

4. Act of 1867, § 45, R. S., § 5012.

4a. Can. Bankr. Act of 1919, §§ 89-97.

5. Construction of section.—Field v. U. S. (C. C. A., 8th Cir.), 14 Am. B. R. 607, 137 Fed. 6, holding that where a statute is plain and unambiguous, the courts may not lawfully extend it by interpretation to a class of persons who are excluded from its effect by its terms for the reason that their acts may be more mischievous than those of the class whose deeds it denounces.

6. U. S. v. Lake (D. C., Ark.), 12 Am. B. R. 270, 129 Fed. 499. See also U. S. v. Wiltberger,

5 Wheat. 96, 5 L. Ed. 37; U. S. v. Clayton, Fed. Cas. No. 14,814; In re McDonough, 49 Fed. 309.

7. Acts prior to bankruptcy.—In the case of In re Steed (D. C., N. Car.), 6 Am. B. R. 107 Fed. 682; United States v. Cohn (D. C. N. Y.), 15 Am. B. R. 357, 143 Fed. 933, the court said: "This provision of the bankrupt act does not make any act of the bankrupt before the bankruptcy criminal. But if a bankrupt, before the bankruptcy, has concealed his property and, after his trustee is appointed, continues to conceal it from the trustee, he is criminally liable under this section, and, if indicted for such crime, evidence of his acts of concealment before the bankruptcy, as well as those subsequent thereto, would undoubtedly be admissible as a part of the *res gestae*."

may be continued after bankruptcy and thus the bankrupt become amenable to its provisions.⁸

c. **Offenses knowingly and fraudulently committed.**—The offenses, punishable by imprisonment pursuant to this section, all involve the element of conscious fraud, namely, knowingly and fraudulently transferring or embezzling property, or concealing it from the trustee, and committing perjury by taking a false oath during the proceeding.⁹

d. **Jurisdiction.**—The district court sitting in bankruptcy has jurisdiction to arraign, try, and punish any person who has committed any of the offenses enumerated in this section.¹⁰ So had the circuit court.¹¹ So, it seems, have the State courts, under State laws making the same acts crimes.¹² Likewise, the Federal courts in the exercise of their customary criminal jurisdiction, have power to try and punish for crimes committed in bankruptcy proceedings, other than those enumerated in the law.¹³

e. **Indictment or information.**—(1) **IN GENERAL.**¹⁴—The use of word "information" in § 29-d seems to indicate that a prosecution under this section can be by information.¹⁵ Since *In re Wilson*,¹⁶ and *Mackin v. U. S.*,¹⁷ however, it may be doubted whether any offense referred to in subsections *a* and *b*—each one being a crime, rather than a misdemeanor—can be proceeded on save by indictment. The debtor being technically a bankrupt¹⁸ from the time even an involuntary petition is filed, an indictment will lie before an adjudication.¹⁹ Where the indictment has been drawn under U. S. R. S., § 5392, relating to false statements, and a conviction had, the judgment will be reversed and the cause remanded to the trial court with instructions to enter a new judgment imposing such punishment as § 29 permits.²⁰ All matters necessary to constitute the offense must be clearly pleaded.²¹ It is not sufficient to set forth the offense in the words of the statute, unless these words are sufficient to include all the elements of the offense, without uncertainty and ambiguity.²² Objections as to the sufficiency of the indictment,

8. As in the case of a continuing concealment, see *U. S. v. Cohn* (D. C., N. Y.), 15 Am. B. R. 357, 142 Fed. 983; *U. S. v. Goldstein* (D. C., Va.), 12 Am. B. R. 755, 132 Fed. 789.

9. *Matter of Lenweaver* (D. C., N. Y.), 36 Am. B. R. 73, 226 Fed. 987; *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650; *In re Gilpin* (D. C., Pa.), 20 Am. B. R. 374, 160 Fed. 171.

10. See Bankr. Act, § 2(4). See also Am. B. R. Dig. § 1179.

11. See Bankr. Act, § 23-c. Circuit courts were abolished by the Judicial Code.

12. *State v. Thompson*, 58 N. H. 270; *Commonwealth v. Walker*, 108 Mass. 309.

13. *U. S. v. Nichols*, Fed. Cas. 15,880. *Contra: Anon.*, Fed. Cas. 475.

14. See also Am. B. R. Dig. § 1188.

15. *U. S. v. Block*, Fed. Cas. 14,609.

16. 114 U. S. 422.

17. 117 U. S. 348.

18. Bankr. Act, § 1(4).

19. *U. S. v. Myers*, Fed. Cas. 15,848.

20. *Wechsler v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579, revg. 16 Am. B. R. 1, holding that the imposition of a sentence under § 5392, though

erroneous, did not involve an entire failure of prosecution, and the judgment of conviction might be reversed and the cause remanded to the trial court with instructions to enter a new judgment imposing such imprisonment as § 29 of the bankruptcy act permits.

The indictment itself controls.—It is immaterial what statute the district attorney had in mind when he drew the indictment, if the charges made are embraced by some statute in force. The indictment itself must be looked to, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute. *Williams v. U. S.*, 168 U. S. 389.

21. *U. S. v. Prescott*, Fed. Cas. 16,084. Thus, an indictment charging perjury for omitting assets from schedules is defective unless it charges directly that there was other property. *Bartlett v. U. S.* (C. C. A., 8th Cir.), 5 Am. B. R. 678, 106 Fed. 884.

22. *McNiel v. U. S.* (C. C. A., 5th Cir.), 18 Am. B. R. 19, 150 Fed. 82, citing *U. S. v. Carl*, 105 U. S. 611, 26 L. Ed. 1135; *U. S.*

taken after the verdict by motion in arrest, must relate to matters of substance; formal or artificial insufficiencies are waived.²³ Useful precedents will be found in cases cited in the foot-note.²⁴ Cases construing those subsections of the law of 1867 which made the obtaining of property on credit on false representation an offense, are no longer in point. Such offenses can, however, still be punished by a proper proceeding under the State laws.

(2) **FALSE OATH; INDICTMENT.**—The indictment need not allege that the oath was corruptly false,²⁵ but it should charge that the alleged false oath was wilfully false.²⁶ An allegation in indictments for perjury that the defendant's testimony was false and that they believed it to be false is sufficient without alleging the actual facts.²⁷ An indictment, charging that defendants conspired to give false oaths in a bankruptcy proceeding, should state what false oaths were to be given, or the subject thereof with such reasonable particularity that the defendants may be apprised of the nature of the charge against them.²⁸ If the alleged false oath pertains to a statement of assets in the bankrupt's schedule, the indictment must allege in what respects the statement was deficient, by stating that property was omitted, and describing such property.²⁹

(3) **CONCEALMENT OF PROPERTY; INDICTMENT.**—The statute referring to the offense of a person having "knowingly and fraudulently concealed, while a bankrupt or after his discharge, from his trustee any property belonging to his estate in bankruptcy," sets forth all the elements of the offense, and an indictment which uses the words "unlawfully, knowingly and fraudulently" to characterize the word "conceal" is good, and plainly excludes unintentional acts. The indictment need not charge that the alleged bankrupt, at the time

v. Hess, 124 U. S. 483, 31 L. Ed. 516; *Evans v. U. S.*, 153 U. S. 584, 38 L. Ed. 830; *Keck v. U. S.*, 172 U. S. 434, 43 L. Ed. 505; *Meyer v. U. S.* (C. C. A., 5th Cir.), 33 Am. B. R. 877, 220 Fed. 822.

23. *Ulmer v. United States* (C. C. A., 6th Cir.), 34 Am. B. R. 143, 219 Fed. 641.

24. *U. S. v. Chapman*, Fed. Cas. 14,784; *U. S. v. Crane*, Fed. Cas. 14,887; *U. S. v. Latorre*, Fed. Cas. 15,567; *U. S. v. Jackson*, 2 Fed. 502; *U. S. v. Lake*, 12 Am. B. R. 270, 129 Fed. 499 (sustaining allegation as to false oath to schedules by an officer of a corporation); *Jacobs v. United States* (C. C. A., 1st Cir.), 20 Am. B. R. 550, 161 Fed. 694. See also Am. B. R. Dig. §§ 1187, 1191.

25. *United States v. Hearing*, 26 Fed. 744; *Kovaloff v. United States* (C. C. A., 7th Cir.), 28 Am. B. R. 767, 202 Fed. 475. See also Am. B. R. Dig. § 1190.

26. *United States v. Lake* (D. C., Ark.), 12 Am. B. R. 271, 129 Fed. 499.

27. *United States v. Freed* (C. C., S. Dak.), 25 Am. B. R. 89, 179 Fed. 236, holding that there is no necessity that the record negative the exceptions of the statute, alleging that the indicted corporation was in fact engaged principally in one of the occupations mentioned in § 4-b of the bankruptcy act.

Allegation of falsity of statements.—An indictment which charges in substance that the defendant committed perjury when he swore, upon examination before the referee, that his books of account were burned on a certain date, that instead of having been

burned on that date, they were in existence and in his possession up to the date of the examination, and that he knew he was making false oath when he swore that they were burned, sufficiently charges that the statements made by the defendant were false. *Kovaloff v. United States* (C. C. A., 7th Cir.), 28 Am. B. R. 767, 202 Fed. 475.

Allegation of belief as to falsity of statement.—An indictment charging a bankrupt with perjury upon his examination in testifying as to the giving of a check in payment of a debt, which recites the testimony of the defendant, that he was indebted to the payee in the amount named, that he paid him such sum and that such payment was a liquidation of the indebtedness, and then continues, "of which statement the said (bankrupt) did not believe to be true," sufficiently alleges no belief as to the veracity of the statement. *Daniels v. United States* (C. C. A., 6th Cir.), 27 Am. B. R. 790, 196 Fed. 459.

28. *United States v. Waldman* (C. C., N. Y.), 26 Am. B. R. 677.

29. *Bartlett v. U. S.* (C. C. A., 9th Cir.), 5 Am. B. R. 678, 106 Fed. 884.

Filing false schedules.—An indictment charging the filing of a schedule which the defendant "knew well to be false," is insufficient. There must be allegations that the schedule was false or to show wherein it was false. *United States v. Baker* (D. C., R. I.), 39 Am. B. R. 244, 26 Fed. 741.

Sufficiency of description.—An indictment against the president of a bankrupt corporation for making a false oath to its schedules, may describe the assets charged to have been fraudulently and knowingly omitted from such schedules as "one hundred and fifty thousand dollars in lawful money of the United States." *U. S. v. Lake* (D. C., Ark.), 12 Am. B. R. 270, 129 Fed. 499.

of the alleged concealment of his property, knew that a trustee had been appointed or the name of the trustee. The mode of the concealment is also entirely immaterial and need not be set forth in the indictment, and no allegation of ownership is made essential by the statute, save that the property was property "belonging to his estate in bankruptcy."³⁰ It is sufficient to charge that the bankrupt has "knowingly and fraudulently concealed and secreted" property.³¹ In indicting a bankrupt corporation for fraudulently concealing assets, there is no necessity, in order to show the jurisdiction of the bankruptcy court, to adjudicate, that the record should negative the exceptions of the statute, alleging that the corporation was in fact engaged principally in one of the occupations mentioned in § 46.³² An indictment, charging that defendant unlawfully, knowingly, wilfully and fraudulently concealed from his trustee certain property, carries with it a sufficient averment that defendant knew that said property belonged to his estate in bankruptcy.³³ A general allegation that the property alleged to have been concealed consisted of goods, wares, and merchandise, the character, kind, and particular description of which is to the grand jury unknown, is permissible from necessity only, when the grand jury does not have and cannot obtain a knowledge of the facts.³⁴

(4) CONSPIRACY TO CONCEAL PROPERTY; INDICTMENT.³⁵—An indictment, under § 5440 of the U. S. R. S., of a conspiracy to violate § 29-b, which charges defendants with conspiring that a bankrupt corporation shall conceal its assets, is not insufficient, because it appears that the defendants were not bankrupts.³⁶ If the act of conspiracy was committed prior to bankruptcy it

30. *United States v. Comstock* (Cir. Ct., Mass.), 20 Am. B. R. 520, 163 Fed. 416; *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513. See also Am. B. R. Dig., § 1189.

Unnecessary allegations.—An indictment which commences and concludes with averment substantially in the language of the statute to the effect that the bankrupt concealed money from the trustee, is not subject to a demurrer because it contains an averment that the defendant "then and there knowingly, wilfully and fraudulently, and while he was a bankrupt as aforesaid, concealed the aforesaid sum of money from his said receiver which said sum of money belonged then and there to the bankruptcy estate of the said Morris M. Meyer." As the indictment averred every fact necessary to be proved to constitute the offense denounced by the statute, its sufficiency was not impaired by the unnecessary averment as to a concealment from the receiver. Such an indictment need not allege a demand on the defendant by the trustee for the property claimed to have been concealed. *Meyer v. United States* (C. C. A., 5th Cir.), 33 Am. B. R. 877, 220 Fed. 822.

It is not necessary to allege that the property was not exempt from execution under the laws of the State of the bankrupt's domicile. *United States v. Greenbaum* (D. C., Mich.), 42 Am. B. R. 286, 252 Fed. 259.

Duplicity.—An indictment for concealing property which alleges the crimes in the words of the statute is not duplicitous because it alleges the concealment of several different kinds of property and the manner and places in which it was concealed. *Tugenshaft v. United States* (C. C. A., 5th Cir.), 45 Am. B. R. 310, 263 Fed. 562.

Use of word "conceal".—It is sufficient to allege a concealment by using the word "conceal" without stating how and in what manner the alleged concealment was accomplished. *United States v. Greenbaum* (D. C., Mich.), 42 Am. B. R. 286, 252 Fed. 259.

Time and place.—An indictment sufficiently

states the time and place of the alleged offense where it is averred that it took place in a city named on a certain day of the month. *United States v. Greenbaum* (D. C., Mich.), 42 Am. B. R. 286, 252 Fed. 259.

31. *United States v. Phillips* (D. C., N. Y.), 27 Am. B. R. 625, 196 Fed. 574.

32. *U. S. v. Freed* (C. C., N. Y.), 25 Am. B. R. 89, 179 Fed. 236.

33. *McNeil v. United States* (C. C. A., 5th Cir.), 15 Am. B. R. 18, 150 Fed. 82.

34. *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513.

35. See also, under this section, sub-title "Conspiracy," *post*, p. 632, and Am. B. R. Dig., § 1191.

36. *Cohen v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 8, 157 Fed. 651, *affg.* 15 Am. B. R. 387; *United States v. Young & Holland Co.* (Cir. Ct., R. I.), 22 Am. B. R. 484, 170 Fed. 110, holding that an indictment for conspiracy to conceal the assets of a corporation in anticipation is not demurrable on the ground that there was no existing bankruptcy when the conspiracy originated.

Indictment date of offense.—Indictments charging conspiracy under section 5440, U. S. R. S., and concealment under section 29-b of the bankruptcy act, as of June 9, 1909, the date when a demand for the property had been made by the trustee, properly charge the offenses as of that date, notwithstanding that the evidence given thereunder shows the offenses to have been committed thirty days before filing the petition in bankruptcy, for a refusal to produce the property upon demand constitutes a continuance of the offenses as of the date charged. *United States v. Stern* (D. C., Pa.), 26 Am. B. R. 110, 186 Fed. 854, *affd.* 26 Am. B. R. 101.

Sufficiency of indictment for concealment of assets.—Counts of an indictment, alleging that the bankrupt had a large number of provable claims and insufficient assets to pay the same, and that, while the "company"

must be alleged that it was in contemplation of such bankruptcy,³⁷ and must allege the commission of an overt act after bankruptcy.³⁸ An indictment which charges that defendants, contemplating bankruptcy proceedings against the bankrupt, a corporation, conspired to conceal from the trustee in bankruptcy property belonging to the estate in bankruptcy of the said corporation and that in pursuance of such conspiracy they removed the bankrupt's entire stock of goods from its place of business, sold the same and concealed the proceeds from the receiver and trustee in bankruptcy, but contains no allegations that any of the defendants were officers of or connected in any way with the bankrupt, does not state a crime, it being no criminal offense under the bankruptcy act for a person who is not a bankrupt to conceal the bankrupt's property from the trustee.³⁹ An indictment under this section for conspiracy to commit the criminal offense of knowingly and fraudulently concealing property of a partnership from their trustee in bankruptcy, is not insufficient because it fails to allege that a trustee was actually appointed, where the indictment avers that the conspirators contemplated, anticipated and planned that an involuntary petition in bankruptcy should be filed and the partners should be adjudicated bankrupts and a trustee should thereafter be appointed for their estate.⁴⁰ Neither is it necessary to allege in an indictment for conspiracy to conceal the assets of a corporation to allege the insolvency of the corporation at the time of the disposition of the assets, since conspiracy by a solvent corporation to conceal assets in contemplation of insolvency would be a crime.⁴¹ But § 29-d providing that "a person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information filed in court within one year after the commission of the offense," is inapplicable to an indictment under § 5440 of the U. S. R. S. for conspiracy to commit an offense arising under the bankruptcy act.⁴² The omission of the words "knowingly and fraudulently" or any equivalent therefor, from an indictment for conspiracy to conceal from the trustee assets of a bankrupt estate, is fatal on demurrer.⁴³

was bankrupt, the defendant (an individual) did conceal from the trustee in bankruptcy the proceeds of a certain sale of property of the bankrupt, but does not allege that there was any concealment by the bankrupt or any receipt of assets after the filing of the petition or any act by officers acting for the corporation, are demurrable. *United States v. Rosenstein* (D. C., N. Y.), 33 Am. B. R. 730, 211 Fed. 738.

37. An indictment for conspiracy to conceal assets of a bankrupt estate, which shows that the conspiracy was entered into and the assets removed and concealed prior to the bankruptcy, but that said acts were done in contemplation of bankruptcy, is not alleged nor the commission of any overt act after the bankruptcy, no offense under section 5440 of the United States Revised Statutes is charged, even though a further conspiracy to continue to conceal the alleged concealed property is alleged. *United States v. Grodson* (D. C., Ill.), 21 Am. B. R. 68, 164 Fed. 157. An indictment for conspiracy, the substance of which was that B, one of the de-

fendants, should purchase goods and that A, the other defendant, should conceal them, and that afterward B should go into bankruptcy, and that the concealment should continue, with the intention that at some subsequent time the profit by the concealment should be divided between the conspirators, sufficiently charges an offense under section 29-b(1) of the bankruptcy act, 1898, which punishes a concealment of property "while a bankrupt." *Alkon v. United States* (C. C. A., 1st Cir.), 22 Am. B. R. 489, 163 Fed. 810.

Anticipation of involuntary bankruptcy.—An indictment is sufficient which charges that the defendants concealed their property in anticipation of bankruptcy proceedings by their creditors. *Meyer v. United States* (C. C. A., 7th Cir.), 43 Am. B. R. 690, 258 Fed. 212.

38. *United States v. Grodson* (D. C., Ill.), 21 Am. B. R. 68, 164 Fed. 157. See also *United States v. Baker* (D. C., R. I.), 39 Am. B. R. 846, 243 Fed. 741.

39. *United States v. Waldman* (C. C. N. Y.), 26 Am. B. R. 677, 183 Fed. 524.

40. *Radin v. United States* (C. C. A., 2d Cir.), 25 Am. B. R. 640, 189 Fed. 568.

41. *United States v. Rosenstein* (D. C., N. Y.), 33 Am. B. R. 730, 211 Fed. 738.

42. *United States v. Comstock* (Cir. Ct., R. I.), 20 Am. B. R. 526, 162 Fed. 416.

43. *United States v. Comstock* (Cir. Ct., R. I.), 20 Am. B. R. 526, 162 Fed. 416.

f. Practice in general.—There being no rules or forms prescribed for the practice under this section, that practice should conform to criminal proceedings other than in bankruptcy in the court where the trial is had.⁴⁴

II. OFFENSES BY A TRUSTEE AND PUNISHMENT.

a. What constitute the offenses.—Subsection *a* is new. Its purpose is plain, and the words used are of such simple yet comprehensive meaning as to cover every intentional withholding of or parting with the property of the estate, or the concealment or destruction of a document, by a trustee. The words "transfer,"⁴⁵ "document,"⁴⁶ and "trustee"⁴⁷ have enlarged meanings in this law. An allegation that the person named in the indictment was "duly appointed trustee," is sufficient;⁴⁸ although it is better practice to give details as to his appointment and qualification. That the act was "knowingly and fraudulently" done must be distinctly charged and clearly proven. It seems also that a trustee may commit the offense specified in § 29-b (2).⁴⁹ A trustee cannot be compelled to give testimony which may tend to show that he has misappropriated the funds of the bankrupt's estate.⁵⁰

b. Punishment.—The penalty under subsection *a* is imprisonment and the only limitation is that the time shall not be more than five years.

III. OFFENSES BY OTHER THAN OFFICERS AND PUNISHMENT.

a. By a bankrupt.—This subject has already been discussed elsewhere.⁵¹ Any offense which, if committed by a bankrupt, can be punished under this subsection is also an objection to his discharge. Under the rule that a penal statute must be strictly construed, the word "person" as used in clause *b* of this section has been held not to include an officer of a corporation which is declared a bankrupt,⁵² but the better rule would seem to be that the officers of a corporation may be indicted for the crime of concealing its assets, if they participated in its commission.⁵³

b. Concealment of property.⁵⁴—(1) **IN GENERAL.**—It is a felony to conceal the assets of a bankrupt from his trustee.⁵⁵ This section applies to both voluntary and involuntary bankruptcy.^{56a}

The somewhat elastic meaning of the word "conceal" should be borne in

44. Trial; disqualification of counsel.—The fact, that the attorney for the petitioning creditors, the receiver appointed by the court, and the trustee in bankruptcy, aided, as a duly appointed special assistant U. S. district attorney in the prosecution of an indictment under the Federal statute against a bankrupt for fraudulent concealment of assets, is not a ground for reversal, although such counsel would have been disqualified under the state statute. *Terry v. United States* (C. C. A., 6th Cir.), 37 Am. B. R. 466, 235 Fed. 701.

45. Bankr. Act, § 1 (25).

46. Bankr. Act, § 1 (13).

47. Bankr. Act, § 1 (26).

48. Kerch v. United States (C. C. A., 1st Cir.), 22 Am. B. R. 544, 171 Fed. 366.

49. See in this section, post.

50. In re Smith (D. C., N. Y.), 7 Am. B. R. 213, 112 Fed. 509.

51. See generally under Section Fourteen of this work.

52. United States v. Lake (D. C., Ark.), 12 Am. B. R. 270, 129 Fed. 490; *Field v. United States* (C. C. A., 8th Cir.), 14 Am. B. R. 507, 137 Fed. 6.

53. Kauffman v. United States (C. C. A., 2d Cir.), 32 Am. B. R. 22, 212 Fed. 613.

In indicting a bankrupt corporation for an offense against the bankruptcy act of fraudulently concealing assets, there is no necessity, in order to show the jurisdiction of the bankruptcy court to adjudicate, that the record should negative the exceptions of the statute, alleging that the corporation was in fact engaged principally in one of the occupations mentioned in section 4-b of the Bankruptcy Act. *United States v. Freed* (Cir. Ct., N. Y.), 25 Am. B. R. 89, 179 Fed. 236.

See under this section, sub-title "Conspiracy to conceal property," *ante*, p. 623.

54. See also Am. B. R. Dig. §§ 1180-1182.

55. Kauffman v. United States (C. C. A., 2d Cir.), 32 Am. B. R. 22, 212 Fed. 613.

56a. Tugenshaft v. United States (C. C. A., 5th Cir.), 45 Am. B. R. 310, 263 Fed. 562.

mind.⁵⁶ Likewise, the necessity of charging and proving that the act was "knowingly and fraudulently" done, as this is an essential element of the crime.⁵⁷ Concealment of property was also an offense under the former law, and the cases then decided will be found valuable.⁵⁸

(2) CONTINUING CONCEALMENT.—The well-recognized doctrine of "continuing concealment" should also be considered, for the continuance of a concealment by a bankrupt after bankruptcy may constitute the offense,⁵⁹ and evidence of his acts of concealment prior to bankruptcy is admissible as part of the *res gestae*.⁶⁰

(3) WHAT CONSTITUTES OFFENSE.—The offense is completed, if the property was concealed knowingly and fraudulently before bankruptcy, and on the appointment of a trustee, the bankrupt fails to surrender it or to disclose the disposition he has made of it.⁶¹ A concealment from a trustee after his appointment and a failure to deliver over to him upon demand any property or cash which the bankrupt may have in his possession, is an offense as of any date that the concealment continues.⁶² So, a concealment of property by a

56. A criminal concealment of property by a bankrupt is the continuous concealment of the property from the trustee during the whole course of the bankruptcy proceedings or beyond, but to prove such concealment it is not necessary to take up each moment of the bankrupt's life while the proceedings last and to prove what he did as a means of proving what he did not. *Johnson v. U. S.* (C. C. A., 1st Cir.), 20 Am. B. R. 724, 163 Fed. 30.

57. See p. 622, *ante*; In re *Taplin* (D. C. Iowa), 14 Am. B. R. 360, 135 Fed. 861; *U. S. v. Cohn* (C. C., N. Y.), 15 Am. B. R. 357, 142 Fed. 983; *U. S. v. Levinson* (D. C., S. Car.), 13 Am. B. R. 29; In re *Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; *Klein v. Powell* (C. C. A., 3d Cir.), 23 Am. B. R. 494, 174 Fed. 640; *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

Essential elements.—The essential elements of concealment, etc., are that it must be by the bankrupt, while a bankrupt or after his discharge, and from his trustee, of property belonging to the estate in bankruptcy, and such concealment must be "knowingly and fraudulently" done. *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513.

58. Consult Vol. 6, Am. Dig., Century Ed., "Bankruptcy," § 735.

"The term 'concealed' used in this section [in § 68 of the act of 1799] is one of plain interpretation and obviously applies to articles intended to be secreted and withdrawn from public view on account of their being so subject to duties, or from some fraudulent motive." *U. S. v. 350 Chests of Tea*, 12 Wheat, 493, 6 L. Ed. 702.

59. See under Section Fourteen of this work, subtitle "Continuing concealment." *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513; *Conetto v. United States* (C. C. A., 9th Cir.), 42 Am. B. R. 189, 251 Fed. 42.

Continuing concealment.—Thus if a bankrupt has disposed of property belonging to him, prior to the adjudication, and has the proceeds thereof in his possession or within

his authority, to use and appropriate subsequently, there is a continuing concealment, for which he is amenable to the law, although the fact of concealment by intent and purpose took place while he was not a bankrupt. In re *Jacobs & Verstandig* (D. C., Ore.), 17 Am. B. R. 470, 147 Fed. 797.

60. *U. S. v. Cohn* (C. C., N. Y.), 15 Am. B. R. 357, 152 Fed. 983; *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513. Compare *Matter of Gilroy* (D. C., N. Y.), 14 Am. B. R. 627, 633, 140 Fed. 733, where Judge Holt says: "It is a serious defect in the bankrupt law that it contains no adequate provisions for criminal punishment for the fraudulent concealment of property in contemplation of bankruptcy."

Evidence of continuing concealment.—Testimony of facts indicating concealment of property before bankruptcy is admissible in proof of its concealment continued and completed after bankruptcy. As evidence of acts committed before bankruptcy is admissible in proof of concealment then begun and thereafter completed, so evidence of acts before bankruptcy is admissible in proof of fraudulent intent with which concealment is completed after bankruptcy. *Glass v. United States* (C. C. A., 3d Cir.), 36 Am. B. R. 558, 222 Fed. 773.

61. *Conetto v. United States* (C. C. A., 9th Cir.), 42 Am. B. R. 189, 251 Fed. 42; *Kaufman v. United States* (C. C. A., 2d Cir.), 11 Am. B. R. 22, 212 Fed. 613; *Warren v. United States* (C. C. A., 5th Cir.), 29 Am. B. R. 555, 199 Fed. 753, holding, that where one conceals property before bankruptcy keeps it concealed after bankruptcy and the appointment of a trustee, and fails to surrender it, he is guilty of the crime of concealing assets, although the initial concealment was before he became a bankrupt, the offense in such case being complete when he fails to surrender the property to his trustee in bankruptcy or to disclose to him its whereabouts.

62. *United States v. Stern* (D. C., Pa.), 26 Am. B. R. 110, 186 Fed. 854, *aff'd* 28 Am. B. R. 101.

voluntary bankrupt after he has filed his petition and before the appointment of a trustee is an offense under this section.⁶³ Likewise, it is a crime to fraudulently conceal property from the trustee, even though the property had been disposed of before an order to pay over to the trustee was made.⁶⁴ The offense of fraudulently concealing assets is committed where the bankrupt dishonestly applies money or property to his own use or purposes so that he himself or some other person whom he may desire to benefit receives advantage and profit by the concealment; the application of money in good faith to the payment of a debt after a petition in voluntary bankruptcy is filed does not necessarily constitute a fraudulent concealment, although as a result of the payment the creditor receives an undue advantage.⁶⁵

(4) **CONCEALMENT FROM TRUSTEE.**—The appointment of a trustee in bankruptcy is an essential element of the offense of knowingly and fraudulently concealing a bankrupt's property from his trustee; but such appointment of the trustee is not an ingredient of the crime of conspiring to commit such offense.⁶⁶ The bankruptcy act does not make it a criminal offense for a person who is not a bankrupt to conceal the bankrupt's property from the trustee.⁶⁷ Thus, there can be no conviction unless it is shown that the defendant had been adjudicated a bankrupt.⁶⁸

(5) **CONCEALMENT BY CORPORATION OR PARTNERSHIP.**—A bankrupt corporation is capable of committing the criminal offense of knowingly or fraudulently concealing its property from its trustee.⁶⁹ Although it has been held that the concealment must be by the bankrupt, and that an officer of a bankrupt corporation is not liable to punishment under § 29 for concealment by such corporation,⁷⁰ the more effective rule seems to be, that, if the officers of a

63. *U. S. v. Goldstein* (D. C., Va.), 12 Am. B. R. 755, 132 Fed. 789, in which the court said: "It is true that clause 1 applies to concealing property from the trustee, and that in the case at bar the alleged concealment was prior to the appointment of the trustee. But when a person files his voluntary petition in bankruptcy, he knows that a trustee will be appointed, and that such trustee takes title as of the date of the adjudication. It follows that a concealment of property after the adjudication, even if before the appointment of the trustee, is a concealment from the trustee."

64. *Matter of Stern* (D. C., N. J.), 32 Am. B. R. 281, 215 Fed. 979.

65. *U. S. v. Lowenstein* (D. C., Pa.), 11 Am. B. R. 134, 126 Fed. 884. This view was also taken under the act of 1867 (*United States v. Smith*, Fed. Cas. No. 16,339), where Judge Hall of the Northern District of New York, instructed a jury as follows: "If he, in point of fact, received money to the extent of \$2,000, and withheld it from his creditors and from his assignee then he is liable to be convicted. . . . If he paid it over to his creditors to honest creditors, and stated the fact upon his examination, then he would not be liable."

66. *Radin v. United States* (C. C. A., 2d Cir.), 25 Am. B. R. 640, 189 Fed. 568.

67. *United States v. Waldman* (C. C.,

N. Y.), 26 Am. B. R. 677, 188 Fed. 524; *United States v. Rosenstein* (D. C., N. Y.), 33 Am. B. R. 730, 211 Fed. 738.

68. *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650; *Gilbertson v. United States* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672, holding that without adjudication as a bankrupt within the meaning of the bankruptcy act, a conviction upon a charge of concealing from his trustee, while a bankrupt, property of the estate in violation of section 29-b, cannot be upheld, notwithstanding proof of flagrant concealment of the property from the *de facto* trustee. See also *United States v. Rabinowich* (U. S. Sup. Ct.), 42 Am. B. R. 255, 238 U. S. 78.

69. *Kauffman v. United States* (C. C. A., 2d Cir.), 32 Am. B. R. 22, 212 Fed. 613; *Cohen v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 8, 157 Fed. 651.

70. *Field v. U. S.* (C. C. A., 9th Cir.), 14 Am. B. R. 507, 137 Fed. 6; *United States v. Lake* (D. C., Ark.), 12 Am. B. R. 270, 129 Fed. 499. These cases were before the court in *Cohen v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 8, 157 Fed. 653, and held inapplicable where the indictment charges a conspiracy that a bankrupt corporation should conceal its assets, as distinguished from a conspiracy that the officers of a bankrupt corporation should conceal its assets.

corporation have participated in the commission of the offense, they may be indicted and punished therefor.⁷¹ A member of a bankrupt partnership, although not himself adjudicated a bankrupt, may be prosecuted for the fraudulent concealment of firm property from its trustee.^{71a}

(6) **CONCEALMENT BY THIRD PARTY IN AID OF BANKRUPT.**—It has been ruled that while a third person cannot be convicted under this section of concealing property he may be convicted under the United States Criminal Code as a principal under the provision making all who aid and abet the commission of a crime liable as principal.⁷²

(7) **OMISSION TO SCHEDULE PROPERTY.**—It is not an offense under this section to omit to name property in the schedule by accident or mistake,⁷³ or worthless claims upon which an action could not be maintained,⁷⁴ or property which the debtor did not know that he owned,⁷⁵ or property which the bankrupt honestly thought did not pass to the trustee,⁷⁶ or where the evidence does not show that a legally consummated gift or transfer has been made.⁷⁷ But if it appear that property was omitted from the schedules with the fraudulent purpose of concealing it, an offense is committed.⁷⁸ The omission if fraudulent will constitute the oath to the schedule, a false oath, and as such a distinct offense from that of concealing property from the trustee.⁷⁹ The advice of counsel has been held to be no defense.⁸⁰ The offense may not be retrieved by the subsequent good conduct of the defendant, although the court may consider such conduct in imposing sentence.⁸¹

(8) **EVIDENCE OF CONCEALMENT.**—The court may exclude evidence of facts, which, though relevant, is too remote to be material in the circumstances.⁸² The act to constitute a concealment need not be a physical act in the nature of a conversion, begun and completed after bankruptcy, and hence evidence of acts committed before bankruptcy may be admitted as showing intent.⁸³ And, for the same purpose, conversations with the bankrupt prior to the concealment are admissible.^{83a} Neither a bankrupt's schedules in bank-

71. *Wolf v. United States* (C. C. A., 4th Cir.), 89 Am. B. R. 106, 238 Fed. 902. In the case of *United States v. Freed* (C. C., N. Y.), 25 Am. B. R. 89, 179 Fed. 236, the court said: "The crime of concealing assets could be committed by a corporation, and Freed (president of the corporation) could be indicted for the offense, if he participated in its commission. *Cohen v. U. S.* (C. C. A., 2d Cir.), 19 Am. B. R. 8, 157 Fed. 651, 85 C. C. A. 113; *U. S. v. Young & Holland Co.* (C. C., R. I.), 22 Am. B. R. 484, 170 Fed. 110. Those were cases of conspiracy; but, if one may be guilty of conspiracy to commit an act, it cannot be that he is not guilty if the conspiracy is accomplished. I do not regard *Field v. U. S.* (C. C. A., 8th Cir.), 14 Am. B. R. 507, 137 Fed. 6, 69 C. C. A. 568, as binding, after *Cohen v. U. S.*, *supra*." See also Am. B. R. Dig. § 1182.

71a. *Conetto v. United States* (C. C. A., 9th Cir.), 42 Am. B. R. 189, 251 Fed. 42. See also *Malvin v. United States* (C. C. A., 2d Cir.), 42 Am. B. R. 98, 252 Fed. 449.

72. *Kauffman v. United States* (C. C. A., 2d Cir.), 32 Am. B. R. 22, 212 Fed. 613; *Good v. Kane* (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 966.

Necessity of convicting corporation first.—Under the United States Criminal Code (§ 332) all abettors are made principals. It is not necessary therefore, that a bankrupt corporation should first be convicted before bringing to trial one charged with aiding and abetting in the concealment of its assets from a trustee in bankruptcy. *Shea v. Lewis* (C. C. A., 8th Cir.), 30 Am. B. R. 438, 206 Fed. 877.

73. See p. 260, *ante*. Although it may be evidence of a fraudulent intent. *Gretsch v.*

United States (C. C. A., 3d Cir.), 36 Am. B. R. 571, 231 Fed. 57.

74. *In re Pearce*, 21 Vt. 611.

75. *In re Parker*, Fed. Cas. 10,720, 4 Biss. 501.

76. *In re Adams* (D. C., N. Y.), 4 Am. B. R. 696, 104 Fed. 72; *Rugely v. Robinson*, 19 Ala. 404.

77. *In re DeLeeuw* (D. C., N. Y.), 3 Am. B. R. 418, 98 Fed. 408.

78. *In re Bacon* (D. C., N. Y.), 30 Am. B. R. 584, 205 Fed. 545.

79. *Gretsch v. United States* (C. C. A., 3d Cir.), 36 Am. B. R. 571, 231 Fed. 57.

80. *McNiell v. United States* (C. C. A., 5th Cir.), 18 Am. B. R. 18, 150 Fed. 82, holding that evidence that counsel advised the bankrupt to keep his business open up to the usual closing time of the day of his adjudication is not admissible to relieve the bankrupt from liability for keeping the funds received on such day.

81. *Kern v. United States* (C. C. A., 6th Cir.), 22 Am. B. R. 223, 169 Fed. 617.

82. *Johnson v. United States* (C. C. A., 1st Cir.), 23 Am. B. R. 359, 170 Fed. 581. See also Am. B. R. Dig. § 1194.

83. *Glass v. United States* (C. C. A., 3d Cir.), 36 Am. B. R. 550, 222 Fed. 773.

83a. *Green v. United States* (C. C. A., 2d Cir.), 39 Am. B. R. 637, 240 Fed. 949.

ruptcy nor his examination before the referee, if objected to by the bankrupt, are admissible on an indictment for concealment of property.⁸⁴ The books of the bankrupt are admissible in evidence upon a trial of the indictment although he claims his privilege.⁸⁵ The nature of the act of concealment is such that it can rarely be proved by direct testimony; the evidence must be largely if not wholly circumstantial, and "such as in practical affairs of life tends to produce belief and conviction in the minds of those to whom such evidence is addressed."⁸⁶

c. False oath.⁸⁷—(1) **IN GENERAL.**—The fifth amendment of the United States Constitution does not prohibit the imposition of a punishment for false swearing on a compulsory examination.⁸⁸ Nor does the immunity provision of § 7 (9) of the bankruptcy act, that no testimony given by a bankrupt upon his examination "shall be offered in evidence against him in any criminal proceeding" exempt him from a criminal prosecution for giving false testimony on such an examination.⁸⁹ The insertion of this common-law offense in the statute simply creates a different penalty for a crime already defined,⁹⁰ and where a defendant, in a proceeding in bankruptcy, has been indicted under this section, and also under the Penal Code, he can only be prosecuted under this section.^{90a} The false oath must have been "knowingly and fraudulently" made.⁹¹

(2) **WHAT CONSTITUTES FALSE OATH.**—What is a "false oath" in bankruptcy is considered elsewhere.⁹² The words "false oath," as employed in this section, comprehend false swearing by the bankrupt in a proceeding to investigate the truth of specifications filed against his discharge.⁹³ And also false testimony given by a witness before a special commissioner, appointed under § 21-a, prior to the bankrupt's adjudication,⁹⁴ but it does not embrace the verification by the bankrupt of schedules from which he has omitted property transferred in fraud of creditors more than four months before the filing of the petition;⁹⁵ although it may include a verification of schedules from which property which should have been transferred to the trustee has been fraudulently omitted.⁹⁶ The making of a false oath either in or out of bank-

84. *Johnson v. United States* (C. C. A., 1st Cir.), 20 Am. B. R. 724, 163 Fed. 30; *Jacobs v. United States* (C. C. A., 1st Cir.), 20 Am. B. R. 550, 161 Fed. 694.

Failure to schedule not a concealment.—The offense denounced by the provisions of section 29-b contemplate the concealment of property by some other act or acts upon the part of the bankrupt than merely omitting it from the schedules, and affirmative false statements of some material fact or facts by the bankrupt, wilfully and intentionally made by him, knowing the same to be false. In re *Hennebry* (D. C., Iowa), 31 Am. B. R. 231, 207 Fed. 882; *Gretsch v. United States* (C. C. A., 3d Cir.), 36 Am. B. R. 571, 231 Fed. 57.

85. *Johnson v. United States* (U. S. Sup. Ct.), 30 Am. B. R. 14, 228 U. S. 457; *Kerrich v. United States* (C. C. A., 1st Cir.), 22 Am. B. R. 544, 171 Fed. 386, distinguishing *Johnson v. United States* (C. C. A., 1st Cir.), 20 Am. B. R. 724, 163 Fed. 30. Compare *People v. Swarts and Greenberg* (Ill. Crim. Ct.), 8 Am. B. R. 487, 24 Mut. Corp. Rep. 266.

86. *Stern v. United States* (C. C. A., 3d Cir.), 28 Am. B. R. 101, affg. 26 Am. B. R. 110, 186 Fed. 854. See also *United States v. Greenbaum* (D. C., Mich.), 42 Am. B. R. 256, 252 Fed. 259.

The mere fact that a man was president of a corporation and as such had opportunity to find out that a considerable portion of the stock in trade of the corporation had disappeared, and that he frequently visited the place of business of the corporation, but took no active part in its management, is not sufficient to show that

he knowingly and fraudulently concealed the assets of the corporation. *Wolf v. United States* (C. C. A., 4th Cir.), 39 Am. B. R. 106, 238 Fed. 902.

87. See also Am. B. R. Dig. § 1183.

88. *Glickstein v. United States*, 27 Am. B. R. 786, 222 U. S. 139.

89. *Wechsler v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579, revg. 16 Am. B. R. 1.

90. *Wechsler v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579.

90a. *Rosenthal v. United States* (C. C. A., 8th Cir.), 41 Am. B. R. 583, 248 Fed. 684.

91. *National Bank of Louisville v. Carley* (C. C. A., 3d Cir.), 12 Am. B. R. 119, 127 Fed. 696.

Knowingly and fraudulently.—When a person states matter which he does not believe to be true, wilfully and contrary to his oath, he may certainly be said to make a false oath "knowingly and fraudulently." *Wechsler v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579, revg. 16 Am. B. R. 1.

92. See under Section Fourteen of this work, subtitle "A false oath in the proceeding."

93. *Edelstein v. United States* (C. C. A., 8th Cir.), 17 Am. B. R. 649, 159 Fed. 636.

A false oath is evidently a corruptly false oath, such as will subject the affiant to a prosecution for perjury. In re *Gilpin* (D. C., Pa.), 20 Am. B. R. 374, 389, 160 Fed. 171.

94. *United States v. Liberman* (C. C., N. Y.), 23 Am. B. R. 734, 176 Fed. 161; *United States v. Gray* (D. C., N. Y.), 43 Am. B. R. 158, 255 Fed. 98.

ruptcy proceedings is perjury, and punishable as such; if made in a bankruptcy proceeding it is punishable as prescribed in this section, rather than as prescribed in the Federal Penal Code.⁹⁷ Although this section prescribes no punishment for one who suborns another to make a false oath in a proceeding in bankruptcy, one who is guilty of such subornation is punishable under the Penal Code,⁹⁸ but the crime of false swearing in bankruptcy proceedings is not equal in enormity to the crime of perjury.⁹⁹ The offense, when once committed, cannot be retrieved by right and lawful conduct on the part of the defendant in assisting his trustee in gathering assets which ought to have been disclosed before.¹⁰⁰ The making of a "false account" is not a crime except as here prescribed. These latter words when applied to a debtor are not important, as an unverified account by the bankrupt is practically unknown. Not so where the false account is filed by the trustee or receiver; it is often not verified, but this would not save the guilty officer from the penalty of the statute. This subsection then refers to the perjury of, or the making of a false account in the proceeding by, any person.

(3) **ADMINISTRATION OF OATH.**—In a trial of an indictment under this clause, it must be shown that the oath was administered by an officer authorized to administer it.¹⁰¹ A referee may administer such an oath.¹⁰²

(4) **EVIDENCE OF FALSE OATH.**—Evidence should be clear and satisfactory.¹⁰³ In a prosecution for false swearing evidence which not only contradicts the testimony of the defendants, but so far preponderates it as to justify the jury in finding that the latter was not only false but was made by the defendant knowingly and fraudulently is all that is necessary to prove the crime of making a false oath.¹⁰⁴ Proof that the defendant took the oath either before he began to testify or when he finished and signed the testimony is sufficient to support the charge of perjury.¹⁰⁵

96. In re Heneby (D. C., Iowa), 31 Am. B. R. 231, 207 Fed. 882.

98. *Gretch v. United States* (C. C. A., 3d Cir.), 36 Am. B. R. 571, 231 Fed. 57.

97. *U. S. v. Wechsler* (D. C., N. Y.), 16 Am. B. R. 1, revd. on other grounds, 19 Am. B. R. 1, 158 Fed. 579.

98. *Epstein v. United States* (C. C. A., 7th Cir.), 28 Am. B. R. 561, 196 Fed. 354. See U. S. Penal Code, § 126.

99. *Kahn v. United States* (C. C. A., 2d Cir.), 32 Am. B. R. 109, 214 Fed. 54.

100. *Kern v. United States* (C. C. A., 6th Cir.), 22 Am. B. R. 223, 169 Fed. 617.

101. In re Conroy (D. C., Pa.), 14 Am. B. R. 249, 134 Fed. 764, holding that if the bankrupt knowingly and fraudulently made a false oath in respect to a conveyance of real property owned by him, at any time, he is guilty of this offense.

102. *United States v. Simon* (D. C., Wash.), 17 Am. B. R. 41, 146 Fed. 89, holding that an indictment of a bankrupt for perjury is not demurrable upon the ground that the referee was not authorized to administer an oath to the defendant.

103. In re Troeder (C. C. A., 1st Cir.), 17 Am. B. R. 723, 150 Fed. 710. See also Am. B. R. Dig. § 1195.

An inquiry as to assets or liabilities of a bankrupt may be carried back as far as is necessary, and everything bearing upon the

question at the time of bankruptcy is material. Hence a question with respect to the financial condition of the business of the said bankrupt; and with respect to the amount of assets and liabilities of the said bankrupt, is material, although relating to the bankrupt's financial condition several years before the filing of the petition in bankruptcy. *United States v. Rosenthal* (D. C., N. Y.), 33 Am. B. R. 730, 211 Fed. 738.

Evidence of business relations between defendant and bankrupt.—Where the defendant testified before the referee that he received cash for a check delivered to the bankrupt, while the prosecution claimed that he merely received checks in return, the object being to pad the bankrupt's bank account, evidence may be admitted tending to show close business and confidential relations between the accused and the bankrupt to show motive. *Ulmer v. United States* (C. C. A., 6th Cir.), 34 Am. B. R. 153, 219 Fed. 641, citing *Daniels v. United States* (C. C. A., 6th Cir.) 27 Am. B. R. 790, 196 Fed. 450.

Testimony of witness before referee.—Upon the prosecution of a defendant for false swearing in a bankruptcy proceeding, it is error to allow the prosecution to bring out on cross-examination of a hostile witness, his testimony given before the referee in bankruptcy, it not being done for the purpose of refreshing his memory. *Rosenthal v. United States* (C. C. A., 8th Cir.), 41 Am. B. R. 583, 246 Fed. 684.

104. *Kahn v. United States* (C. C. A., 2d Cir.) 32 Am. B. R. 109, 214 Fed. 54.

105. *United States v. Wechsler* (D. C., N. Y.), 16 Am. B. R. 1, revd. on other grounds 19 Am. B. R. 1, 158 Fed. 579.

d. Punishment.—Here, too, the only punishment is by imprisonment; but the maximum is two, not five, years.¹⁰⁶ If perjury is charged and the indictment is laid under the general law, the punishment prescribed by that law will, of course, follow a conviction.

e. Offenses by others.—(1) **IN GENERAL.**—While the word "person"¹⁰⁷ includes the officers¹⁰⁸ named in the law, and thus any of the offenses enumerated in subsection *b* may be chargeable to an officer, yet the last three subdivisions of subsection *b* are manifestly intended to meet acts or omissions by others than the bankrupt or such officers. These subdivisions are new, and have as yet received little attention from the courts.

(2) **PRESENTING A FALSE CLAIM.**—The presenting of a false claim under oath against a bankrupt's estate is a crime.^{109a} Though the clause is phrased somewhat awkwardly, it is thought that it applies to an attorney who presents such a claim in an ordinary proceeding, as well as in one for a composition. The intention clearly is to penalize the filing of false claims, and to make both the claimant and any one who acts in his stead in presenting the claim liable therefor. The words "used any such claim in composition" enlarge the scope of the clause in such proceedings; it may have been presented without knowledge of its falsity, but acted on, as by assenting to the offer of composition, after that fact became known. Knowledge of falsity is essential, but that the presentation or use was fraudulent does not seem a necessary element. On a prosecution for this offense testimony given by the defendant on a hearing in bankruptcy is admissible.^{109b} The books of the bankrupt, accompanied by explanatory evidence by accountants and statements made by the bankrupt to credit companies, are admissible on the question whether the defendant made a loan to the bankrupt.^{109c}

(3) **RECEIVING PROPERTY WITH INTENT TO DEFEAT THE ACT.**—The elements of pleading and proof here are: (a) The receipt of a material amount of property belonging to the bankrupt, (b) after the filing of the petition,¹¹⁰ and (c) with intent to defeat the act.¹¹¹ This offense can, therefore, not be committed by one who is the unconscious beneficiary of a fraudulent transfer or preference before bankruptcy,¹¹¹ though intent to defeat the act is palpable. On the other hand, only intent, not also the result, need be shown. But intent will never be presumed where the acts complained of are made the foundation of an indictment; it must be proved. This offense will, in the nature of things, be rare, and occur only in involuntary cases before actual adjudication.

106. Three counts in an indictment for a false oath under section 29, where the defendant made substantially the same statement at three different times, charge but one offense, and in such a case imprisonment for more than two years specified in such section is unauthorized. *Uimer v. United States* (C. C. A., 6th Cir.), 34 Am. B. R. 143, 219 Fed. 641.

Effect of Revised Statutes, § 5392.—While the effect of section 5392 of the United States Revised Statutes, making oral and written false statements perjury, when sworn to before any competent tribunal, officer or person in any case in which a law of the United States authorizes an oath to be administered, is restricted by section 29 of the Bankruptcy Act, both sections may be construed together as providing a stated penalty for the crime of false swearing, with the proviso that when the offense is committed in a bankruptcy proceeding the offender, upon conviction, shall be subjected

to a different penalty. *Wechsler v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579, revg. 16 Am. B. R. 1.

107. Bankruptcy Act, § 1 (19).

108. Bankruptcy Act, § 1 (18).

109a. Advice of counsel.—Where the defendant did not detail all the facts and circumstances to his counsel as to the entire transaction but merely stated to his counsel that he had loaned money to the bankrupt, he was not entitled to a binding instruction for acquittal on the ground that he acted on the advice of counsel in filing his claim and therefore did not knowingly present a false claim under oath. *Levinson v. United States* (C. C. A., 3d Cir.), 45 Am. B. R. 305, 263 Fed. 257.

109b. *Levinson v. United States* (C. C. A., 3d Cir.), 45 Am. B. R. 305, 263 Fed. 257.

109c. *Levinson v. United States* (C. C. A., 3d Cir.), 45 Am. B. R. 305, 263 Fed. 257.

110. See *U. S. v. Latorre*, Fed. Cas. 15,567, 8

(4) **EXTORTING MONEY.**—The fifth subdivision is clearly aimed at those creditors who seek an advantage as a consideration for consenting to a proposed composition. It may, of course, be availed of where pressure, including a money payment, is exerted, resulting in the withdrawal of objections to a discharge. Whether it is available where a debt is not proven in consideration of a new promise may be doubted; such a new promise is neither money nor property.¹¹² Cases are conceivable, too, where the bankrupt may commit this offense. The broad meaning of "person" should be remembered.¹¹³ The mere attempt to extort is enough. But extortion is not shown where a creditor loaned money to a bankrupt for use in paying the consideration of a composition and the bankrupt promised that when the composition was confirmed he would pay the creditors the balance of their claim, after deducting their share of the consideration of such composition.¹¹⁴

(5) **CONSPIRACY.**¹¹⁵—Under § 5440 of the U. S. R. S. (now § 37 of the United States Criminal Code) it has been held that a person who conspires with another to commit an offense against the bankruptcy act is liable to prosecution.¹¹⁶ If a bankrupt conceal his property before the appointment of a trustee and continue to conceal it after the appointment he violates the bankruptcy act and a conspiracy that he shall do so violates the conspiracy statute.¹¹⁷ Insolvent debtors can be convicted of conspiracy to conceal property in anticipation of involuntary bankruptcy proceedings against them.^{117a} The offense of conspiracy, as defined by § 37 of the U. S. Criminal Code, is not one arising under the Bankruptcy Act.¹¹⁸ Individuals may be guilty of the offense of conspiring to conceal the assets of a corporation, although the corporation, as such, was not a party to the conspiracy.¹¹⁹ Circumstantial evidence is admissible to prove the crime of conspiracy to conceal assets,¹²⁰ as the crime, from the nature of the case, can rarely be proved by direct oral evidence. If the proof shows a previous meeting and a concert of action thereafter, each of the parties doing some act contributing toward the accomplishment of an unlawful purpose, a jury is justified in finding that they were conspiring to accomplish that purpose.¹²¹ Upon a prosecution for conspiracy, the schedules are admissible in evidence.¹²² Evidence not only of the fraudulent concealment of assets by a bankrupt, but of the joint participation of the defendants in the acts by which the fraudulent concealment was accomplished is sufficient to sustain a conviction for con-

Blatchf, 134; Knapp, etc., Co. v. Drew (C. C. A., 8th Cir.), 20 Am. B. R. 355, 160 Fed. 413. See also Am. B. R. Dig., § 1185.

110. Knapp, etc., Co. v. Drew (C. C. A., 8th Cir.), 20 Am. B. R. 355, 160 Fed. 413; In re Lutig (D. C., Mass.), 15 Am. B. R. 773, 162 Fed. 322, holding that the mere sale of a creditor's claim to a brother-in-law of a bankrupt is not necessarily a commission of the offense of receiving "any material amount of property from a bankrupt after the filing of the petition," nor does it necessarily involve any intent to defeat the act.

111. See Wayne Knitting Mills v. Nugent (D. C., Ky.), 4 Am. B. R. 747, 104 Fed. 530. Compare also *s. c.*, in Supreme Court, Mueller v. Nugent, 181 U. S. 1, 7 Am. B. R. 224.

112. Where an alleged bankrupt, without suggesting the pendency of bankruptcy proceedings permits an action at law by the principal petitioning creditor to go to judgment, and pays the same, if the payment is received with intent to take no further action in the bankruptcy proceedings, it may constitute the receipt of money "after the filing of the petition, with intent to defeat this act," within the meaning of section 29b (4) of the bankruptcy Act. Matter of Lavery & Son (D. C., Mass.), 37 Am. B. R. 606, 235 Fed. 910.

113. Bankruptcy Act, § 1 (19).

The provision applies to all persons who extort money or property from any one as a consideration for acting or forbearing to act in bankruptcy proceedings. United States v. Dunkley (D. C., Cal.), 38 Am. B. R. 127, 225 Fed. 1000.

114. Zavelo v. Reeves, 227 U. S. 625, 29 Am. B. R. 493.

115. See under this section, sub-title "Conspiracy to conceal property; indictment," *supra* p. 623. See also Am. B. R. Dig., §§ 1184, 1191, 1196.

116. U. S. v. Bayer, Fed. Cas. 14547, 4 Dill 407.

117. Cohen v. United States (C. C. A., 9th Cir.), 19 Am. B. R. 8, 12, 157 Fed. 651, aff. 15 Am. B. R. 357; United States v. Rhodes (D. C. Ala.), 32 Am. B. R. 523, 212 Fed. 513.

117a. Meyer v. United States (C. C. A., 7th Cir.), 43 Am. B. R. 690, 258 Fed. 212.

118. Rabinowitz v. United States (C. C. A. 2d Cir.), 34 Am. B. R. 130, 222 Fed. 846.

The crime of conspiracy to conceal assets cannot be committed unless the assets to be concealed are such as the trustee is entitled to receive. Malvin v. United States (C. C. A., 2d Cir.), 42 Am. B. R. 98, 252 Fed. 449.

spiracy.¹²³ Each one of joint defendants may take the stand in his own behalf and his testimony is admissible for and against his codefendant.¹²⁴ Proof that some of the assets alleged to have been concealed were preferentially transferred merely, does not make a conviction improper where there is proof that other assets were concealed in pursuance of the conspiracy.^{124a}

(6) PUNISHMENT.—The punishment for either of these offenses, like those committed by the bankrupt, is imprisonment for not more than two years.

(7) ATTORNEYS VIOLATING ACT.—An attorney who designedly defeats or attempts to defeat the operation of the bankruptcy act is subject to suspension,^{124b} or disbursement.^{124c}

IV. OFFENSES BY A REFEREE AND PUNISHMENT.

a. In general.—The former law penalized the taking of unlawful fees. This subsection is, therefore, new. There are no cases yet reported under it. For what will make a referee "directly or indirectly interested," see under section thirty-nine, *post*; also for what constitutes his duty as to giving information. But the offense defined in subdivision 3 cannot be committed until the referee has been directed by the court, which here means the judge, to permit the inspection.

b. Punishment.—Here the punishment does not involve imprisonment; but ousts the guilty officer from office and makes him liable to a fine of not more than \$500. This offense is, therefore, not an infamous crime.¹²⁵

V. NO PROSECUTION AFTER ONE YEAR.¹²⁶

The limitation contained in subsection *d* is absolute. The indictment must be found or the information filed within one year after the commission of the offense.¹²⁷ This subdivision has no application to an indictment under § 37 of United States Criminal Code for conspiracy to commit an offense arising under the bankruptcy act.¹²⁸

119. *United States v. Young & Holland Co.* (Cir. Ct., R. I.), 22 Am. B. R. 484, 170 Fed. 110; *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513.

120. *Stein v. United States* (C. C. A., 3d Cir.), 28 Am. B. R. 101, 193 Fed. 888; *United States v. Green* (D. C., Va.), 34 Am. B. R. 405, 220 Fed. 973; *Meyer v. United States* (C. C. A., 7th Cir.), 43 Am. B. R. 690, 258 Fed. 212.

121. *Radin v. United States* (C. C. A., 2d Cir.), 25 Am. B. R. 640, 189 Fed. 658.

122. *United States v. Green* (D. C., Pa.), 34 Am. B. R. 405, 220 Fed. 973.

123. *United States v. Green* (D. C., Pa.), 34 Am. B. R. 405, 220 Fed. 973.

124. *Radin v. United States* (C. C. A., 2d Cir.), 25 Am. B. R. 640, 189 Fed. 658.

124a. *Meyer v. United States* (C. C. A., 7th Cir.), 43 Am. B. R. 690, 258 Fed. 212.

124b. *In re Naphtaly* (Cal. Sup. Ct.), 14 Cent. L. J. 96.

124c. *In re Joseph* (N. Y. Sup. Ct.), 135 App. Div. (N. Y.) 589, 120 N. Y. Supp. 793.

125. *Compare U. S. v. Block*, Fed. Cas. 14,609.

126. See also Am. B. R. Dig., § 1199.

127. Continuing concealment; indictment barred by statute of limitations.—The fact that concealed property remains concealed does not continue the offense; and where an indictment which charged bankrupt with having knowingly and fraudulently concealed assets from his trustee, was found more

than twelve months after the filing of the bankruptcy petition and schedules and more than twelve months after bankrupt's adjudication and the appointment of a trustee, but the evidence as to defendant's acts in relation to the property all related to a period prior to his filing his petition in bankruptcy. He having done nothing since that time but remain passive and silent, the prosecution for the offense was barred by section 29d of the Bankruptcy Act, which provides that an indictment for concealing assets shall be found within one year after the commission of the offense. *Warren v. United States* (C. C. A., 5th Cir.), 29 Am. B. R. 555, 199 Fed. 753.

An unsupported statement of the district attorney as to when a defendant accused of false swearing was sworn in the bankruptcy proceeding, is insufficient to establish that the offense occurred within the limitation prescribed by this subdivision. *Rosenthal v. United States* (C. C. A., 8th Cir.), 41 Am. B. R. 583, 248 Fed. 684.

128. *United States v. Rabinowitz* (U. S. Sup. Ct.), 42 Am. B. R. 255, 238 U. S. 78; *United States v. Comstock* (Cir. Ct., R. I.), 20 Am. B. R. 526, 162 Fed. 416; *Rabinowitz v. United States* (C. C. A., 2d Cir.), 34 Am. B. R. 130, 222 Fed. 846.

SECTION THIRTY.

RULES, FORMS, AND ORDERS.

§ 30. Rules, Forms, and Orders.—*a* All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

Analogous provisions: In U. S.: Act of 1868, § 10.
In Eng.: Act of 1883, § 127.
In Can.: Act of 1919, § 66.

SYNOPSIS OF SECTION.

RULES, FORMS, AND ORDERS.

I. Rules, Forms, and Orders, 634.

- a. Comparative legislation and meaning of section, 634.*
- b. Those prescribed should be followed, 634.*
- c. Supplemental rules and forms, 635.*

RULES, FORMS, AND ORDERS.¹

a. Comparative legislation and meaning of section.—The English bankruptcy authorizes the lord chancellor, with the concurrence of the president of the board of trade, to make, revoke, and alter general rules in bankruptcy, which, when laid before parliament, have the same effect as if previously enacted by that body.² The general rules in England are, therefore, as much law as the statute. The provisions in the Canadian Act are similar to those in the English Act.^{2a} Our system does not permit judicial legislation of this character. The former act gave the justices of the Supreme Court power to frame general orders for a variety of purposes.³ The orders then framed and the forms prescribed for carrying them out have been used as models for those now in vogue,⁴ and the court will construe the present general orders as the general orders under the earlier statute were construed.⁵ The purpose is, of course, to accomplish uniformity in practice throughout the States.⁶

b. Those prescribed should be followed.—It has been distinctly held that the general orders promulgated by the Supreme Court in accordance with this section are binding upon courts of bankruptcy. They confer rights as well as prescribe rules of practice.⁷ The rules and forms prescribed by

1. See also Am. B. R. Dig., § 37.

2. Eng. Act of 1883, § 127.

2a. Can. Bankr. Act of 1919, § 66.

3. Act of 1867, § 10.

4. See Bump on Bankruptcy (9th ed.), and General Orders and Forms therein.

5. In re Levin (C. C. A., 1st Cir.), 23 Am. B. R. 845, 176 Fed. 177.

6. Savings Bank v. Bank, Fed. Cas. 12,919.

State rules of practice.—When an adjudication is made in bankruptcy the case is in the U. S. District Court, and rules of State

practice regarding acts to be done within a specified time yield to the rules of the Federal court. In re Fall City Shirt Mfg. Co. (D. C., Ky.), 3 Am. B. R. 437, 98 Fed. 592.

7. In re Scott (D. C., N. Car.), 3 Am. B. R. 625, 99 Fed. 404; In re Schiller (D. C. Va.), 2 Am. B. R. 704, 96 Fed. 400. It is the duty of referees to comply with General Order XXIII. Faulk & Co. v. Steiner (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 661.

the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law.⁸ It is the duty of referees and trustees to conform therewith.⁹ Filing has been refused to papers not in accordance with the official forms.¹⁰ The general orders are not to be taken as enlarging the statute, but must, if possible, be construed consistently with it.¹¹ But the general orders are not always in tune with the law; and the forms show a want of harmony at times both with the law and the general orders. In such cases, the law, of course, controls.¹² The general orders and forms have not, in respect to procedure, the full force and effect of law.¹³ In any event they do not abrogate the law. The orders being simply an amplification of the law with respect to procedure, they should not be construed as extending the powers granted to the court by virtue of the law itself.¹⁴ Rules may not enlarge the statute, but are merely prescribed to carry the act into effect.¹⁵

c. Supplemental rules and forms.—The general orders are intended only to confine the practice in bankruptcy within certain broad limits. They are not exclusive, and most of the district courts have prescribed supplemental rules; these should always be consulted. Even these have not always been found sufficient, and local rules are sometimes promulgated by the referees.¹⁶ Rules of the district courts may not conflict with the rules and forms pro-

8. In re Gerber (C. C. A., 9th Cir.), 26 Am. B. R. 608, 617, 186 Fed. 693, so held as to the rules and forms in regard to exemptions; Powell v. Pangborn (N. Y. Sup. Ct.), 31 Am. B. R. 650; Sabin v. Blake-McFall Co. (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501.

Effect on jurisdiction.—A rule, not expressly authorized by some law of Congress, cannot confer judicial power on a District Court, to set aside or disregard the findings of fact of a referee, in an action by a trustee in bankruptcy to recover an alleged preference, where the parties had expressly stipulated to have the matter tried and determined by the referee. Grant v. National Bank of Auburn (D. C., N. Y.), 37 Am. B. R. 329, 232 Fed. 201.

9. Faulk v. Steiner (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861; In re Jamieson (D. C., Ill.), 9 Am. B. R. 681, 120 Fed. 697.

10. Mahoney v. Ward (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278, holding that a written or typewritten schedule will not be accepted. The printed blank containing forms prescribed by the rules of court must be used.

11. In re City Contracting Co. (D. C., Hawaii), 30 Am. B. R. 133.

12. See In re Soper (Rec., N. Y.), 1 Am. B. R. 193. See also comments and discussions of rules and forms at the various conventions of referees in bankruptcy, 1 N. B. N. 435-438; also 2 N. B. N. Rep., Number for Oct. 1, 1900, pp. 29-32. As to case where there was conflict between rule and statute, see In re Isaacson (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 779; In re City Contracting Co. (D. C., Hawaii), 30 Am. B. R. 133.

13. West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463, where the court said: "These rules were but intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case." Compare In re Baxter, Fed. Cas. 1,121.

14. Orcutt Co. v. Green, 204 U. S. 96, 17 Am. B. R. 72, in which the court, in considering the effect of General Order 21, said: "There is nothing in that provision inconsistent with, or opposed to, anything stated in the bankruptcy law upon the subject, and we must therefore take the statute and read them together, the order being simply somewhat of an amplification of the law with respect to procedure, but nothing which can be construed as beyond the powers granted to the court by virtue of the law itself."

15. Weidenfeld v. Tillinghast (C. C., N. Y.), 18 Am. B. R. 531, 104 N. Y. Supp. 712.

Forms prescribed are not intended to effect any change in the law. Burke v. Guarantee & Trust Co. (C. C. A., 3d Cir.), 14 Am. B. R. 31, 134 Fed. 562. They are to be "observed and used with such alterations as may be necessary to suit the circumstances of any particular case." General Order 38. The fact that the official form for involuntary petitions contains an allegation of insolvency does not make such an allegation material where the statute provides that other facts alone constitute a sufficient cause for adjudication. West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463.

16. For those in force in the western district of New York, see 1 N. B. N. 112-116. See also Samson v. Burton, Fed. Cas. 12,285. For additional forms, see Hagan & Alexander's Bankruptcy Forms, 2d ed.

mulgated by the Supreme Court.¹⁷ Likewise of the forms. Some of the more valuable, as well as many new ones suggested by experience, will be found under "Supplementary Forms," *post*. Where there is no rule to the contrary, or official form which is applicable, they may be used. Existing forms, too, may often be modified to fit a particular case; so, also, two or more prescribed forms may be combined.¹⁸ The goal to be reached is the important consideration. If without much violence done to prescribed rules and forms, the practitioner does so, he need concern himself as little about a technical observance of them as the court will with a captious objection on the other side.¹⁹

17. In *re Johnson* (D. C., Ark.), 19 Am. B. R. 814, 158 Fed. 342. Thus, in *Matter of Nathanson* (D. C., N. Y.), 19 Am. B. R. 56, 152 Fed. 585, it was held that Form 58, promulgated by the Supreme Court under this section, must be complied with by a creditor desiring to oppose an application for a discharge.

18. *Mather v. Coe* (D. C., Ohio), 1 Am. B. R. 504, 92 Fed. 333. Reference should be made to Hagar and Alexander's *Bankruptcy Forms*, 2nd Ed., for forms not included in this work.

19. Compare *In re Paige* (D. C., Ohio), 1 Am. B. R. 679, 99 Fed. 533.

SECTION THIRTY-ONE.

COMPUTATION OF TIME.

§ 31. **Computation of Time.**—*a* Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Analogous provisions: In U. S.: Act of 1867, § 48, R. S., § 5013.

In Eng.: Act of 1883, § 141, General Rule 4.

In Can.: Act of 1919, § 82.

Cross-references: To the law: Expiration of four months' period, § 3-b; time limit for vacating preference secured by legal proceeding, § 3-a(3).

Schedules to be filed within ten days, § 7(8).

Composition, application to set aside within six months, § 13.

Discharge, time limit upon application, § 14-a.

Revocation of discharge within one year, § 15.

Petition in involuntary proceedings, returned within fifteen days, § 18-a.

Bankrupt to appear within five days, § 18-b.

Appeal from judgment within ten days, § 25-a.

Allowance of claim, proof filed within one year, § 57-n.

Notice to creditors, by mail, ten days, § 58-a.

Time for publication, § 58-b.

Preferential transfers, etc., within four months, § 60.

Priority of wages earned within three months, § 64-b(4).

Dividends, time of declaring, § 65.

Unclaimed for six months, paid into court, § 66.

Transfers, liens, etc., within four months' period, § 67.

Vesting property in trustee as of date of adjudication, § 70.

To the General Orders: Time of filing papers to be indorsed by clerk or referee, II.

Schedules in involuntary proceedings, within five days, IX.

Times and places where referees shall act, XII.

Trustee's report as to exemptions within twenty days, XVII.

Order to show cause granted by referee where trustee fails to report within five days, XVII.

Referee to make return to judge under oath on first Tuesday of each month, XXVI.

SYNOPSIS OF SECTION.

COMPUTATION OF TIME.

I. Computation of Time, 638.

a. *In general*, 638.

b. *By months and years*, 638.

c. *By days*, 638.

d. *By fractions of a day*, 638.

I. COMPUTATION OF TIME.

a. **In general.**—The rule stated in this section is familiar. The English law is similar.¹ The Canadian act is along the same line as our own but more elaborate.^{1a} The law of 1867 differed only in the words prescribing what days were holidays.² This the present statute does elsewhere.³ But the rule does not permit the exclusion of Sundays or holidays, save those coincident with the "day last included."⁴

b. **By months and years.**—The phrases "four months" and "one year" are frequent in the act. The present section speaks only of "time enumerated by days." Under the former statute, however, it was held that the same rule applied when the time was enumerated by months and years.⁵ So, also, under the law of 1898.⁶ While the first six words of the section would seem to indicate that it was not intended to apply where the time is enumerated by months or years, the following words "or in any proceeding in bankruptcy" makes it applicable to any proceeding in bankruptcy where the number of days is material.⁷ In the dissolution of attachments made within four months this section has been applied in computing those months.⁸

c. **By days.**—Here the statute is self-explanatory. Time limitations, based on days, are found in many sections;⁹ also in some of the general orders.¹⁰ Cases on the timely filing of petitions will be found in the footnote.¹¹

d. **By fractions of a day.**—Here the rule seems to be that fractions of a day will be disregarded. This doctrine is the composite of an ancient controversy. Cases under the present law and its predecessor are cited in the footnote.¹² There can now, however, be no question about the rule being as stated.¹³

1. Eng. Act of 1883, § 141.

1a. Can. Bankr. Act of 1919, § 82.

2. Act of 1867, § 48; R. S., § 5013.

3. Bankruptcy Act, § 1 (14).

4. Compare *In re York*, Fed. Cas. 18,139.

5. *In re Lang*, Fed. Cas. 8,056; *Cooley v. Cook*, 125 Mass. 406.

6. *Matter of Lewandowski* (D. C., Mass.), 39 Am. B. R. 804. Compare *In re Stevenson* (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 110; *In re Holmes* (D. C., Vt.), 21 Am. B. R. 339, 165 Fed. 225, in which the court said: "Applying this section to section 14, I hold that the old expression of 'a year and a day' is applicable, or, in other words, if a bankrupt is adjudicated on the 23d day of November, 1908, he may file his application for discharge on the 24th day of November, 1908, and if the 24th falls on Sunday, or a holiday, the next day thereafter."

7. *In re Holmes* (D. C., Vt.), 21 Am. B. R. 339, 165 Fed. 225; *Matter of Lewandowski* (D. C., Mass.), 39 Am. B. R. 804.

8. *Jones v. Stevens*, 5 Am. B. R. 571, 94 Me. 582; *In re Warner* (D. C., Conn.), 16 Am. B. R. 519, 144 Fed. 987.

9. Thus, see *In re Wolf* (D. C., N. J.), 2 Am. B. R. 322, 94 Fed. 382. Where a bankrupt has to vacate or discharge a preference five days before the 22d of a certain month it has been held that he has all of the 17th day of such month. *Pittsburgh Laundry v. Imperial Laundry* (C. C. A., 3d Cir.), 18 Am. B. R. 756, 154 Fed. 662.

10. See *In re Scott* (D. C., N. Car.), 3 Am. B. R. 625, 99 Fed. 404.

11. *In re Rogers*, Fed. Cas. 12,003; *In re*

Lang, Fed. Cas. 8,056. Exceptions to a trustee's report, filed one day late, that is, more than twenty days thereafter, will be dismissed. *Matter of Amos* (Ref., Ga.), 19 Am. B. R. 804. See also Am. B. R. Dig., § 234.

12. *In re Stevenson* (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 110; *In re Dupree* (D. C., N. Car.), 8 Am. B. R. 321, 97 Fed. 28; *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 383, 95 Fed. 637; *In re Stoner* (D. C., Pa.), 5 Am. B. R. 402, 105 Fed. 752; *Jones v. Stevens*, 5 Am. B. R. 571, 94 Me. 582, disapproving of *Westbrook Mfg. Co. v. Grant*, 60 Me. 88; *In re Tomdanda St. Planning Mill Co.* (Spec. M., N. Y.), 6 Am. B. R. 38. And under the law of 1867, *Dutcher v. Wright*, 94 U. S. 553.

13. **Fractions of a day.**—The rule in bankruptcy, as in other judicial proceedings, is that as to the general doctrine the law does not allow fractions of a day, and that such fractions will only be considered when substantial justice so requires. *Moore v. Third Nat. Bank of Philadelphia* (Super. Ct. Pa.), 24 Am. B. R. 568, 41 Pa. Super. Ct. 497, quoting *Collier on Bankruptcy* (6th ed.), p. 332; *In re Warner* (D. C., Ct.), 16 Am. B. R. 519, 144 Fed. 987, holding that an attachment made on February 5, 1905, in the forenoon, is within four months prior to June 8, 1905, at 5 p. m., the time of the filing of the petition in bankruptcy and adjudication thereon, and is thereby dissolved.

SECTION THIRTY-TWO.

TRANSFER OF CASES

§ 32. **Transfer of Cases.**—*a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

Analogous provisions: In U. S.: None, save in General Order XVI, under the Act of 1867.
See also R. S., § 5121.

In Eng.: Act of 1883, § 97; General Rules, 18-26.

In Can.: Act of 1919, §§ 6, 68.

Cross-references: To the law: Jurisdiction of court of bankruptcy to transfer cases to other courts of bankruptcy, § 2(19).

Jurisdiction over one partner includes all partners, § 5.

To the General Orders: Petitions in different districts; priorities, VI.

Proceedings in partnership cases, VIII.

I. TRANSFER OF CASES.

Meaning and scope.—This section is intended to avoid conflicts of jurisdiction between the courts of different districts. Three different district courts might have jurisdiction, *i. e.*, where the bankrupt resides, where he has his domicile, and where he has his principal place of business.¹ Three petitions even might be filed, were the case involuntary. The possible complications increase when partnerships are considered. Therefore, the Supreme Court, under the former law, influenced doubtless by the analogy of the last clause of § 36 of that law prescribed by rule² that the court first acquiring jurisdiction should keep it. This rule is now General Order VI, but with a sentence added to make it conform to the section under discussion. The latter is new. It seems intended to modify the hard and fast rule of seniority formerly applied, by permitting one of the courts having jurisdiction to relinquish it and to order a consolidation, if “for the convenience of parties in interest.”³ Neither the act nor

1. Bankruptcy Act, § 2.

2. See Act of 1867, General Order XVI.

3. In re Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456; In re Globe Security Co. (D. C., N. Y.), 12 Am. B. R. 764, note, 132 Fed. 709.

Transfer for convenience of parties in interest.—Where petitions have been filed in different districts, the case should be heard in the district of the bankrupt's domicile, or else be transferred to the district where it would be for the greatest convenience of the parties in interest. In re Wixelbaum (D. C., N. Y.), 3 Am. B. R. 392, 98 Fed. 589.

Where a petition has been filed against a corporation in the district of its domicile, and thereafter a petition is filed against it in a district in another State, the court in which the first petition is filed, unless satisfied that it is for the greatest convenience of all parties in interest that the case should be transferred, is required to retain jurisdiction until the proceedings are closed. In re Tybo Mining & Reduction Co. (D. C., Me.), 13 Am. B. R. 68, 132 Fed. 697.

Where proceedings in bankruptcy against a corporation had been commenced in Alabama, Tennessee and New Jersey, in order

the general order attempts to define the terms, "greatest convenience" or "parties in interest." The interpretation placed upon them by the court,⁴ that the term "parties in interest," covers every party having any interest in or connection with the case, including priority, secured and unsecured creditors, as well as the bankrupts themselves, and that the term, "greatest convenience," depends upon all the circumstances—proximity of a majority of creditors and the place of business of the bankrupts to the court, proximity of witnesses whose attendance is desired in any hearing, and, perhaps numerous other factors—would seem to be the correct view.⁵ Jurisdiction so to do is conferred by § 2 (19). The expressed preference of a majority of the creditors for a transfer, while worthy of careful consideration, is not conclusive upon the question of convenience; the burden of proving greater convenience is upon those seeking the transfer.⁶ Save as modified by this section, however, the practice in vogue under the former law is continued under the present. Unless the court in which the first petition is filed is satisfied that it is for the greatest convenience of all parties in interest that the case should be transferred, it will retain jurisdiction,⁷ and may stay the other court or courts from further proceeding until an adjudication is made or refused.⁸ The petitioners in the

named, and the proceeding in the latter State, including the adjudication therein, is by order transferred to the Tennessee court, an order of the Alabama court transferring the proceeding therein to the Tennessee court, upon the ground of "greatest convenience of parties in interest," is only reviewable by appeal from the order of transfer, although the court granting such order may have made an erroneous finding that the Tennessee court had jurisdiction of the proceeding therein. *Kyle Lumber Co. v. Bush* (C. O. A., 5th Cir.), 13 Am. B. R. 535, 133 Fed. 688.

A motion to transfer a proceeding against a domestic corporation commenced in the Southern District of New York three days prior to the filing of a petition against it in Colorado, will be granted, and the proceedings consolidated. *Matter of The General Metals Co.* (D. C., N. Y.), 12 Am. B. R. 770, 133 Fed. 84.

General Order No. 6 as to the jurisdiction of the court where two or more petitions are filed in different districts against the same debtor is subject to the provisions of this section (§ 32) relating to the transfer and consolidation of petitions for the convenience of parties in interest. In *re Isaacson* (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 779; *Matter of New Era Novelty Co.* (D. C., N. J.), 39 Am. B. R. 80, 241 Fed. 298.

4. *Matter of United Button Co.* (D. C., Del.), 13 Am. B. R. 454, 137 Fed. 668.

5. In *re Sterne & Levi* (D. C., Tex. Ref.), 26 Am. B. R. 259.

6. **Burden of proving convenience.**—*Matter of United Button Co.* (D. C., Del.), 13 Am. B. R. 454, 137 Fed. 668, which construes generally the provisions of this section.

In a proceeding before the bankruptcy court first taking jurisdiction of a bankruptcy case, to determine the question which of two bankruptcy courts should proceed

with the case for the greatest convenience of parties in interest, the burden of satisfying the court by a fair preponderance of the evidence that it would be for the greatest convenience of parties in interest to transfer such case to the other court is under section 32 of the Bankruptcy Act and General Order VI, upon the party seeking the transfer, and where ample notice of the time and object of a hearing upon the matter has been given to all parties in interest and no creditor appears in favor of a transfer and nothing in support of such petition to transfer is offered by the petitioner against an array of facts and circumstances constituting a great preponderance of the evidence in favor of the court first taking jurisdiction retaining and proceeding with the case, such petition to transfer should be denied. In *re Sterne & Levi* (D. C., Tex. Ref.), 26 Am. B. R. 259.

7. In *re Greenfield*, 42 How. Pr. (N. Y.), 469; In *re Penn*, Fed. Cas. 10,927; In *re Boylan*, Fed. Cas. 1,757; In *re Boston*, H. & E., etc., Fed. Cas. 1,678; In *re Leland*, Fed. Cas. 8,228; *Shearman v. Bingham*, Fed. Cas. 12,733.

8. In *re Sears* (D. C., N. Y.), 7 Am. B. R. 279, 112 Fed. 58, as modified on another point by s. c., 8 Am. B. R. 713, 117 Fed. 294; *Matter of United Button Co.* (D. C., N. Y.), 12 Am. B. R. 261, 132 Fed. 378.

Bankrupt corporations.—The word "individual," as used in General Order VI, providing that "in case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile," is equivalent to "person," and as such includes a corporation. *Matter of United Button Co.* (D. C., N. Y.), 12 Am. B. R. 761, 132 Fed. 378; *Matter of New Era Novelty Co.* (D. C., N. J.), 39 Am. B. R. 80, 241 Fed. 298.

preferred district must proceed with diligence to secure their rights, for if there be an adjudication in another district, jurisdiction thereon to administer the estate is obtained.⁹

Where the business transactions of two alleged bankrupt corporations organized in different jurisdictions are so intermingled as to be impossible of separation, the court which first acquires jurisdiction may proceed. *In re South-Western Bridge & Iron*

Co. (D. C., Kan.), 13 Am. B. R. 304, 133 Fed. 568.

2. *Matter of United Button Co.* (D. C., N. Y.), 12 Am. B. R. 261, 132 Fed. 378; *Matter of New Era Novelty Co.* (D. C., N. J.), 39 Am. B. R. 80, 241 Fed. 298.

SECTION THIRTY-THREE.

CREATION OF TWO OFFICES.

§ 33. Creation of Two Offices.—*a* The offices of referee and trustee are hereby created.

Analogous provisions: In U. S.: Act of 1867, § 3, R. S., § 4943.

In Eng.: None.

In Can.: None.

Cross-references: To the law: Court may include referee, § 1 (7).

Officer includes referee and trustee, § 1(18).

Referee means referee who has jurisdiction, § 1(21).

Trustee includes all trustees of the estate, § 1(26).

Offenses by referee and trustee, § 29.

Referees, appointment, removal and districts, § 34.

Qualifications and oath, §§ 35, 36.

Number and jurisdiction, §§ 37, 38.

Duties, compensation, contempts before, §§ 39-41.

Records; absence or disability, §§ 42, 43.

Trustees, appointment, § 44.

Qualifications; death or removal, §§ 45, 46.

Duties and compensation, §§ 47, 48.

Accounts and papers, § 49.

Bonds of referees and trustees, § 50.

SYNOPSIS OF SECTION.

CREATION OF TWO OFFICES.

I. Creation of Offices of Referee and Trustee, 642.

a. Comparative legislation, 642.

b. Referee and trustee, 642.

I. CREATION OF OFFICES OF REFEREE AND TRUSTEE.

a. Comparative legislation.—The corresponding officers under the English system are registrars and trustees; under the law of 1867, registers and assignees.¹ No statute heretofore, however, has formally created the offices.

b. Referee and trustee.—The statute elsewhere prescribes that the word "officer" shall include clerk, marshal, receiver, referee, and trustee.² The two former existed before the law was passed; the third comes into being only in those cases where the court finds him necessary and appoints him.³ It is a little difficult to understand why this section was necessary; § 34 provides for the appointment of referees, § 44 of trustees. Each, though thus an officer, has but intermittent functions. The effect of this doctrine

1. Act of 1867, § 3, R. S., § 4903.

2. Bankruptcy Act, § 1 (18).

3. Bankruptcy Act, § 2 (3) (15).

on the limitations of § 72 is considered later.⁴ The referee is formally designated for a special term,⁵ and is vested with powers only as to such cases as have been referred to him. The trustee is, save for this section, not an officer at all, but a liquidator, appointed by the creditors.⁶ For the jurisdiction, duties, and compensation of these officers, and the like, reference should be had to the succeeding sections.⁷

4. See § 72 of this work.

5. Bankruptcy Act, § 34 (1).

6. Bankruptcy Act, § 44.

7. Bankruptcy Act, §§ 34-50.

SECTION THIRTY-FOUR.

APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.

§ 34. **Appointment, Removal, and Districts of Referees.**—a Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Analogous provisions: In U. S.: As to appointment, Act of 1867, § 3, R. S., § 4993; Act of 1841, 5; Act of 1800, § 2; As to removal, Act of 1867, § 5, R. S., § 4997.

In Eng.: None.

In Can.: Act of 1919, § 64.

Cross-references: To the law: Court may include referee, § 1 (7).

Referee means referee having jurisdiction of estate, § 1(2).

Reference to referee where judge is absent from district, § 18-f.

Offenses by referee, § 29.

Qualifications; oath of office, §§ 35, 36.

Number of referees, § 37.

Jurisdiction and duties; compensation, §§ 38-40.

Contempts before referees, § 41.

Bonds of referees, § 50.

SYNOPSIS OF SECTION.

APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.

I. Appointment, Removal, and Districts of Referees, 644.

a. *Appointment*, 644.

b. *Removal*, 645.

c. *Term*, 645.

d. *Limits of district*, 645.

I. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.

a. **Appointment.**¹—Under the present law, the judge of each district appoints the referees. By the former law, the registers were appointed by him, but on the nomination of the chief justice.² The power to appoint is limited

1. See also Am. B. R. Dig., § 66.

2. Act of 1867, § 3, R. S., § 4993.

within the territorial limits of the court; a judge of one district while holding court in another district cannot appoint a referee for the latter district. The "court" must appoint the referee, and not "the judge."³ But a district judge holding a court of bankruptcy, may appoint or remove a referee, though there is another district judge in the district having equal and concurrent authority.⁴ The appointment is usually in the form of a court order, designating the limits of the referee's district and his term of office. From that time and during such term all bankruptcy cases arising in his district are usually referred to him, unless he is absent, disqualified or removed;⁵ they may, however, for the convenience of parties be referred to any referee within the territorial jurisdiction of the court,⁶ or the court may appoint a special referee to hear a particular case in the event of the disqualification of the regular referee.⁷ The order of designation being discretionary the circuit court of appeals will not undertake to review it.⁸ If there is more than one referee in the referee district, the cases are distributed in such manner as the court directs.

b. Removal.⁹—This is, like the appointment, discretionary. But it must be either because the services of a referee are not needed, or for other cause. The cause should be stated in the order of removal. It is not thought that the words "for cause" here give the right to notice and a hearing. As long as the judge finds the cause sufficient, it is enough.¹⁰ The circuit court of appeals may not control the discretion of a district court in the matter of the appointment or removal of a referee.¹¹

c. Term.—The register held office until the judge deemed his assistance unnecessary. The term of the referee is, however, fixed at two years. There is nothing in the statute which invalidates the acts of a referee after the expiration of his term. He continues a referee in each unclosed case previously referred. If removed, the order of removal will doubtless remove him as to such cases. Without any standing order of appointment, the court can continue to refer cases in his district to him, provided there is no other regularly appointed referee in his district, and the order of reference will in itself confer jurisdiction and be deemed an appointment to that extent.

d. Limits of district.—Under the former law, at least one register was appointed in each congressional district. This seems to have been dropped out when that law was fused into the Revised Statutes.¹² Now the referee district is fixed by the judge, but should be so that each county "may constitute at least one district." This seems to mean that referee districts cannot be larger than a single county, a provision apparently ignored in many jurisdictions.¹³ There is warrant, however, for the practice, for the judge may conclude that the services of a referee are not needed in a particular county and combine it with another county or counties into a single referee district.

3. *In re Steele* (D. C., Ala.), 20 Am. B. R. 446, 162 Fed. 694.

4. *Birch v. Steele* (C. C. A., 5th Cir.), 21 Am. B. R. 539, 165 Fed. 577.

5. Compare Bankruptcy Act, § 43.

6. See under § 22 of this work.

7. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

8. *In re Alden* (C. C. A., 1st Cir.), 30 Am. B. R. 48, 205 Fed. 145.

9. See also Am. B. R. Dig., § 66.

10. Compare *State v. Doherty*, 25 La. Ann. 119.

11. *Birch v. Steele* (C. C. A., 5th Cir.), 21 Am. B. R. 539, 165 Fed. 577.

12. Act of 1867, § 3, R. S., § 4993.

13. It is well known that referee districts of two or three counties, or even of a score of counties, and in one case, the Southern District of Illinois, of a whole district, have been created under this seemingly inelastic clause.

SECTION THIRTY-FIVE.

QUALIFICATIONS OF REFEREES.

§ 35. **Qualifications of Referees.**— *a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

Analogous provisions: In U. S.: Act of 1867, § 3, R. S., §§ 4994, 4995.

In Eng.: None.

In Can.: None.

Cross-references: To the law: Referee includes referee having jurisdiction of estate, § 1(21).

Creation of office; appointment and removal, §§ 33, 34.

Oaths of office, § 36.

Referee's absence a disability, effect, § 43.

Bond of referee, § 50.

SYNOPSIS OF SECTION.

QUALIFICATIONS OF REFEREES.

I. Qualifications of Referees, 646.

a. *In general*, 646.

b. *Disqualification*, 647.

I. QUALIFICATIONS OF REFEREES.¹

a. *In general.*— A referee is a judicial officer;² and this section sets proper limits on nepotism in his appointment or the enjoyment by him of more than one office.³ The former law contained no restriction save that the register

1. See also Am. B. R. Dig., §§ 67, 68.

2. Compare *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178; *Mueller v. Nugent*, 181 U. S. 1, 7 Am. B. R. 224; *Clendenning v. Red River Valley Nat. Bank* (Sup. Ct.,

N. Dak.), 11 Am. B. R. 245, 12 N. Dak. 51 94 N. W. 901.

3. In unpopulous districts, this is often a hardship, as a referee by this section is clearly disqualified from holding any other

must be a counselor-at-law of the district or the State courts.⁴ Further restrictions were prescribed in his oath of office, and he was prohibited from acting as attorney or counselor in any bankruptcy case in his district, especially after the amendment of 1874.⁵ Now a referee must be (a) a resident of, or have offices in the district for which he is appointed,⁶ and (b) competent to serve; (c) provided he does not hold any other office of profit or emolument (except certain offices here enumerated) or (d) is related to certain judicial officers of the United States by consanguinity or affinity within the third degree.

b. **Disqualification.**—Referees, although duly appointed, if not strictly within the terms of this section, would probably be disqualified to act at all. Disqualification often occurs in specific cases.⁷ Whether he is disqualified is usually a matter either of discretion on the part of the judge or of conscience on the part of the referee. This matter is discussed elsewhere.⁸

office, either legislative, executive, or municipal (with the exceptions specified in this section), provided it is one of profit or emolument. The restriction is, however, on the whole, a wise one. It is sufficiently unfortunate that referees must practice their profession as a means of livelihood, thus, one day sitting in judgment, the next perhaps pleading in another court against him who was a pleader in the referee court but yesterday. They certainly should not exercise other functions of a political or public character.

4. Act of 1867, § 3, R. S., § 4994.

5. R. S., §§ 4995, 4995-a.

6. In re Schenectady Engineering & Con-

struction Co. (D. C., N. Y.), 17 Am. B. R. 279, 147 Fed. 868, holding that a court of bankruptcy of one district has no power to appoint a referee residing without its territorial jurisdiction.

7. **When referee not disqualified.**—A debtor who owes an alleged bankrupt a debt which is not denied by the debtor, and whose status as a debtor cannot be changed by any of the proceedings in bankruptcy, and whose liability would be unaffected by such proceedings, is not disqualified to act as referee in bankruptcy. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

8. See under §§ 39 and 43.

SECTION THIRTY-SIX.

OATHS OF OFFICE OF REFEREES.

§ 36. **Oaths of Office of Referees.**—*a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

Analogous provisions: In U. S.: Act of 1867, § 3, R. S., § 4995.

In Eng.: None.

In Can.: None.

Cross-references: To the Forms: Form of oath of office, No. 16.

OATH OF OFFICE OF REFEREES.¹

This provision emphasizes the difference between the register under the former law and the referee under the present. The register was merely an assistant to the judge, his functions largely clerical;² the referee is, in effect, in all cases referred to him, save in name and concerning a few matters reserved to the judge by the statute, a court of original jurisdiction.³ Therefore, this section requires him to take the same oath as that taken by other Federal judges.⁴ This is the historic oath found in § 712 of the U. S. R. S. and from it incorporated into Form No. 16. It should be taken before the district judge.⁵

1. See also Am. B. R. Dig., § 69.

2. Act of 1867, § 3, R. S., § 4993.

3. For cases holding this, see under § 39.

4. *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 181.

5. Form No. 16.

SECTION THIRTY-SEVEN.

NUMBER OF REFEREES.

§ 37. Number of Referees.—*a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Analogous provisions: In U. S.: Act of 1867, § 3, R. S., § 4993.

In Eng.: None.

In Can.: Act of 1919, § 64.

Cross-references: To the law: Appointment, removal and districts of referees, § 34.

I. NUMBER OF REFEREES.

This section should be read with § 34. The former act gave a like discretion.¹ The only limit on the number of referees in any given district is that only so many shall be appointed as may be necessary "to assist in expeditiously transacting the bankruptcy business" pending in such district.² The authority of the court of bankruptcy to appoint referees is confined in number only within the discretion of the court itself.³

1. Act of 1867, § 3, R. S., § 4993.

2. Save in large trade centers like New York, Chicago, Philadelphia, Boston and Baltimore, but one referee has, as a rule, been appointed for each referee district.

3. In re Steele (D. C., Ala.), 19 Am. B. R.

671, 156 Fed. 853, holding that where there are two district judges having concurrent jurisdiction, one of them may appoint a referee without the concurrence of the other, while the other is absent from the district.

SECTION THIRTY-EIGHT.

JURISDICTION OF REFEREES.

§ 38. **Jurisdiction of Referees.**—a Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Analogous provisions: In U. S.: Act of 1867, § 4, R. S., §§ 4998, 4999, 5002, 5009.

In Eng.: Act of 1883, § 99; General Rule 7.

In Can.: Act of 1919, § 65.

Cross-references: To the law: Court may include referee, § 1 (7).

Referee means referee having jurisdiction of the bankrupt estate, § 1 (21).

Jurisdiction of court of bankruptcy, § 2.

Bankrupts to comply with lawful orders, § 7-a(2).

Examination of bankrupt, § 7-a(9).

Stay of suits by or against bankrupt, § 11-a.

Composition, jurisdiction as to, § 12.

Discharges, application to be made to judge, § 14-a.

Adjudication, filing petition, § 18-a.

Reference of case to referee where judge is absent from district, § 18-f.

Oaths administered by referee, § 20-a(1).

Examination of persons before referee, § 21.

Certified copies of proceedings, § 21-d.

Cross-references: Continued.

- Reference of cases after adjudication, § 22.
- Wrongful acts by referee, punishment, § 29-c.
- Duties of referees, § 39-a.
- Acts of referees prohibited, § 39-b.
- Compensation of referees, § 40.
- Contempts before referees, § 41.
- Records of referees, how kept, § 42.
- Absence or disability of referee, § 43.
- Bonds of referees, execution and sureties, § 50.
- Meetings of creditors, referee's duties, § 55.
- Proof and allowance of claims, § 57.
- Notices to creditors given by referee, § 58-c.
- Expenses of administering estates, payment, § 62.
- Dividends, declaration and payment, § 65.
- To the General Orders:** Referee may require indemnity for expenses, X.
- Duties of referee as to administration, XII.
- Order of reference; thereafter proceedings to be before referee, XII(1); time and place where referee acts, XII(2).
- Taking testimony before referee, XXII.
- To the Forms:** Order of reference, No. 14.
- Order of reference in judge's absence, No. 15.
- Order for examination of bankrupt, No. 23.
- Certificate by referee to judge, No. 56.
- See also Supplemental Forms, *post*; Hagar and Alexander's Bankruptcy Forms, 2nd Ed.

SYNOPSIS OF SECTION.

JURISDICTION OF REFEREES.

- I. Jurisdiction of Referees in General, 651.**
 - a. *Comparative legislation*, 651.
 - b. *Scope and meaning of section*, 652.
- II. Express Powers, 653.**
 - a. *To make adjudications or dismiss petitions*, 653.
 - (1) IN GENERAL, 653.
 - (2) GENERAL ORDER XII, 653.
 - (3) PRACTICE AFTER REFERENCE IN INVOLUNTARY CASES, 653.
 - b. *Power to administer oaths, conduct examinations, etc.*, 654.
 - c. *Power to seize and release property*, 655.
 - d. *Power to exercise generally the statutory jurisdiction of the judge, except in certain matters*, 656.
 - (1) IN GENERAL, 656.
 - (2) JURISDICTION OVER DISCHARGES AND COMPOSITIONS, 658.
 - (3) POWER OF REFEREE TO GRANT INJUNCTIONS, 659.
 - (4) EMPLOYMENT AND COMPENSATION OF STENOGRAPHERS, 660.

I. JURISDICTION OF REFEREES IN GENERAL.¹

a. *Comparative legislation.*—The English act of 1883 has a similar section.² The jurisdiction of registrars in bankruptcy is, however, both larger and

¹ See also Am. B. R. Dig., §§ 70-79.

² Eng. Act of 1883, § 99.

smaller than that of our referees. They, as a rule, cannot act save on applications unopposed, yet they have the very important power of making interim orders in cases of urgency and, if of the high court, may grant discharges and confirm compositions. The jurisdiction of registrars in Canada is similar to that of the English registrars.^{2a} Under our law of 1867, the registers had power to transact administrative or *ex parte* business,³ but issues of law or fact were always heard by the judge.⁴ A comparison of the two sections will indicate the great difference between their functions and those of the present referees.

b. Scope and meaning of section.—Manifestly this section is one of limitation. Unless jurisdiction is given or can reasonably be inferred from its words, it cannot, as a rule, be exercised by the referee.⁵ However, the broad terms of subdivision 4 coupled with, in many districts, rules conferring on them all the powers and functions of the judge that are not by the statute or the general orders specifically reserved to the court proper, make the section almost unlimited in its scope, and read into it the numerous other sections conferring jurisdiction on the court itself. The breadth and importance of these functions are discussed later.⁶ It should be noted, however, that (a) this jurisdiction is territorial, *i. e.*, it must be exercised "within the limits of their districts;"⁷ and (b) it is always subject "to a review by the judge."⁸ A referee is a judicial officer, and all his acts are presumed to be legal within the scope of his authority.⁹ The findings of referees acting within their jurisdiction are entitled to the respect and credit given to officers acting judicially,¹⁰ and on matters within their jurisdiction have the same force and effect as if rendered by any court of general jurisdiction,¹¹ and are conclusive upon State courts.¹² It is especially provided in this section that all the referee's acts are subject to review by the judge.¹³ The practice on review is considered hereafter under the next section.¹⁴ Some of the illustrative cases are collated in the foot-note.¹⁵

^{2a} Can. Bankr. Act of 1919, § 65.

³ Act of 1867, § 4, R. S., § 4998.

⁴ Act of 1867, §§ 4 and 6, R. S., §§ 5009, 5010.

⁵ Matter of Continental Producing Co. (D. C. Cal.), 44 Am. B. R. 216, 261 Fed. 627. Other sections confer powers on the referees, as, for instance, Bankruptcy Act, § 39. But the intention seems to have been to summarise all general grants of jurisdiction here. See also Am. B. R. Dig., § 71.

⁶ See discussion under section 39, as well as this section.

⁷ In re Schenectady Eng. & Const. Co. (D. C. N. Y.), 17 Am. B. R. 279, 147 Fed. 898. See also Am. B. R. Dig., § 72.

⁸ For reviews by the judge and practice thereon, see section 39 of this work. By this section every act of a referee in bankruptcy is subject to review by a judge of the United States District Court. *Ellis v. Krulewitch* (C. C. A., 8th Cir.), 15 Am. B. R. 615, 141 Fed. 954.

⁹ *Conti v. Sunseri* (C. C. P., Pa.), 18 Am. B. R. 891; Matter of Looney (D. C., Tex.), 44 Am. B. R. 642, 262 Fed. 209.

¹⁰ In re Covington (D. C., N. Car.), 6 Am. B. R. 373, 110 Fed. 143; In re Eagles (D. C., N. Car.), 8 Am. B. R. 733, 99 Fed. 696.

¹¹ *McMahon v. Pithan*, 66 Ia. 498, 33 Am. B. R. 125, 147 N. W. 920; *Coen v. James*, 164 N. Y. App. Div. 419, 33 Am. B. R. 249, 150 N. Y. Supp. 202.

See also Am. B. R. Dig., § 86.

Findings as res judicata.—Although a referee has specific power to hear and determine all questions arising upon claims filed and objections thereto, he has no power to bring a claimant before him to determine

the validity of the claim; but where the claimant voluntarily appears seeking relief a determination of the referee, disallowing the claim unless the claimant surrenders to the trustee preferences in accordance with section 57-g of the Bankruptcy Act, is a valid adjudication of the facts involved in a subsequent suit by the trustee to recover the preferences, in so far as it was necessary for the referee to consider the facts. *McCluch v. Davenport Savings Bank* (D. C., Ia.), 35 Am. B. R. 765, 226 Fed. 309. See also *Lincoln v. Peoples' Nat. Bank* (D. C., Mich.), 44 Am. B. R. 381, 260 Fed. 422; *Coen v. James*, 164 N. Y. App. Div. 419, 33 Am. B. R. 249, 150 N. Y. Supp. 202, holding that an order of a referee, denying the right to recover a check payable to a trustee in bankruptcy, as a part of the deposit it required upon a composition, is *res adjudicata*.

¹² *Clendenen v. Red River Valley Nat. Bank* (Sup. Ct., N. Dak.), 12 N. Dak. 51, 11 Am. B. R. 245, 94 N. W. 901; *Coen v. James*, 164 N. Y. App. Div. 419, 33 Am. B. R. 249, 150 N. Y. Supp. 202.

¹³ In re Hanson (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 717.

¹⁴ See post, p. 667.

¹⁵ *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *White v. Schloerb*, 178 U. S.

II. EXPRESS POWERS.

a. To make adjudications or dismiss petitions.—(1) IN GENERAL.—Subdivision 1 confers upon referees the power to consider petitions in bankruptcy referred to them by the clerk and to make adjudications or dismiss the petitions. This clause has reference to petitions in bankruptcy which have been referred by the clerk to a referee when the judge is absent from the judicial district, or division of the district in which the petition is pending, as provided by § 18-f of the act.¹⁶ In such cases the referee has jurisdiction to make the adjudication or dismiss the petition. This refers to involuntary as well as voluntary cases, and charges the referee with a distinct duty, which, where a petition does not show the jurisdictional facts, should result in a dismissal. A referee cannot, however, grant an adjudication in any other case.¹⁷ The form used should be an adaptation of Forms Nos. 11 and 12.

(2) GENERAL ORDER XII.¹⁸—The Supreme Court has supplemented the statute with a rule which is in turn supplemented by the terms of Forms Nos. 14 and 15. The first paragraph of this general order requires the court to fix a day upon which the bankrupt shall attend before the referee, and provides that from that day the bankrupt shall be subject to his orders and that all proceedings shall thereafter be before the referee. This has sometimes been thought to withhold jurisdiction from the referee until the day set. The better opinion is that—the limitation on jurisdiction imposed being clearly against the manifest purpose of the statute to vest the referee with complete jurisdiction at once the order of reference is made—he immediately has power to exercise any of the functions or perform any of the duties prescribed, and even before the order of reference is actually received. The second paragraph of this general order is of little importance. Referees invariably fix the times and places when they will act. It would be both confusing and impracticable if the judges did so. In important districts the referee's court has a stated place for sittings, often specified by a standing order, and frequently in courtrooms or chambers set apart for them in the local Federal building; the time is specified either by a general order or in each notice or order.

(3) PRACTICE AFTER REFERENCE IN INVOLUNTARY CASES.—On receiving or making an adjudication in an involuntary case, the referee should forthwith enter and have served on the bankrupt an order directing him to prepare and file his schedules as required by § 7 (8),¹⁹ this that the case may be presently proceeded with, or, the bankrupt, if recalcitrant, reported in con-

542, 3 Am. B. R. 178; In re Steuer (D. C., Mass.), 5 Am. B. R. 209, 104 Fed. 976; In re Scott (Ref., Mass.), 7 Am. B. R. 35; affd. on review, s. c., 7 Am. B. R. 39; In re Hudleston (Ref., Ala.), 1 Am. B. R. 572. Compare also *Gierveiter v. Sevier*, 33 Ark. 592.

16. In re Elby (D. C., Iowa), 19 Am. B. R. 734, 157 Fed. 935, holding that the referee has no jurisdiction to dismiss a bankruptcy proceeding after the adjudication. Compare In re Scott (Ref., Mass.) 7 Am. B. R. 35, wherein it was held that, after an adjudication of bankruptcy, the referee has original jurisdiction to entertain a creditor's petition to dismiss the proceedings upon the ground that the bankrupt was not at the time of the filing of his petition a resident of the district.

See also Am. B. R. Dig., § 73.

17. For effect of erroneous adjudication, if jurisdictional question is not promptly raised, see In re Polakoff (Ref., N. Y.), 1 Am. B. R. 358; In re Ohlsdell (D. C., N. Y.), 4 Am. B. R. 95, 101 Fed. 246. But see In re Mason (D. C., N. Car.), 3 Am. B. R. 599, 99 Fed. 256. Compare, under former law, In re Penn, Fed. Cas. 10,927. If the bankrupt contests, the issues presented must be tried by the court. In re Humbert Co. (D. C., Iowa), 4 Am. B. R. 771, 100 Fed. 439.

18. See also notes and cases cited under General Order XII.

19. In re Franklin Syndicate (D. C., N. Y.), 4 Am. B. R. 244, 101 Fed. 402.

tempt. Where the bankrupt is absent or has absconded, it is customary first to call on his attorneys of record, if any, to prepare and file such schedules. Where he has none or they have not the facts to do this—the practice suggested by General Order IX being usually out of the question—the practice has grown up of issuing subpoenas to any or all persons who seem likely to know of the bankrupt's business affairs and, after an examination of them and the debtor's books, to make out as complete schedules as possible. To this end, the referee, who is charged with this duty,²⁰ usually drafts the attorneys of the petitioning creditors as his assistants. Schedules so prepared should be in triplicate, but need not be verified; they will often require amendment. Not, however, until they are prepared and filed, should a first meeting be called. The expense of this preliminary proceeding is chargeable to the estate.

b. Power to administer oaths, conduct examinations, etc.—Subdivision 2 of this section grants to referees the power to administer oaths, examine witnesses, require production of documents and generally to conduct examinations. These powers would also flow from subdivision 4. The previous statute gave similar, though not as comprehensive, functions to the register.²¹ Subpoenas are not to be issued by the referee under any circumstances, but by the clerk.²² The power to swear witnesses is distinct from that conferred on referees to administer the oaths "required by this act" by § 20-a (1).²³ The formula used in swearing witnesses is similar to that in the local courts, but its phraseology should always be adapted to the proceeding or trial in which the witness is sworn. The power expressly conferred upon referees by subdivision 4 to perform "such part of the duties except, etc., as are by this act so conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts," has been thought sufficient to authorize them to pass upon the competency, relevancy, or materiality of any question considered in the course of an examination.²⁴ Rules have been promulgated in several of the districts conferring power in this regard.²⁵ The weight of authority seems now to favor the rule that a referee acting as such, or as a special commissioner may not exclude evidence which he deems inadmissible; it is his duty under General Order XXII to receive the evidence which is offered, to note objections and to record the evidence.²⁶ But this is clearly subject to the exception that evidence should not be permitted to be introduced, or its production compelled, where it is plainly privileged or so clearly and affirmatively incompetent.

20. Bankruptcy Act, § 39-a (6). But see General Order IX. Consult also § 7 of this work.

21. Act of 1867, § 4, R. S., § 4098.

22. *In re Pierce* (D. C., Col.), 6 Am. B. R. 747, 111 Fed. 516.

23. *U. S. v. Simon* (D. C., Wash.), 17 Am. B. R. 41, 146 Fed. 89, holding that the Bankruptcy Law expressly authorizes an oath to be administered by a referee in bankruptcy to a witness appearing voluntarily or under compulsory process to give testimony in support of claims presented by alleged creditors.

24. The authority of the referee extends beyond taking, ruling upon and reporting evidence, and includes making findings and recommendations thereon. *In re Kaiser* (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689

25. Rule 22, Western District of New York.

26. Power to exclude evidence.—*Bank of Ravenswood v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463; *In re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 138 Fed. 837; *In re Sturgeon* (C. C. A., 2d Cir.), 14 Am. B. R. 681, 139 Fed. 608; *Dressel v. North State Lumber Co.* (D. C., N. Car.), 9 Am. B. R. 541, 119 Fed. 531; *In re Lipset* (D. C., N. Y.), 9 Am. B. R. 32, 119 Fed. 379; *In re Covington* (D. C., N. Car.), 6 Am. B. R. 373, 110 Fed. 143; *In re De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328; *First National Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 862. But in *Matter of Wilde's Sons* (D. C., N. Y.), 11 Am. B. R. 714, 131 Fed. 142, it was held that a referee in bankruptcy, whether acting in his charac-

irrelevant and immaterial that such introduction or production would be an abuse of the process of the court.²⁷ If the proceeding is one originally instituted before the referee, as for the discovery of concealed assets, it has been held that he has full power to exclude irrelevant testimony, and that General Order XXII does not prevent the exercise of such power in such a proceeding.²⁸ And in any case the referee should determine, in the first instance, the question of the witness' competency or the admissibility of his testimony; he should certify the question to the court when requested to do so in a proper manner; such a method of procedure will tend to expedite the proceeding and avoid confusion.²⁹ The requirement in such general order that the testimony of a witness must be read over to him and be signed, does not exclude or render useless testimony given under oath; but upon the death of the witness before signature it may be proven by the oath of the stenographer who reported it, or by a witness who heard it.³⁰ If a referee fails to include rejected evidence with objections noted, the remedy is an application to the district court, or failing there, to the circuit court of appeals for an order that such evidence be taken and preserved.³¹ Documents may be ordered in the usual way. When the bankrupt is present, the direction is often verbal. If he is not present, or the document is in the possession of a third person, a subpoena *duces tecum*, or an order to the same effect, is customary.³² The concluding clause of this subdivision reserves to the judges the right to commit, and doubtless, therefore, to attach a balky witness.³³

c. Power to seize and release property.—Subdivision 3 seems to refer to a power to seize and hold property conferred upon the judge by § 69. A like power is suggested by § 3-e; and it seems, given by § 2 (15). This subdivision will, however, probably be construed as such a limitation on the general words of the two sections last mentioned as to prohibit the referee from exercising this jurisdiction, save in cases where the clerk has issued a certificate showing the inability of the judge to act for one of the reasons specified.^{33a} The power is an important one in involuntary cases.³⁴ It is

ter as referee or as special commissioner, has a right to exclude evidence which he deems inadmissible.

Duty to take all testimony.—It is the duty of examiners, masters, referees, and the court taking evidence in controversies in bankruptcy, in the absence of a jury, to take, record, and, in case of an appeal, to return to the reviewing court, all the evidence offered by either party, that which they hold to be incompetent or immaterial as well as that which they deem competent and relevant, to the end that if the appellate court is of the opinion that evidence rejected should have been received it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the rejected evidence. *Missouri Electric Co. v. Hamilton Brown Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 270, 272, 185 Fed. 283.

See also Am. B. R. Dig., § 83.

27. *Matter of Clark* (Ref., Cal.), 21 Am. B. R. 776, 782; *Missouri Electric Co. v. Hamilton Brown Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 270, 272, 185 Fed. 283; *First National Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 105 Fed. 852.

28. *In re Harrison Bros.* (D. C., Pa.), 28 Am. B. R. 293, 107 Fed. 320, holding that a referee who is presiding in a proceeding originally in-

stituted before him to compel a bankrupt to turn over concealed assets, acts in a judicial capacity, being regarded as a judicial officer, invested with the same powers and duties in bankruptcy matters as a district judge, and having full power to exclude irrelevant testimony.

29. *In re Harrison Bros.* (D. C., Pa.), 28 Am. B. R. 293, 107 Fed. 320; *In re Rues* (D. C., Pa.), 20 Am. B. R. 281, 159 Fed. 252; *In re Wilde's Sons* (D. C., N. Y.), 11 Am. B. R. 715, 131 Fed. 142.

30. *Matter of Blaesser* (D. C., N. Y.), 36 Am. B. R. 795, 230 Fed. 528.

31. *First National Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 105 Fed. 852.

32. *Matter of Clark* (Ref., Cal.), 21 Am. B. R. 776.

33. See Bankruptcy Act, § 41. See also Am. B. R. Dig., §§ 1164, 1165.

33a. "Division of the district."—A referee is not authorized to exercise the powers of a judge when the latter is absent from the territorial jurisdiction of the referee, which is usually a county. The phrase "or the division of the district" as used in said section does not apply to the jurisdictional limits of a referee but to a division of a district for the purpose of holding court. *Matter of Veles* (D. C., Porto Rico), 39 Am. B. R. 307, 9 P. R. Fed. 404.

34. *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 144 Fed. 245, holding that the referee may make a summary order authorizing the seizure of property in the hands

clear that this provision of the Bankruptcy Act refers to the appointment of receivers, or the releasing of property, in involuntary cases, and is to be read in connection with section 18-f.³⁵ It is apparently the only instance where the referee as such has jurisdiction before an order of reference. Perhaps the clerk's certificate has the effect of such an order.

d. Power to exercise generally the statutory jurisdiction of the judge, except in certain matters.— (1) IN GENERAL.—The referee is given, by subdivision 4, power "to perform such duties, except, etc., as shall be prescribed by the rules and orders of the courts of bankruptcy in their respective districts, except as herein otherwise provided." The exact effect of the words "and as shall be prescribed," etc., has not yet been authoritatively declared. "Jurisdiction" and "duties" are, of course, widely different things. While a court of bankruptcy may direct referees to perform "duties" not enumerated in § 39, it cannot by rule confer a "jurisdiction" it does not itself have. Further, this clause occurs in a section devoted to the "jurisdiction of referees." It seems to follow that "duties" is here used in the sense of jurisdiction; and, therefore, that to be vested with jurisdiction other than that expressly conferred by this section or charged with duties other than those set out in § 39, referees must be given such jurisdiction by a standing or special rule of the district court.³⁶ The question is not without difficulty and the opposite view seems sometimes to be taken for granted. It is not, however, often important. The district courts have quite generally supplied the necessary rule.³⁷ It seems that the word "herein" refers to the whole statute.³⁸ Under this clause, it has been held that the referee may grant stays,³⁹ appoint receivers,⁴⁰ issue summary orders to compel restitution of property,⁴¹

of an alleged fraudulent vendee, where it is necessary for the preservation of such property.

Taking possession and releasing property.—Referees in bankruptcy are invested, subject always to a review by the judge, within the limits of their district as established from time to time, with jurisdiction to exercise the powers of the judge for taking possession and releasing of the property of the bankrupt, in the event of the issuance by the clerk of a certificate showing the absence of the judge from the judicial district, or the division of the district, or his sickness or inability to act. *Darrough v. First National Bank of Claremore* (Okla. Sup. Ct.), 37 Am. B. R. 75, 156 Pac. 191.

35. *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117.

36. General Order XII (1). And see *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 315, for a case where jurisdiction to stay was exercised before there was any rule giving it.

The duties of a referee do not begin until the case has been referred to him, and his jurisdiction, therefore, includes only such parts of the bankruptcy jurisdiction of the District Court as are carried by the reference. *Matter of Weidhorn* (D. C., Mass.), 39 Am. B. R. 338, 243 Fed. 756.

Where the bankruptcy court has jurisdiction, the referee has also jurisdiction except when the case is referred to him for a special purpose, or where the bankrupt asks to be adjudged a bankrupt or seeks a discharge. *Matter of Brenner* (D. C., Pa.), 26 Am. B. R. 646, 649, 190 Fed. 209.

37. Thus, the following rule was early promulgated in the Northern District of New York, and adopted by the Western District of the same State:

XXVI. Powers delegated to referees.—The referees heretofore or hereafter appointed for the Northern District of New York are hereby, respectively, vested with the jurisdiction which, by the Bankruptcy Act of July 1, 1898, and the general orders of the Supreme Court, promulgated at the October term of 1898, the court or judge may delegate to or confer upon said referees; and they are, respectively, empowered and authorized to do all acts, take all proceedings, make all orders and decrees, and perform all duties so authorized to be delegated by said act, and said general order, without special authority in each case and under the general authority conferred by this order.

38. *In re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 143 Fed. 598.

39. See post, this section, "Power of referee to grant injunctions." Set also Am. B. R. Dig., § 77.

40. That the referee has jurisdiction to appoint receivers after the reference under his general powers, conferred upon him by § 38 (4), and General Order XII (1), has often been decided. *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117.

41. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *In re Logan* (D. C., N. Y.), 23 Am. B. R. 543, 196 Fed. 678; *Matter of Schmid* (C. C. A., 3d Cir.), 36 Am. B. R. 548, 230 Fed. 818; *Knapp & Spencer Co. v. Drew* (C. C. A., 8th Cir.), 20 Am. B. R. 353.

authorize a trustee to compromise a claim due from the bankrupts by the acceptance of a smaller sum than the amount of the claim,^{41a} dismiss a petition on which an adjudication has already been had,⁴² determine the ownership of property which is in the possession of the bankrupt at the time of the bankruptcy proceedings and passes as part of the estate into the possession of the receiver or trustee in bankruptcy, where a third party claims the ownership of such property,⁴³ and determine whether the claim of a third person is adverse or merely colorable,⁴⁴ but that he has no jurisdiction to determine adverse claims to property claimed to belong to the bankrupt's estate, which, at the time of the institution of the proceedings in bankruptcy, was in the possession of a third person, claiming an interest therein.⁴⁵ Nor may a referee make an order directing the restoration of property by the bankrupt, where upon his examination at the first meeting of creditors, he was not apprised of the fact that an order would be issued, and there were no formal pleadings.⁴⁶ A referee may order a sale of the bankrupt's real estate, discharged of liens, and may hear and determine the validity and priority of claims upon the proceeds of the sale.⁴⁷ It has also been held that the referee may grant

160 Fed. 413, holding that a petition of a trustee for a summary order upon a corporation creditor to show cause why it should not turn over money received from the bankrupt, after the institution of the bankruptcy proceedings, may be entertained by a referee. *Matter of Velez* (D. C., Porto Rico), 39 Am. B. R. 307, 9 P. R. Fed. 404; *Gavilan v. Lugo* (D. C., Porto Rico), 39 Am. B. R. 326, 9 P. R. Fed. 344; *Matter of Salm Baking Co.* (D. C., Tex.), 43 Am. B. R. 511. See also Am. B. R. Dig. § 76.

Surrender of property.—To justify an order that a bankrupt pay over money or deliver property to his trustee, the referee should find as a fact that the bankrupt, since filing his petition, had concealed and withheld from the trustee property belonging to the bankrupt estate. *In re Felson* (D. C., N. Y.), 10 Am. B. R. 716, 124 Fed. 288. The referee or the district court may compel bailees or agents of the bankrupts to surrender property. *Matter of Cohn* (Ref., Cal.), 18 Am. B. R. 786.

It is proper practice for a trustee to apply to a referee for an order to compel the bankrupt to turn over assets and after his finding to review it, if so advised, by filing with him a petition for review by the district judge, as provided by General Order XXVII. *Matter of Nanken* (C. C. A., 2d Cir.), 40 Am. B. R. 459, 246 Fed. 811.

41a. *Matter of Goldman Brothers* (D. C., Pa.), 39 Am. B. R. 58, 241 Fed. 385.

42. *In re Scott* (Ref., Mass.), 7 Am. B. R. 35. Compare *In re Elby* (D. C., Iowa), 19 Am. B. R. 734, 157 Fed. 935.

43. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 L. Ed. 405; *In re Scrinopskie* (Ref., Kan.), 10 Am. B. R. 221; *In re Holbrook Shoe & Leather Co.* (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973; *In re Schimmel* (D. C., Pa.), 29 Am. B. R. 361, 203 Fed. 181; *Mound Mines Co. v. Hawthorne* (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882; *Matter of Traunstein & White* (D. C., Mass.), 34 Am. B. R. 482, 225 Fed. 317; *In re Drayton* (D. C., Wis.), 13 Am. B. R. 602, 135 Fed. 883.

Compelling restoration of assets.—Where the treasurer of a bankrupt corporation sub-

mits to the jurisdiction of the referee in attempting to establish a claim against the bankrupt, jurisdiction is thereby acquired to make an order under proper circumstances compelling him to turn over money improperly withdrawn from the treasury of the bankrupt. *Matter of Auto Safety Signal Lamp Co.* (D. C., Pa.), 37 Am. B. R. 17, 237 Fed. 299. Where property was in the bankrupt's possession, under a claim of ownership by him at the time when his voluntary petition in bankruptcy was filed and adjudication thereon occurred, the referee may entertain summary proceedings to compel the restoration of such property or its value to the bankruptcy officials. *Matter of First* (D. C., Mass.), 37 Am. B. R. 512.

Determination of validity of claims or liens.—The power to determine the extent, character, or validity of claims or liens asserted against property in the hands of the bankruptcy court is necessarily broad. Hence, where a holder of bonds issued by the bankrupt appeared in response to a petition by the trustee to determine the validity of all liens, and litigated the question of the validity of the bonds, the referee had jurisdiction. *Matter of Valecia Condensed Milk Co.* (D. C., Wis.), 37 Am. B. R. 504, 233 Fed. 173.

Determination of fact of possession.—A referee may determine upon conflicting testimony whether property claimed by the trustee has or has not come into the possession of a third party. This because no question of the "right to possession" is thus determined. *Matter of Kramer and Muchnick* (D. C., Pa.), 33 Am. B. R. 223, 218 Fed. 138.

44. *In re Blum* (C. C. A., 7th Cir.), 29 Am. B. R. 332, 202 Fed. 883; *In re Hayden* (D. C., Mass.), 22 Am. B. R. 764, 172 Fed. 623; *In re Holbrook Shoe & Leather Co.* (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973; *In re Logan* (D. C., N. Y.), 28 Am. B. R. 543, 196 Fed. 678; *Gavilan v. Lugo* (D.

an order authorizing the trustee to intervene in an attachment suit for the purpose of maintaining it for the benefit of the bankrupt estate.⁴⁸ A referee, in the exercise of functions pertaining to a court of bankruptcy, may entertain plenary jurisdiction over suits or proceedings for the setting aside of preferences,⁴⁹ or the recovery of property fraudulently transferred.⁵⁰ A referee is not vested with power to order the trustee to specifically perform a contract of the bankrupt,⁵¹ nor has he jurisdiction to compel the specific performance by third persons of an agreement with the bankrupt.⁵² And a plenary proceeding should be brought on the equity side of the court for the reformation of a contract entered into by the bankrupt.⁵³ The numerous functions of a court of bankruptcy which, through this subdivision, may be performed by the referee are pointed out in the "cross-references." For the law and practice in the exercise of them, reference should be had to the appropriate sections of this work.

(2) JURISDICTION OVER DISCHARGES AND COMPOSITIONS.—The referee is denied jurisdiction of these important matters, as he is of adjudications save in the absence of the judge.⁵⁴ All questions, at every step, arising out of

C., Porto Rico), 39 Am. B. R. 326, 9 P. R. Fed. 344.

45. *In re Walsh Bros.* (D. C., Iowa), 21 Am. B. R. 14, 163 Fed. 352; *Spears v. Frenchton and Burnsville R. R. Co.* (C. C. A., 4th Cir.), 31 Am. B. R. 679, 213 Fed. 784; *In re Gill* (C. C. A., 8th Cir.), 26 Am. B. R. 883, 190 Fed. 706; *In re Cohn* (D. C., N. Y.), 3 Am. B. R. 421, 98 Fed. 75; *In re Peacock* (D. C., N. Y.), 24 Am. B. R. 159, 178 Fed. 851; *In re Bacon* (D. C., N. Y.), 28 Am. B. R. 565, 196 Fed. 986; *Dreyer v. Perkins* (C. C. A., 5th Cir.), 33 Am. B. R. 232, 217 Fed. 889.

46. *Matter of Atwater* (D. C., N. Y.), 36 Am. B. R. 109, 227 Fed. 511.

47. *In re Minner's Brewing Co.* (D. C., Pa.), 20 Am. B. R. 717, 162 Fed. 327.

48. *Conti v. Sunseri* (C. C. P., Pa.), 34 Pa. C. C. 25, 18 Am. B. R. 891.

49. *Graham v. Faith* (C. C. A., 1st Cir.), 41 Am. B. R. 590, 253 Fed. 32. See also *Knapp & Spencer v. Draw* (C. C. A., 8th Cir.), 20 Am. B. R. 355, 160 Fed. 413; *In re Elletson Co.* (D. C., W. Va.), 23 Am. B. R. 530, 174 Fed. 859. Compare *In re Carlile* (D. C., N. Car.), 29 Am. B. R. 373, 199 Fed. 612; *In re Overholzer* (D. C., N. Dak.), 23 Am. B. R. 10; *Matter of Velez* (D. C., Porto Rico), 39 Am. B. R. 307, 9 P. R. Fed. 404.

50. *Matter of Weidhorn* (C. C. A., 1st Cir.), 41 Am. B. R. 592, 253 Fed. 28; *Matter of Fraser* (D. C., N. Y.), 41 Am. B. R. 839; *Matter of Salm Baking Co.* (D. C., Tex.), 43 Am. B. R. 511. See also *In re Kearney* (D. C., Pa.), 21 Am. B. R. 721, 167 Fed. 995; *In re O'Brien* (D. C., Mass. Ref.), 21 Am. B. R. 11, *affd.* by Judge Dodge; *In re Shults & Mark* (D. C., N. Y.), 11 Am. B. R. 690; *In re Murphy* (Ref., N. Y.), 3 Am. B. R. 499; *In re Jules & Frederic Co.* (Ref., Mass.), 27 Am. B. R. 136, 193 Fed. 533 (*revd.* on other

grounds, 34 Am. B. R. 5); *In re Coffey* (D. C., N. Y.), 19 Am. B. R. 148.

53. *Dreyer v. Perkins* (C. C. A., 5th Cir.), 33 Am. B. R. 232, 217 Fed. 889.

54. *Specific performance.*—A referee in bankruptcy has no jurisdiction of a suit by the trustee to compel the specific performance of an agreement by promoters of a corporation to issue stock to the bankrupt in payment for services. *Matter of Ballou* (D. C., Ky.), 33 Am. B. R. 21, 215 Fed. 810, holding that section 23b of the bankruptcy act providing that "Suits by the trustee shall only be brought or presented in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant," except suits under sections 60, 67 and 70, does not confer jurisdiction upon a referee of a suit by a trustee to compel specific performance of an agreement between promoters of a corporation and the bankrupt. The word "courts" in said section does not include a court of bankruptcy.

55. Holding that an application to reform a contract made to a referee in bankruptcy, with request that if he thinks he lacks jurisdiction to entertain it he should forward it to the court, does not bring the matter before the court in a proper manner. *Matter of Bondurant Hardware Co.* (D. C., Ga.), 37 Am. B. R. 308, 231 Fed. 247.

56. *Bankr. Act, § 18-e-f-g*; *In re McDuff* (C. C. A., 5th Cir.), 4 Am. B. R. 110, 161 Fed. 241; *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736; *In re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479; *In re Johnson* (D. C., Ark.), 19 Am. B. R. 814, 158

applications for discharges are original questions for the court,⁵⁷ and the referee has no jurisdiction to decide any question unless it has been referred to him.⁵⁸ The words of the subdivision extend such limitation not only to applications for discharge or composition, but "to questions growing out of" the two specified proceedings. Thus, a referee has no jurisdiction over a proceeding for the revocation of a discharge or for setting aside a composition.⁵⁹ This limitation in actual practice is often one of nomenclature rather than fact. As previously observed, save when a jury trial is had, on objections to a discharge the referee usually sits on the case as a special master in chancery, and reports the facts and his opinion to the court for its guidance.⁶⁰ The practice on such references is discussed under § 14, *ante*.

(3) **POWER OF REFEREE TO GRANT INJUNCTIONS.**—The third paragraph of General Order XII supplements subdivision 4 of this section and withdraws jurisdiction from referees to grant injunctions to stay proceedings of a court or officer of the United States or of a State.⁶¹ Where the rules adopted by the district court negative the right of a referee to issue injunction orders, such power does not exist.⁶² But the referee may have jurisdiction to issue injunctions, directed to any party not an officer of the United States or of a State, unless the injunction stays the proceedings of the court.⁶³ In some districts it is the custom for referees to grant temporary injunctions returnable before the judge.⁶⁴

Fed. 342; *Matter of Sonnabend* (Ref., Mass.), 13 Am. B. R. 117; *Matter of Amer* (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576. See also Am. B. R. Dig. § 1047.

57. *In re Johnson* (D. C., Ark.), 19 Am. B. R. 814, 158 Fed. 342.

58. *In re McDuff* (C. C. A., 5th Cir.), 4 Am. B. R. 110, 101 Fed. 241; *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736; *Matter of Amer* (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576; *In re Randall* (D. C., Pa.), 20 Am. B. R. 305, 159 Fed. 298, holding that a certificate of conformity granted by the referee is void, where the specification of objections have not been disposed of.

A referee, as a special master, upon the hearing of a specification of objections to a discharge, should not base a finding upon the original examination of the bankrupt before him as referee. *In re Murray* (D. C., Conn.), 20 Am. B. R. 700, 162 Fed. 983.

Objecting to discharge.—The referee cannot, of his own motion, raise objections to the bankrupt's discharge. *Matter of Walsh* (C. C. A., 7th Cir.), 43 Am. B. R. 266, 256 Fed. 653.

59. Consult Sections Thirteen and Fifteen of this work.

60. See discussion under Section Fourteen of this work.

61. "The reason for section 2 of General Order XII seems to me to be obvious; the Supreme Court had in mind the dignity of other courts, Federal and State, and of other officers, and provided that they might only be interfered with by a tribunal of equal rank, and not by a subordinate official, unless for definitely described reasons action by the latter should be unavoidable." *In re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 143 Fed. 598.

62. *In re Siebert* (D. C., N. J.), 13 Am. B. R. 348, 133 Fed. 781. In this case it was held that, if, by consent of the parties in a case, the referee acquires jurisdiction to hear a motion for injunction, he may hear it, and advise the judge of his decision by filing it with the clerk of the court. The judge of the court, and he only, may then, if the decision of the

referee be that an injunction should issue, make an order for injunction. The referee may also, without consent of the parties, in order to prevent injury to the property of the bankrupt, grant a temporary stay of judicial proceedings; but such stay should be but for a few days, and only until the applicant can have an opportunity to move for an injunction before the judge.

63. *In re Steuer* (D. C., Mass.), 5 Am. B. R. 209, 214, 104 Fed. 976, 980, approved in *In re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 143 Fed. 598. See also Am. B. R. Dig. § 77.

An injunction granted by the referee will be sustained where the parties have submitted to him for disposition the question at issue between them. *In re Benjamin* (D. C., Pa.), 15 Am. B. R. 351, 140 Fed. 320.

Injunction re-issued by court.—Where a district court upon its own motion broadens and issues anew an injunction restraining the prosecution of a suit in a state court, it is immaterial whether the referee had authority to order the stay in the first instance. *In re Roger Brown & Co.* (C. C. A., 8th Cir.), 28 Am. B. R. 336, 196 Fed. 758.

A referee, acting as special master, has no authority, and none can be granted to him by the court, to make an order in the nature of an injunction. *Matter of Gordon* (D. C., Cal.), 41 Am. B. R. 500, 250 Fed. 798.

Ejectment proceedings.—Where at the time of the appointment of a receiver in bankruptcy the bankrupt was in possession of premises under a written lease and the lessor had instituted ejectment proceedings in the State court, alleging a breach of condition, it was proper for the referee to temporarily enjoin said proceedings in order to give the receiver an opportunity to decide whether or not to defend and try to retain the lease for the benefit of the estate. *Matter of Lombardy Inn Co., Inc.* (D. C., Mass.), 44 Am. B. R. 44.

64. See *In re Sabin* (Ref., N. Y.), 1 Am. B. R. 315; *In re Rogers* (Ref., Ky.), 1 Am. B. R. 541; *In re Siebert* (D. C., N. J.), 13 Am. B. R. 348, 133 Fed. 781; *In re Mussey*, 2 N. B. N. Rep. 113.

(4) **EMPLOYMENT AND COMPENSATION OF STENOGRAPHERS.**—The meaning of subdivision 5 of this section would seem to be that a referee in bankruptcy may make use of the services of a stenographer, when the trustee considers that the testimony should be taken, and that in such case the rate is fixed, but this rate has nothing to do with the employment of a stenographer on isolated and unusual occasions, where, at the request of the creditors or of the receiver, a special hearing is had before a special commissioner.⁶⁵ The purpose of this subdivision is clear—to permit the use of modern methods in preserving testimony. But, strictly, a stenographer will not be employed save “upon the application” of the trustee,⁶⁶ or where there has been a stipulation of the parties or money has been deposited for the expense as provided by General Order X;⁶⁷ though, it seems, the necessary expense of a referee in perpetuating testimony may be called for in advance, and is probably an expense of administration.⁶⁸ In a proper case,⁶⁹ the referee will doubtless direct the trustee to make such an application. Where the taking of the testimony was necessary to the estate or resulted

65. *Matter of Stark* (D. C., N. Y.), 18 Am. B. R. 467, 155 Fed. 694, holding that the provisions of section 38, subdivision 5, do not apply to hearings before a special commissioner.

Discretion of referee.—Whether the testimony of a bankrupt, upon the hearing of an application by the trustee to compel him to turn over certain property, shall be heard orally, taken in long hand or by a stenographer is within the discretion of the referee. *Matter of Goldstein* (D. C., N. Y.), 19 Am. B. R. 96, 155 Fed. 695.

66. Expense of a stenographer cannot be allowed to a referee, except where he is employed upon the application of the trustee under section 38, and a referee's allowance to himself of \$250 for stenographer's fees in “adjustment, correspondence and notices in matters of claims and other business of the state,” should be disallowed as unauthorized. In re *Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731.

An allowance made to stenographers for services in taking testimony in proceedings before the referee commented upon, and the allowance reduced to forty cents per page for three copies of testimony. In re *Ellett Electric Co.* (D. C., N. Y.), 28 Am. B. R. 453, 197 Fed. 400.

Although under section 38, subdivision 5, an examination of the bankrupt and the employment of a stenographer therefor may, as a general rule, be allowed at the expense of the estate, that should not be allowed for the benefit of general creditors at the expense of the wages claims of workmen objecting thereto, when the funds in hand are only sufficient to pay the preferred claims. Such expenses should be at the charge of the general creditors alone. In re *Rozinsky* (D. C., N. Y.), 3 Am. B. R. 830, 101 Fed. 229.

Charges for clerk hire and stationery may

be disallowed to the referee, there being no voucher for the stationery and the employment of the clerk by the referee being unauthorized by statute. In re *Carolina Cooperage Co.* (D. C., N. Car.), 3 Am. B. R. 184, 96 Fed. 950.

67. **Stipulation as to payment of stenographer's fees.**—In re *Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731; In re *Todd* (D. C., N. Y.), 6 Am. B. R. 8, 109 Fed. 265. In this case the court said: “The rule established by the late Mr. Justice Blatchford in this court, and ever since followed in regard to stenographer's fees, was that when not provided for by law, they could not be taxed in any cause, except upon a written stipulation between the attorneys. Such has been the uniform practice in this court, the attorneys usually dividing and paying the expense of taking and transcribing the stenographer's notes, and taxing in accordance with the stipulation in favor of the successful party the sums paid by him for his share of the notes.”

Agreement as to appointment and payment of stenographer.—Where the petitioning creditors and the alleged bankrupt agreed that the testimony should be taken before the referee by certain stenographers, and that each side should pay one-half of the expense thereof, but no order was made by the referee, it must be impliedly agreed that the stenographer's bill for taking the testimony and furnishing a transcript to the referee should go into the costs against the losing party. But such agreement does not cover the cost of a transcript of the testimony ordered by a party for his own use. *Matter of Pearce* (D. C., Mass.), 37 Am. B. R. 710, 235 Fed. 917. See Am. B. R. Digest, §§ 79, 284.

68. See General Orders X and XXXV(2): § 64-b(3).

69. Compare In re *Todd* (D. C., N. Y.), 6 Am. B. R. 88, 109 Fed. 265.

to its advantage, such an order can, it is thought, be made *nunc pro tunc*. The subdivision is also often supplemented by district or referee district rules.⁷⁰ The exigencies of speedy administration and the multitude of cases which have arisen in important jurisdictions early made the employment of regular stenographers imperative. It is thought that the very liberal interpretation of this subdivision thus far prevailing will continue. The method of taking testimony is prescribed by General Order XXII.

70. Thus, in the Western District of New York:

Rule 11. *Perpetuation of testimony*.—(1) The examination of the bankrupt and any witnesses at meetings of creditors or otherwise, and all testimony offered on contested claims, or for any other purpose, will be taken down by the official stenographer in the form of question and answer, and transcribed. One copy thereof will be inserted in the record book of the referee and the other copy will be delivered to the trustee. The expense of thus perpetuating testimony will be at the rate of ten cents (10c.) a folio for both copies, and shall be paid as follows: Where there are no assets, for one reasonable examination on one day, by the bankrupt, and thereafter by the creditor or party in interest for whose benefit or at whose request

such examination is had; where there are assets, as may be ordered by the referee in each particular case.

(2) After the testimony has been transcribed, the attorney in charge of the case will produce each witness before the referee, that such testimony may be signed, as provided in General Order XXII.

(3) If indemnity is not demanded, all moneys advanced by the referee in publishing or mailing notices, or for traveling expenses, or for procuring the attendance of witnesses, or in perpetuating testimony, or otherwise, shall be paid to the referee prior to, or at the time, application is made to him for the report or certificate called for by District Rule X (that on the bankrupt's application for a discharge).

SECTION THIRTY-NINE.

DUTIES OF REFEREES.

§ 39. **Duties of Referees.**—*a* Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counsellors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

Analogous provisions: In U. S.: Act of 1867, §§ 4, 5, R. S., §§ 4998, 5000, 5001.
In Can.: Act of 1919, § 65.

Cross-references: To the law: Declaration and payment of dividends, § 65.

Bankrupts to file schedules and lists of creditors, § 7 (8).

Examination of records and papers to be permitted, § 29-c.

Cross-references — Continued:

Notices to creditors to be given, § 58.

Making up and transmitting records, §§ 2(10), 42.

Perpetuation of testimony; employment of stenographer, § 38(2) (5).

Offenses by and disqualification of referee, §§ 29-b, 36.

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Referee may require indemnity for expenses, X.

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Orders of referee to state as to notice, XXIII.

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Review of order of referee by judge, XXVII.

To the Forms: Notice of first meeting of creditors, No. 18.

Appointment of trustee by referee, No. 23.

Notice to trustee of his appointment, No. 24.

Order for examination of bankrupt, No. 28.

List of claims and dividends to be recorded by referee and delivered to trustee, No. 40.

Certificate by referee to judge on review, No. 56.

See also Supplementary Forms, *post*; Hagar and Alexander's *Bankruptcy Forms*, 2nd Ed.

SYNOPSIS OF SECTION.**DUTIES OF REFEREES.****I. Miscellaneous Duties of Referees, 664.**

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1. MISCELLANEOUS DUTIES OF REFEREES.

a. In general.—Subsection *a* of this section prescribes the general duties of referees. There is nothing exactly similar to this section in previous statutes. Manifestly, it is in the nature of an appendix to § 38. Though captioned "Duties of Referees," some of its clauses confer jurisdiction.

The more important duties of referees are here enumerated. But the section is not exclusive,¹ even in its prohibitions stated in subsection *b*. The referee has many other duties. The only distinction between them and those here specified seems to be that, as to the former, he has some discretion; as to the latter, little, perhaps none. It is apparently the intent of the statute that the supervision of the administration of the bankrupt's estate be left with the referee.²

b. To declare dividends and prepare dividend sheets.—This duty is required by subdivision 1 of subsection *a*. The general subject of dividends is discussed under Section Sixty-five. In actual practice, dividend sheets are prepared by the trustee or his attorney, and checked over and verified by the referee. Form No. 40 may be used, or, better, a schedule somewhat like it, the same to be attached to and made a part of the formal order of distribution. By General Order XXIX, the referee is also required to countersign all dividend checks drawn by the trustee. Since the amendatory act of 1903, there must always be two dividends, if any.

c. To examine and amend schedules and lists of creditors.—This duty is an important one. It seems that the schedules are not a part of the petition.³ They must, however, conform substantially to the law⁴ and the forms.⁵ Thus, the court proper is not called upon to investigate the sufficiency of the schedules. The referee must. If they seem incomplete or defective, he should suspend further proceedings until they are amended.⁶ An opinion by the author of the first and second editions of this work in the case of *In re Mackey*⁷ is illuminating both as to the duties of the referee in such cases and concerning what are defects or omissions.

d. To furnish information.—Subdivision 3 of this subsection should be read in connection with § 29-c (3), though mere failure to furnish information other than as there specified is not an offense. This duty clearly refers to replies to letters of inquiry, as well as to answers to oral questions and permission to inspect papers on file. Replies to letters may be franked. But

1. See, for instance, Bankr. Act, §§ 55-b and 58-c.

2. *Matter of Rosenfeld-Goldman Co.* (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921.

3. *In re Patterson*, Fed. Cas. 10,815.

4. See Bankr. Act, § 7(8). See also Am. B. R. Dig. § 249.

5. Forms Nos. 1 and 2.

6. *Matter of Spiller* (D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490, holding that the jurisdiction of the referee is not necessarily suspended pending the amendment of the schedules.

7. Duty of referee to examine schedules.—The provisions of section 39-a(2) as to the

examination of schedules of property and lists of creditors is mandatory. It is the duty of the referee to make the examination and to order an amendment in case of defects or omissions, even though no interested party may move in the matter. Since an examination should be made immediately after the reference of the matter to the referee and prior to the meeting of creditors, in voluntary proceedings, at least, the examination should be made before many of the interested parties will, in the natural course of procedure, have entered their appearance. *In re Mackey* (Ref., N. Y.), 1 Am. B. R. 593.

it has been held that a referee is not required to furnish copies of papers.⁸ The duty here enjoined is often a burden. Some referees have adopted forms for answers, especially where information is sought concerning the total of claims shown and assets scheduled. The referee can be reimbursed for such specific expenses as are actually and necessarily incurred in giving the desired information.^{9a}

e. To give notices to creditors.—There is an unimportant conflict between subdivision 4 and § 58-c. The referee should give all notices. Some of the more common notices are specified in § 58-a, which see. General Order XVI prescribes another notice that the referee is supposed to give, but which in actual practice is rarely found necessary.⁹ As a rule, while the original notice must be signed by the referee, the clerical work of preparing and posting is done by the attorney in charge. In districts where no allowance was made for the giving of notices, such a practice has been necessary; if done by the referee, indemnity for the expense incurred can be demanded.¹⁰ Whatever the method, the "official business" envelope can be used. This subject is also considered under Section Fifty-eight.

f. To make up records and transmit them or copies to the clerk.—Subdivisions 5, 7 and 8 relating to records and papers are largely supplemented by § 42, which see. The size and completeness of the record book there prescribed varies in the different districts; in some it is a mere docket, with brief entries indicating the meetings held and orders granted; in others a detailed running account of the whole proceeding from day to day. Subdivision 7 requires the referee to keep records and to transmit them to the clerk when the case is concluded.¹¹ Subdivision 8 provides for the transmission to the clerk of such papers on file with the referee, or copies thereof, as shall be needed in the court proper before the whole case is sent up as provided in the previous subsection. By General Order XXIV, referees are also required to transmit forthwith to the clerk a list of claims proven. This is an inheritance from the law of 1867,¹² does not fit into the present system of administration, serves no useful purpose, and is rarely observed.¹³ The referee is also required to file monthly statements of disbursements with the judge.¹⁴

g. To prepare and file schedules in certain cases.—Section 7 (8) makes it the duty of the bankrupt to prepare, verify and file schedules of his property.¹⁵ If the bankrupt fails in this duty, subdivision 6 of this section requires the referee to prepare and file schedules of property and lists of creditors, or cause the same to be filed. We have already considered this duty of the referee under the preceding section.¹⁶

h. To preserve evidence when no stenographer is present.—The referee may determine whether testimony shall be heard orally, taken in longhand, or written out in the form of stenographer's minutes. If the bankrupt desires the testimony to be perpetuated, the obligation would seem to be on him to

8. Copy of petition for review of payment of attorney's fee need not be furnished by the referee. *In re Lewin* (D. C., Vt.), 4 Am. B. R. 632, 103 Fed. 850.

Duty to furnish copy of testimony of witnesses taken in bankruptcy proceedings. *Matter of Greenbaum* (D. C., Mich.), 40 Am. B. R. 286, 243 Fed. 965.

9a. *Matter of Capital Security Co.* (D. C., Tenn.), 41 Am. B. R. 184, 251 Fed. 927.

9. See Form No. 24.

10. General Order X.

11. Compare Bankr. Act, § 42-c. See *Matter of De Rau* (C. C. A., 6th Cir.), 44 Am. B. R.

409, 200 Fed. 732.

12. General Order XI, under Act of 1867.

13. In the Western District of New York, a district rule makes the certification of the whole record, including the list of claims, addresses, etc., proven, a sufficient observance of this general order.

14. General Order XXVI.

15. See discussion under Bankr. Act, § 7 (8). *ante*. See also Am. B. R. Dig. §§ 245-254.

16. See discussion under Section Thirty-eight, sub-title "Practice after reference in involuntary cases," *ante*, p. 653.

provide the means therefor.¹⁷ As indicated elsewhere,¹⁸ a referee has ample power to secure the attendance and assistance of a stenographer. This subdivision is, therefore, unimportant.

i. To call for papers at the clerk's office.—Subdivision 10 of this section is supplemented by section 51 (3), which should be read in this connection. Even in the same town or city, papers are transmitted by the clerk to the referee by mail.

II. PROHIBITIONS ON REFEREES.

a. Cannot act in cases where interested.—The general disqualification of persons who might otherwise be referees is mentioned elsewhere.¹⁹ A referee duly appointed cannot, however, act in all cases. What amounts to disqualification must be determined in each case.²⁰ Relationship by blood or affinity, even though remote, is usually enough. But owing a debt to the bankrupt,²¹ or, perhaps, being a scheduled creditor of the bankrupt, at least in a no-asset case, does not disqualify. A prior relation of attorney to the debtor, likewise, does not.²² Pending litigation with the bankrupt, it is thought, will. If disqualified, the referee should immediately file a certificate to that effect, stating the reasons for disqualification, with the clerk; and a reference will then be made to another referee. Disqualification sometimes does not appear until the case is far along, and then only in some single matter. In such cases, that matter may be considered by the judge, on receipt of this certificate, or he may refer it specially to another referee. A referee who acts in a case where he is interested commits an offense under the law, and forfeits his office.²³

b. Cannot practice in bankruptcy proceedings.—There was a similar prohibition under the law of 1867.²⁴ The limitation here seems to be on practice "in any bankruptcy proceedings." Under the former law, a register could not practice "in or out of court" in any suit or matter pending in his own district or circuit. The difference between the statutes in literal significance is great; in effect, there should be none. The propriety of giving counsel in pending bankruptcy questions, even in another district, may be doubted. General counsel to clients or other attorneys concerning questions not yet in court seems, however, not to be prohibited and may not be thought improper. There are as yet no cases construing this clause. A violation of this prohibition is not an offense.

c. Cannot purchase property of a bankrupt estate.—This provision is new, and requires no comment. The purchase of the property of a bankrupt

17. Payment of stenographer's fees.—Where, upon the hearing of an application by the trustee to compel the bankrupt to turn over certain property, the trustee has no funds, and the bankrupt claims to be absolutely without means, his motion that the trustee be directed to pay for the stenographer's minutes of the bankrupt's testimony and the referee's fees and disbursements will be denied. *Matter of Goldstein* (D. C., N. Y.), 19 Am. B. R. 96, 155 Fed. 695.

18. See discussion under Section Thirty-eight of this note.

19. Bankr. Act, § 35, *ante*. See also Am. B. R. Dig. §§ 67, 68.

20. See learned foot-note of a former editor of this work, in *In re Gardner* (D. C., Va.),

4 Am. B. R. 420, 103 Fed. 922. See form in "Supplementary Forms," *post*.

21. A debtor who owns an alleged bankrupt a debt which is not denied by the debtor, and whose status as a debtor cannot be changed by any of the proceedings in bankruptcy, and whose liability would be unaffected by such proceedings, is not disqualified to act as referee in proceedings against his creditor. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

22. *Carr v. Fife*, 156 U. S. 494, 39 L. Ed. 508.

23. Bankr. Act, § 29-c(1).

24. Act of 1867, § 4. See the same as amended, R. S., § 4996.

estate, either directly or indirectly, by a referee is an offense whereby he forfeits his office and becomes liable to a fine of not to exceed five hundred dollars.²⁵

III. REVIEWS BY THE JUDGE.²⁶

a. **In general.**—Subdivision 5 of this section relating to records embodying the evidence seems to refer to such records as are needed on reviews, and should be read with General Order XXVII. Thus, a party to an order made by the referee, after hearing on the merits, cannot have a review of it, unless he pursues the mode prescribed by this general order.²⁷ It has been held, however, that notwithstanding the use of the word "creditor" in General Order No. 27, if the interests of several creditors are affected by the rulings or the allowances of the referee, a review should be taken by the trustee as their representative,²⁸ and that in case of a refusal by the trustee, the suitor's remedy is by a motion or petition filed with the court, asking that the trustee be ordered to take a review as to any questions of procedure or allowance.²⁹ A review should be asked by petition; if from an order, this is the only way.³⁰ In the absence of a petition the court is not authorized to review the action of the referee.³¹ A general review of the proceedings before the referee or a review of rulings not directly affecting an order made was not intended either by the bankruptcy act or the general order.³² Ordinarily a review by the judge will be confined to the errors pointed out in the petition,³³ and will be limited to the questions involved in the issues before the referee.³⁴ Where a referee dies after the entering of an order disallowing a claim, before perfecting his findings, the claimant is entitled to a review on both the facts and the law.³⁵

b. **When review should be asked.**—The time within which a review must be asked for is not specified either by the law or by the general orders.³⁶

25. Bankr. Act, § 29-c (2).

26. See also Am. B. R. Dig. §§ 87-94.

27. *Matter of Octave Mining Co.* (D. C., Ariz.), 32 Am. B. R. 474, 212 Fed. 457; *In re Russell* (D. C., Cal.), 5 Am. B. R. 566, 103 Fed. 501; *In re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 147 Fed. 538, holding that a party cannot ignore an order until the referee, under section 41, certifies his disobedience to the judge, and then bring forward again, in his defense, matter of contested before the referee prior to the making of the order, provided the order itself be not void. *Matter of Petersen* (D. C., Nev.), 40 Am. B. R. 637, 252 Fed. 846, citing *Collier on Bankruptcy* (10th ed.), 604.

28. *Matter of Arti-Stain Co.* (D. C., Mass.), 32 Am. B. R. 640, 216 Fed. 942; *In re Mexico Hardware Co.* (D. C., N. Mex.), 28 Am. B. R. 736, 197 Fed. 650.

29. *Matter of Arti-Stain Co.* (D. C., Mass.), 32 Am. B. R. 640, 216 Fed. 942; *In re Mexico Hardware Co.* (D. C., N. Mex.), 28 Am. B. R. 736, 197 Fed. 650.

30. *In re Carlile* (D. C., N. Car.), 29 Am. B. R. 373, 199 Fed. 612; *In re Greek Mfg. Co.* (D. C., Pa.), 21 Am. B. R. 111, 164 Fed. 211; *In re Marks* (D. C., Pa.), 22 Am. B. R. 568, 171 Fed. 281; *In re Clark Coal and Coke Co.* (D. C., Pa.), 23 Am. B. R. 273, 173 Fed. 658.

31. *In re Russell* (D. C., Cal.), 5 Am. B. R. 566, 103 Fed. 501.

32. *Filing petition.*—Where a petition for review was filed only with the clerk but was treated by the referee as filed with him, it was effective as if first filed with the referee, and later by him filed with the clerk, and is no objection to the jurisdiction of the district judge. *Matter of Wood* (C. C. A., 6th Cir.), 40 Am. B. R. 810, 249 Fed. 246.

The certificate of a referee cannot be considered as a petition to review his findings. *Craddock-Terry Co. v. Kaufman* (D. C., Tex.), 23 Am. B. R. 725, 175 Fed. 308. Rulings of a referee upon questions arising during the progress of a case, cannot be brought before a judge of the district court by simply filing in such court exceptions to the rulings. *In re Hawley* (D. C., Iowa), 8 Am. B. R. 632, 116 Fed. 428.

32. *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

33. *Matter of De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 323; *Matter of Association Dairy Co.* (D. C., Conn.), 42 Am. B. R. 321, 261 Fed. 749.

See also Am. B. R. Dig. § 93.

34. *In re Lorch & Co.* (D. C., Ky.), 28 Am. B. R. 784, 199 Fed. 944; *Matter of Graff* (D. C., N. Y.), 43 Am. B. R. 164, 255 Fed. 239.

35. *Matter of Wray* (C. C. A., 2d Cir.), 37 Am. B. R. 23, 233 Fed. 418.

36. *In re Milgram* (D. C., Pa.), 13 Am. B. R. 337, 133 Fed. 802. See also Am. B. R. Dig., § 91.

General Order 27 does not fix the time within which petitions for review of orders of referees shall be taken. A compliance with a local rule, requiring that they be filed within ten days from the date of the order sought to be reviewed, is sufficient. *Matter of Kruse* (D. C., Iowa), 37 Am. B. R. 687, 234 Fed. 470.

As there are no terms in bankruptcy and

It is fixed in some districts by a standing rule.³⁷ In the absence of a rule the application should be made within a reasonable time. The cases are not uniform as to what constitutes a reasonable time; the time within which the petition is to be filed is discretionary with the court and will not be disturbed unless such discretion is abused;³⁸ it has been held that a petition for a review should be filed within the time fixed for an appeal from the same class of orders, and that this should be regarded as a reasonable time.³⁹ The right

no provision in the Bankruptcy Act limiting the time within which an order of a referee in bankruptcy may be reviewed or an order of the District Court reheard, a petition for an order directing the trustee to pay over moneys collected pursuant to an order of the referee may be filed nine months after the granting of said order. *Matter of Barker Piano Co.* (C. C. A., 2d Cir.), 37 Am. B. R. 271, 233 Fed. 522.

37. In some districts a review must be asked within ten days. See *Erie County* (N. Y.), Rule 16, 1 N. B. N. 115; *Matter of Isert* (D. C., Cal.), 36 Am. B. R. 431, 232 Fed. 484; *Matter of Jackson Light & Traction Co.* (D. C., Miss.), 44 Am. B. R. 222.

The effect of a special district rule, taken in connection with General Order 27, was considered in *Re Greek Manufacturing Co.* (D. C., Pa.), 21 Am. B. R. 111, 164 Fed. 211, and the court decided that under the rule and the general order a decision of a referee may only be reviewed by petition, and that such petition must be presented within the period specified by the rule, or afterward only upon special allowance by one of the judges; otherwise, the referee's order (unless, perhaps, when it is obviously beyond his jurisdiction) is no longer subject to review after the ten days have expired. And it was also decided that an order once entered is not subject to be reviewed or altered by the referee himself. In *re Leasher & Son* (D. C., Pa.), 25 Am. B. R. 218, 176 Fed. 650. See in *re Wink* (D. C., Md.), 30 Am. B. R. 298, 206 Fed. 348; *Matter of Wister* (D. C., Pa.), 36 Am. B. R. 809, 232 Fed. 898; s. c. (C. C. A., 3d Cir.), 38 Am. B. R. 215, 237 Fed. 793; *Cary v. International Agricultural Corp.* (D. C., Ohio), 38 Am. B. R. 590, affd. *sub nom.*; *International Agricultural Corp. v. Cary* (C. C. A., 6th Cir.), 38 Am. B. R. 753.

38. Reasonable time, what constitutes.—*Bacon v. Roberts* (C. C. A., 3d Cir.), 17 Am. B. R. 421, 146 Fed. 729, holding that a dismissal of a petition filed fifty days after the order should be sustained; In *re N. Y. Economical Printing Co.* (C. C. A., 2d Cir.), 5 Am. B. R. 697, 106 Fed. 839; In *re Milgram* (D. C., Pa.), 13 Am. B. R. 337, 133 Fed. 802, holding that three months was not a reasonable time; *Crim v. Woodford* (C. C. A., 4th Cir.), 14 Am. B. R. 302, 136 Fed. 34; In *re Foss* (D. C., Me.), 17 Am. B. R. 439, 147 Fed. 790, holding that thirty days is a reasonable time; In *re Grant* (D. C., R. I.), 16 Am. B. R. 256, 143 Fed. 661, holding that a petition filed three and one-half months after the making of the order should be dismissed; In *re Chambers* (Ref.,

R. I.), 6 Am. B. R. 709, holding that a petition filed eighteen months after the decision should be dismissed.

Where, more than six months after the allowance of a claim and three months after a refusal to expunge the claim at the request of the trustee, the referee, upon the creditors' petition for a review of the order allowing his claim, filed a certificate presenting only his refusal to expunge, the certificate will be dismissed upon the ground that the petition for review was too late. In *re Milgram* (D. C., Pa.), 13 Am. B. R. 337, 133 Fed. 802.

Where a referee made and signed an order dated January 24, 1914, disallowing a claim, a petition for review filed February 3, and an amendment filed February 12, are in time. *Matter of Wray* (C. C. A., 2d Cir.), 37 Am. B. R. 28, 233 Fed. 468.

Circumstances and conditions must be extreme which will excuse a delay of more than thirty days in asking for a review of an order of the referee; and where the only excuse offered for a delay of nearly five months in filing a petition to review an order disallowing a claim, is the pendency of an appeal, taken by another party from an order disallowing part of another claim, which prevents the closing and final settlement of the estate, the petitioner is not entitled to an order compelling the referee to make the certificate for review, required by General Order No. 27. In *re Verdon Cigar Co.* (D. C., Mich.), 27 Am. B. R. 56, 193 Fed. 813.

Effect of mistake in filing.—Where a petitioner to review an order of a referee in bankruptcy filed its petition by mistake with the clerk instead of the referee as required by General Order No. 27, in the absence of a special rule prescribing an express limitation of time for initiating proceedings for such review, an application for special leave to file its petition anew is addressed to the discretion of the district court, even though the ten days which it has been customary to allow for making such applications has elapsed. In *re Nippon Trading Co.* (D. C., Wash.), 25 Am. B. R. 695, 182 Fed. 952.

39. In *re Nichols* (D. C., N. Y.), 22 Am. B. R. 216, 166 Fed. 603.

The time to file a petition to review an order of a referee commences to run upon the entry of the order, and the right to review is not waived by a motion to open the hearing and produce further evidence, made before the signature or entry of the order. *Matter of Place* (D. C., N. Y.), 35 Am. B. R. 426, 224 Fed. 778. See also *Matter of Wood* (C. C. A., 6th Cir.), 40 Am. B. R. 810, 248 Fed. 246.

to file such petition may not be so exercised as to unreasonably and unnecessarily delay the distribution of the assets of the bankrupt.⁴⁰ A person who is not a party to proceedings for review may not intervene several months after they were begun, and, upon the withdrawal of the petitioner, be substituted as a party.⁴¹

c. Order only reviewable.—It seems that a review can be asked only after the granting of an order,⁴² though it would seem that the referee may certify a specific question also.⁴³ A petition for a review of the "decision" of the referee would be defective.⁴⁴ The courts will properly hesitate to review an interlocutory order of a referee; such a practice tends to delay the final disposition of the controversy, and will not be encouraged.⁴⁵

d. Contents of petition.—The petition should clearly point out the error complained of, and ask a review.⁴⁶ The matters of law sought to be reviewed should be set out fully.⁴⁷ New facts may not be set up unless by express leave of the court, and this will not be granted unless the evidence is material and likely to produce a different result.⁴⁸

e. Effect of referee's decision on facts.⁴⁹—The position of the referee and his duties are analogous to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report.⁵⁰ Findings of fact by the referee are presumed to be correct until the contrary is shown, and the burden of proof rests with the persons objecting thereto.⁵¹

40. *In re Grant* (D. C., R. I.), 16 Am. B. R. 256, 143 Fed. 661.

41. *Matter of Wister & Co.* (C. C. A., 3d Cir.), 38 Am. B. R. 215, 237 Fed. 793.

42. *In re Schiller* (D. C., Tex.), 2 Am. B. R. 190, 96 Fed. 400; *In re Chambers* (Ref., R. I.), 6 Am. B. R. 709. See also *In re Hawley* (D. C., Iowa), 8 Am. B. R. 632, 116 Fed. 428.

Reviewable order.—A sheet of paper in the handwriting of a referee in bankruptcy, without date, filing mark, signature, or authentication by the referee of any sort, and without verification, and constituting a mere tentative account, is not a reviewable order by the referee for payments by the trustee. *Matter of Lacey & Co.* (D. C., Sup. Ct.), 35 Am. B. R. 231, 43 Wash. Law Rep. 434.

43. *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747. Compare also Form No. 56. In the case of *In re Reukauff* (D. C., Pa.), 14 Am. B. R. 344, 135 Fed. 251, the court held that the act did not authorize the referee of his own motion to certify a question on which he wishes to be advised and which may arise in the proceeding.

44. *In re Chambers* (Ref., R. I.), 6 Am. B. R. 709; *In re Boston Dry Goods Co.* (D. C., Mass.), 11 Am. B. R. 97, 125 Fed. 226; *In re Schneider* (D. C., Pa.), 29 Am. B. R. 469, 203 Fed. 589.

45. *Matter of Graboyes* (D. C., Pa.), 36 Am. B. R. 29, Fed. .

46. *In re Milgraum* (D. C., Pa.), 13 Am. B. R. 337, 133 Fed. 802; *In re Schiller* (D. C., Va.), 2 Am. B. R. 704, 96 Fed. 400; *In*

re Harnden (D. C., N. Mex.), 29 Am. B. R. 507, 200 Fed. 175. For form of petition to review order of referee, see *Hagar & Alexander's Forms in Bankruptcy*, 2d ed., No. 124.

47. *In re Taft* (C. C. A., 6th Cir.), 13 Am. B. R. 417, 138 Fed. 511.

48. *In re McIntire* (D. C., W. Va.), 16 Am. B. R. 80, 85, 142 Fed. 593.

General Orders.—A creditor who has not complied with General Order No. 27 is in no position to review an order of the referee. *Matter of Goldman Bros.* (D. C., Pa.), 39 Am. B. R. 53, 241 Fed. 385.

49. See also Am. B. R. Dig. § 24.

50. *Epstein v. Steinfeld* (C. C. A., 3d Cir.), 32 Am. B. R. 6, 210 Fed. 236, affg. 30 Am. B. R. 387, 206 Fed. 568.

51. *In re Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 810; *Matter of Schultz & Guthrie* (D. C., Mass.), 37 Am. B. R. 604, 235 Fed. 907; *Matter of Aronson* (D. C., Ala.), 37 Am. B. R. 385, 233 Fed. 1022; *Matter of Kean* (D. C., N. Y.),

36 Am. B. R. 628; *In re Williams* (D. C., Ga.), 9 Am. B. R. 731, 120 Fed. 542. In the absence of a clear showing that a finding of the referee in favor of the petitioning creditor was erroneous, the court must presume it to be correct. *In re Hutchins Co.* (D. C., N. Y.), 24 Am. B. R. 647, 179 Fed. 864; *In re Malschick & Levin* (D. C., Pa.), 30 Am. B. R. 237, 206 Fed. 71; *In re Cox* (D. C., N. Mex.), 29 Am. B. R. 456, 199 Fed. 952, citing text.

The findings of the master, concurred in by the court, are to be taken as presumptively correct, and will be permitted to stand unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, but are not

But findings, based on undisputed facts, which are set out in the record, are entitled to no presumption in their favor.⁵² No arbitrary rule can be laid down for determining the weight which should be attached to findings of fact by a referee or special master in bankruptcy. Much must depend upon the character of the findings.⁵³ But when there is neither pleading or proof respecting an issue a finding by the referee must be disregarded.⁵⁴ If the findings be deductions from established facts, they will not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce conclusions as the referee.⁵⁵ So, where the evidence is not in serious conflict, the court is not bound by the conclusions of the referee because the witnesses appeared before him and gave testimony.⁵⁶ But if the findings are based upon conflicting evidence involving questions of credibility and the referee has heard the witnesses much greater weight

conclusive, *Houck v. Christy* (C. C. A., 8th Cir.), 18 Am. B. R. 330, 152 Fed. 612; *Smith v. Seibel* (D. C., Ia.), 44 Am. B. R. 490, 258 Fed. 454.

Review of order dismissing petition in reclamation proceedings.—Where a referee has denied a petition by an alleged conditional vendor to reclaim chattels, all presumptions of evidence are in favor of the validity of his order, and the court must not assume that evidence with respect to any matter was given which would be inconsistent with the conclusion reached by the referee, unless such evidence is sufficiently set forth in the record. *Matter of Farmers' Dairy Association* (D. C., Cal.), 37 Am. B. R. 672, 234 Fed. 118.

52. *Chambers v. Continental Trust Co.* (D. C., Ga.), 38 Am. B. R. 73, 235 Fed. 441, affd. 39 Am. B. R. 872, 239 Fed. 1020; *In re Big Cahaba Coal Co.* (D. C., Ala.), 26 Am. B. R. 910, 190 Fed. 900; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 810; findings of fact should not be lightly distributed by the district judge on review. *Matter of Biehl* (D. C., Pa.), 35 Am. B. R. 150, 237 Fed. 720; *Matter of Georgia Steel Co.* (D. C., Ga.), 39 Am. B. R. 426, 240 Fed. 473; *Matter of S. & S. Mfg. & Sales Co.* (D. C., Ohio), 39 Am. B. R. 786, 246 Fed. 1005.

53. *In re McCrary Bros.* (D. C., Ala.), 22 Am. B. R. 161, 169 Fed. 435; *Ohio Valley Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155; 39 C. C. A. 605; *Baumhauer v. Austin* (C. C. A., 5th Cir.), 26 Am. B. R. 385, 186 Fed. 260, revg. 24 Am. B. R. 750, 179 Fed. 906; *Epstein v. Steinfeld* (C. C. A., 3d Cir.), 32 Am. B. R. 6, 210 Fed. 236, affg. 30 Am. B. R. 387, 206 Fed. 568; *Steinberg v. Cohen & Co.* (C. C. A., 1st Cir.), 42 Am. B. R. 456, 254 Fed. 1.

54. *Matter of Pittsburg-Big Muddy Coal Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 452, 215 Fed. 703.

55. *In re McCrary Bros.* (D. C., Ala.), 22 Am. B. R. 161, 169 Fed. 435; *Ohio Valley Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 919, 163 Fed. 155; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 808; *Matter of Heilbron Brothers* (D. C., Pa.), 35 Am. B. R. 568, 226 Fed. 803; *Matter of Blanchard* (D. C., N. J.), 42 Am. B. R. 177, 253 Fed. 758; *Sternburg v. Cohen & Co.* (C. C. A., 1st Cir.), 42 Am. B. R. 458, 254 Fed. 1.

In re McDonald & Sons (D. C., S. Car.), 24 Am. B. R. 446, 178 Fed. 487, affd. 25 Am. B. R. 948, *Brawley*, district judge, said: "The rule is upon an appeal from a referee to accept his conclusions on questions of fact, unless the same are manifestly erroneous, and that is because he hears the testimony, can

note the demeanor of witnesses, and is in a better position to determine the weight of the spoken words. If there was any conflict in the testimony, any question the determination of which was effected by the credibility of witnesses, I would refuse to disturb his conclusion. Such is not the case here, for there is no conflict in the testimony, and the case turns upon the inferences to be drawn from the proved or admitted facts, and I can no more escape drawing my own inference than from the performance of any other judicial duty."

56. *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 810; *Matter of New York and Philadelphia Package Co.* (D. C., N. J.), 35 Am. B. R. 94, 225 Fed. 219.

Where the evidence is not in serious conflict, and the inferences drawn by the referee from a peculiar state of facts are not sufficiently supported by the evidence the court on review of the referee's order is not bound by his conclusions. *In re People's Department Store Co.* (D. C., N. Y.), 20 Am. B. R. 244, 159 Fed. 286; in this case Judge Hazel said: "Nor is the court bound by the conclusions of the referee because the witnesses appeared before him and gave testimony. The evidence is not in serious conflict, and the conclusions are principally based upon inferences to be drawn from a peculiar state of facts. The inferences drawn by the referee are not thought to be sufficiently supported by the evidence, and therefore there can be no valid objection to a decision based upon the facts and circumstances according to the judgment of this court."

In the case of *In re Swift* (D. C., Mass.), 9 Am. B. R. 237, 114 Fed. 947, Judge Low discusses the weight to be given to findings of fact made by a referee and intimates that where they depend upon inferences to be drawn from admitted facts, the court will exercise its own judgment as to whether such findings should be reversed. As to such findings he observes that the court may interfere although they are not "clearly erroneous."

naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon a review, should not disturb his findings unless there is most cogent evidence of a mistake and miscarriage of justice.⁵⁷ They are entitled to the same con-

57. *Epstein v. Sternfeld* (C. C. A., 3d Cir.), 32 Am. B. R. 6, 210 Fed. 236, affg. 30 Am. B. R. 387, 206 Fed. 568; *Baker v. Bishop-Babcock-Becker Co.* (C. C. A., 4th Cir.), 34 Am. B. R. 396, 220 Fed. 637; *Findlayson v. Barrows* (C. C. A., 5th Cir.), 34 Am. B. R. 429, 221 Fed. 986; *Matter of Hindin* (D. C., Cal.), 34 Am. B. R. 114, 219 Fed. 605; *Matter of Cosatsky* (D. C., Conn.), 33 Am. B. R. 323, 216 Fed. 820; *Matter of Stafford* (D. C., Conn.), 35 Am. B. R. 747, 221 Fed. 127; *Matter of Anderson* (D. C., Ga.), 35 Am. B. R. 487, 224 Fed. 790; *Matter of Crocker* (D. C., Iowa), 33 Am. B. R. 293, 217 Fed. 173; *Matter of Kats* (D. C., N. J.), 32 Am. B. R. 422, 216 Fed. 949; *Matter of Partridge Lumber Co.* (D. C., N. J.), 33 Am. B. R. 537, 215 Fed. 973; *Matter of New York and Philadelphia Package Co.* (D. C., N. J.), 35 Am. B. R. 94, 225 Fed. 219; *Matter of Hefron Co.* (D. C., N. Y.), 33 Am. B. R. 443, 216 Fed. 642; *Matter of Coney Island Lumber Co.* (D. C., N. Y.), 34 Am. B. R. 563, 199 Fed. 803; *Matter of Utica Pipe Foundry Co.* (D. C., N. Y.), 34 Am. B. R. 617, 221 Fed. 787; *Ohio Bank v. Mack* (C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155, 89 C. A. 605; *In re Rider* (D. C., N. Y.), 3 Am. B. R. 192, 96 Fed. 811; *In re Miner* (D. C., Ore.), 9 Am. B. R. 100, 117 Fed. 953; *In re Schriver* (D. C., Pa.), 10 Am. B. R. 746, 125 Fed. 511; *Couts v. Townsend* (D. C., Ky.), 11 Am. B. R. 126, 126 Fed. 249; *In re Royce Dry Goods Co.* (D. C., Mo.), 13 Am. B. R. 257, 133 Fed. 100; *In re Shults* (D. C., N. Y.), 14 Am. B. R. 378, 135 Fed. 623; *Southern Pine Co. v. Savannah Trust Co.* (C. C. A., 5th Cir.), 15 Am. B. R. 618, 141 Fed. 802; *In re Kenyon* (D. C., Ohio), 19 Am. B. R. 194, 156 Fed. 863; *In re Littman* (D. C., Pa.), 20 Am. B. R. 300, 159 Fed. 233; *In re Braselton* (D. C., Ga.), 22 Am. B. R. 419, 169 Fed. 960; *In re McCann Bros. Ice Co.* (D. C., Pa.), 22 Am. B. R. 555, 171 Fed. 265; *In re Hoffman* (D. C., Wis.), 23 Am. B. R. 19, 173 Fed. 234, citing *Collier on Bankruptcy* (7th ed.), p. 504; *In re Boner* (D. C., Ohio), 26 Am. B. R. 321, 189 Fed. 93; *Matter of Brenner* (D. C., Pa.), 26 Am. B. R. 647, 190 Fed. 209; *In re Wright-Dana Hardware Co.* (D. C., N. Y.), 30 Am. B. R. 582, 205 Fed. 335; *In re Walden Bros. Clothing Co.* (D. C., Ga.), 29 Am. B. R. 80, 199 Fed. 315; *Gavilan v. Lugo* (D. C., Porto Rico), 39 Am. B. R. 326, 9 P. R. Fed. 344; *Matter of Georgia Steel Co.* (D. C., Ga.), 39 Am. B. R. 426, 240 Fed. 473; *Matter of Fackler* (D. C., Ohio), 39 Am. B. R. 742, 246 Fed. 864; *Matter of S. & S. Mfg. & Sales Co.* (D. C., Ohio), 39 Am. B. R. 786, 246 Fed. 1005; *Matter of Hadden* (D. C., Ga.), 40 Am. B. R. 24, 242 Fed. 284; *Matter of La Jolla Lumber & Mill Co.* (D. C., Cal.), 40 Am. B. R. 273, 243 Fed. 1004; *Matter of Nejour* (D. C., Ga.), 40 Am. B. R. 393, 246 Fed. 167; *Matter of Victor* (D. C., Ga.), 40 Am. B. R. 399, 246 Fed. 727; *Matter of Atkinson-Kerce Grocery Co.* (D. C., Ga.), 40 Am. B. R. 411, 245 Fed. 481; *Matter of Johnson* (D. C., Ga.), 40 Am. B. R. 687, 247 Fed. 135; *Matter of Schilling and Loller* (D. C., Ohio), 41 Am. B. R. 688, 251 Fed. 972; *Matter of Blanchard* (D. C., N. J.), 42 Am. B. R. 177, 253 Fed. 758; *Matter of Wilson-Nobles-Barr Co.* (D. C., Wash.), 42 Am. B. R. 252, 250 Fed. 966; *Steinburg v. Cohen & Co.* (C. C. A., 1st Cir.), 42 Am. B. R. 456, 254 Fed. 1; *Matter of Caledonia Coal Co.* (D. C., Mich.), 43 Am. B. R. 93, 254 Fed. 742; *Matter of Bass* (D. C., Pa.), 43 Am. B. R. 280, 257

Fed. 137; *Matter of Rosen*, (C. C. A., 7th Cir.), 45 Am. B. R. 5, 263 Fed. 764.

Findings of referee not disturbed.—Thus, the findings of a referee, upon conflicting evidence, that the specifications of objections to a discharge have not been sustained cannot be disregarded where there is sufficient testimony to support them. *In re Forth* (D. C., N. Y.), 13 Am. B. R. 184, 151 Fed. 951; *Matter of Black Lick Mining Co.* (D. C., Pa.), 36 Am. B. R. 4.

Where a referee, upon conflicting testimony, determines the amount due a secured creditor, his finding should not be disturbed. *In re MacKissic* (D. C., Pa.), 22 Am. B. R. 817, 171 Fed. 269. So, a finding of a special master that a deed was in fact fraudulent will not be set aside unless clearly and manifestly erroneous. *Fouche v. Shearer* (D. C., Ga.), 22 Am. B. R. 828, 172 Fed. 592. Decision of referee, allowing the bankrupt a rebate upon his purchases as against the creditor's claim, affirmed, although the court might not have come to the same conclusion. *In re Douglass & Sons Co.* (D. C., Conn.), 8 Am. B. R. 113, 114 Fed. 772. The court will not disturb the referee's findings of fact as to attorney's fees, except for manifest error. *Matter of Atcherley* (D. C., Hawaii), 25 Am. B. R. 827.

In the case of Matter of Utica Pipe Foundry Co. (D. C., N. Y.), 34 Am. B. R. 617, 221 Fed. 787, Judge Ray said:

"It has always been the practice of this court to adopt and approve the findings of the referee or special master on questions of fact, where there was a sharp dispute in the testimony, unless it clearly appeared that the finding and conclusion was either unsupported by the evidence or clearly against the weight of the evidence. It is not enough that the court thinks it might itself have arrived at a different conclusion. It must be satisfied on the record that the referee or special master was wrong in his conclusions. In this case this court cannot so say or find. It was a fair question of fact for the special master, who, as stated, saw and heard the witnesses, to decide."

Findings of fact, made upon conflicting evidence by a referee in bankruptcy, who heard and saw witnesses, and could thus judge of their credibility, will not be disturbed, unless by a clear preponderance of evidence it appears that the referee was not justified in his conclusions. *In re O'Neill* (D. C., N. Y.), 27 Am. B. R. 5, 189 Fed. 1010; *In re Hodge* (D. C., N. Y.), 30 Am. B. R. 522, 205 Fed. 824.

The weight given to a referee's findings applies more particularly to cases in which such findings are deducted from conflicting evidence and depend upon the credibility of witnesses and not to cases upon which inferences are to be drawn from facts established. *In re Big Cahaba Coal Co.* (D. C., Ala.), 25 Am. B. R. 761, 183 Fed. 662; *Baumbauer v. Austin* (C. C. A., 5th Cir.), 26 Am. B. R. 385, 186 Fed. 260, revg. 24 Am. B. R. 750, 179 Fed. 966.

In re Swift (D. C., Mass.), 9 Am. B. R. 237, 118 Fed. 349, Judge Lowell said: "No precise quantitative weight is in this district

sideration as those of a district judge upon conflicting evidence.⁵⁸ The bearing of the witness, his appearance, his general intelligence and deportment are, in many cases, as important in determining the truth of evidence as the words he uses, and therefore the court should not always set aside findings which do not conform to the written evidence.⁵⁹ Where the evidence is not reported the findings of the referee must stand unless they appear to be erroneous on the face of the certificate.⁶⁰ The findings of the referee are not conclusive upon the court as is a verdict of the jury or the findings of facts made by a judge in an action at law, where a jury has been waived.⁶¹ However it is proper for a

assigned to the findings of fact made by a referee. If those findings are based largely upon the good or bad faith of witnesses seen and heard by the referee, this court will always bear in mind that the referee's means of judgment are in an important respect better than its own. If, on the other hand, the findings depend upon inferences to be drawn from admitted facts, this court's means of judgment are nearly as good as the referee's. The weight to be assigned to the referee's findings in the two cases supposed is by no means the same. No labor-saving formula will determine the weight of the findings, or show just how strongly the court must incline against it in order to reverse it. To say that the finding should not be set aside unless it is 'clearly erroneous,' 'manifestly erroneous,' 'so manifestly erroneous as to invoke the sense of justice of the court,' or 'unless it discloses prejudicial errors by the referee, some of which may, without exaggeration, be denominated gross' is to darken counsel, if more is meant than that the court will not set aside the finding unless it is deemed erroneous after due allowance for the circumstances under which it was made. Artificial and quantitative presumptions of fact are foreign to the spirit of the common law, and the introduction of these presumptions has been rare and unfortunate."

"It is the recognized rule of the federal courts—and especially in matters of bankruptcy—that on review of the decisions of a referee, based upon his conclusions on questions of fact, the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the court. This rule must, of necessity, be observed by the courts where the findings and conclusions of the referee are based upon conflicting testimony. He sees and hears the witnesses, and his vantage ground is much better than that of the court for determining the credibility of the witnesses and the weight of their testimony." *In re Stout* (D. C., Mo.), 6 Am. B. R. 505, 109 Fed. 794.

In Georgia the rule, that the finding of the referee on the facts will not be interfered with unless there is clear error, is particularly applicable to a finding as to good or bad faith on the part of the bankrupt in connection with his right to an exemption. *In re West* (D. C., Ga.), 8 Am. B. R. 564, 116 Fed. 767; *In re Waxelbaum* (D. C., Ga.), 4 Am. B. R. 120, 101 Fed. 228.

"The findings of fact by a special master

who attended the examination of the witnesses, thus giving him an opportunity of seeing them testify, while not as conclusive as the findings of facts by a jury or a trial judge sitting as a jury, are very persuasive and if there is substantial testimony to sustain his findings uninfluenced by any mistaken conclusions of law they will not be disturbed by the court hearing the cause on a transcript of the evidence without opportunities to see the witnesses, and thus to judge of their credibility in the same manner as was enjoyed by the master." *In re Harr* (D. C., Wis.), 16 Am. B. R. 213, 143 Fed. 61. The findings of fact of a referee acting as special master, unless clearly erroneous will not be disturbed. *Love v. Export Storage Co.* (C. C. A., 6th Cir.), 16 Am. B. R. 171, 143 Fed. 1; *Peterson v. Mettler* (D. C., Wash.), 29 Am. B. R. 159, 196 Fed. 938; *Harris v. First Sub Bank of Dawson* (D. C., Ga.), 44 Am. B. R. 180, 260 Fed. 635.

Effect of verdict of jury.—The findings of facts made by a referee where the referee is to hear and determine the action have the effect of a verdict of a jury. A judgment entered in accordance with his findings and conclusions if the findings are supported by no evidence or are clearly against the weight of the evidence, or if the conclusions of law are erroneous, may be set aside. *Fifth National Bank v. Lytle* (C. C. A., 2d Cir.), 41 Am. B. R. 374, 250 Fed. 361.

58. *In re Simon & Sternberg* (D. C., Ga.), 25 Am. B. R. 204, 153 Fed. 507.

59. *In re Schwartz* (D. C., N. Y.), 23 Am. B. R. 37, 179 Fed. 767; *In re Littman* (D. C., Pa.), 20 Am. B. R. 300, 159 Fed. 233.

60. *Matter of Miller* (D. C., Mass.), 35 Am. B. R. 333, 225 Fed. 331; *Matter of Murphy* (D. C., Mass.), 35 Am. B. R. 635, 225 Fed. 332; *Matter of Boston French Range Co.* (D. C., Mass.), 37 Am. B. R. 508, 235 Fed. 916; *Matter of Golub* (D. C., Mass.), 39 Am. B. R. 810, 26 Fed. 512.

Matter of Gay & Sturgis (D. C., Mass.), 25 Am. B. R. 417, 224 Fed. 127, wherein it was held that findings of a referee in bankruptcy, establishing a time limit within which customers and creditors of bankrupt stockholders may file petitions for reclamation of securities and to establish liens on cash in possession of trustees, and that the time fixed by him is reasonable, must be affirmed, where the evidence is not reported.

61. *In re Hawks* (D. C., Kan.), 30 Am. B. R. 365, 204 Fed. 309; *Ohio Valley Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155, 158, 89 C. C. A. 605; *In re Harr* (D. C., Wis.), 16 Am. B. R. 213, 143 Fed. 61.

Determination as res adjudicata.—The ruling of a referee on a petition to compel the trustee to convey real property under an agreement by the bankrupt is not res adjudicata as to the validity of a mortgage on the property, or as to lien creditors who were not parties to the proceeding. *Matter of Collins* (D. C., Ia.), 37 Am. B. R. 682, 235 Fed. 367.

referee or master, to whom a matter is referred to find the facts, to state his conclusions upon the case.⁶² The court may reverse findings where certain testimony in the case appears to have been overlooked or ignored.⁶³ The same rules apply on appeal in considering findings of referees which have been approved by district courts; unless clearly erroneous they will not be disturbed.⁶⁴ A referee's findings of fact may be reviewed, although no formal exceptions to his decision are filed where such filing is not required by a rule or order of the court.⁶⁵ The court will not ordinarily consider for the first time questions not raised below, or issues not presented by the record;⁶⁶ if a point is presented by the record the district court may consider it although it was not discussed before or by the referee.⁶⁷ The court is not barred by or confined to the matters certified by the referee; under its broad general powers it may consider any point presented by the record.⁶⁸ The administra-

62. *Matter of Baker* (D. C., Mass.), 32 Am. B. R. 378, 212 Fed. 769.

63. *In re Grant Bros.* (D. C., N. Y.), 9 Am. B. R. 93, 118 Fed. 73.

64. *In re Sweeney* (C. C. A., 6th Cir.), 21 Am. B. R. 866, 168 Fed. 612; *Canner v. Webster Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 168 Fed. 519; *First Nat'l Bank of Phila. v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 852; *Stephens v. Merchants' Bank* (C. C. A., 7th Cir.), 18 Am. B. R. 560, 154 Fed. 341; *In re Noyes Bros.* (C. C. A., 1st Cir.), 11 Am. B. R. 506, 127 Fed. 286; *Buckingham v. Estes* (C. C. A., 6th Cir.), 12 Am. B. R. 182, 128 Fed. 584; *In re Lawrence* (C. C. A., 2d Cir.), 13 Am. B. R. 798, 134 Fed. 843; *Poff v. Adams* (C. C. A., 4th Cir.), 35 Am. B. R. 307, 226 Fed. 187; *Matter of Pennell* (C. C. A., 3d Cir.), 32 Am. B. R. 241, 214 Fed. 337; *Matter of National Pressed Brick Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 224, 212 ed. 878; *Deupree v. Watson* (C. C. A., 6th Cir.), 32 Am. B. R. 407, 216 Fed. 483; *Carrol v. Stern* (C. C. A., 6th Cir.), 34 Am. B. R. 570, 223 Fed. 723; *Continental Coal Corp. v. Roszelle Bros.* (C. C. A., 6th Cir.), 39 Am. B. R. 563, 242 Fed. 243; *Hagan v. McNeil* (C. C. A., 4th Cir.), 41 Am. B. R. 792, 253 Fed. 716.

Thus, the finding of a referee in favor of the allowance of a claim, approved by the district judge, will not be disturbed on appeal, in the absence of demonstration of plain mistake. *Ohio Valley Bank Co. v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155; *Canner v. Webster Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 168 Fed. 519. Such a finding will not be overruled except upon convincing proof that he was wrong. *In re Hatem* (D. C., N. Car.), 20 Am. B. R. 470, 161 Fed. 896. And a finding of a referee, upon conflicting testimony, affirmed by the district court, that an alleged bankrupt was not chiefly engaged in farming, and therefore amenable to bankruptcy, will not be disturbed on appeal. *Stephens v. Merchants' National Bank* (C. C. A., 7th Cir.), 18 Am. B. R. 560, 154 Fed. 341.

See also Am. B. R. Dig., § 1232.

65. Where the specific question as to the correctness of findings of fact by a referee is certified to the court for review no exception is necessary. *In re Miner* (D. C., Ore.), 9 Am. B. R. 100, 117 Fed. 953; *In re*

People's Department Store Co. (D. C., N. Y.), 20 Am. B. R. 244, 159 Fed. 286. Text approved in *In re Lane* (D. C., Idaho), 30 Am. B. R. 749, 206 Fed. 780; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 810.

Under U. S. Equity Rule 33, referee's findings of fact to which there is no objection filed, are conclusive, and a petition for a rehearing, alleging that the facts may be disproved, will be dismissed. *In re Royal* (D. C., N. Car.), 7 Am. B. R. 636, 113 Fed. 140; *In re Carver & Co.* (D. C., N. Car.), 7 Am. B. R. 539, 113 Fed. 138.

66. *In re Richard* (D. C., N. Car.), 2 Am. B. R. 506, 94 Fed. 633. See also *In re Sturgeon*, Fed. Cas. 13,564.

Objections to evidence received by a referee may not be raised for the first time on review of an order made by him. *In re McCann Bros. Ice Co.* (D. C., Pa.), 22 Am. B. R. 555, 171 Fed. 265.

67. *In re Wilde's Sons* (C. C. A., 2d Cir.), 16 Am. B. R. 386, 144 Fed. 972; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 810.

When the record is certified to the district judge, any manifest error will be noticed, that the referees and other officers of the court, if they have fallen into error, may correct the same, if possible, and avoid like error in the future. *In re Woodard* (D. C., N. Car.), 2 Am. B. R. 692, 95 Fed. 955. Upon the review of an order affirming the findings of a referee, the court may rely on any ground disclosed by the record even though it be not the ground upon which the decision was made. *Davis v. Prompton* (C. C. A., 3d Cir.), 20 Am. B. R. 53, 158 Fed. 735.

68. *In re Clay* (C. C. A., 1st Cir.), 27 Am. B. R. 715, 192 Fed. 830, citing *Collier on Bankruptcy* (8th ed.), 505; *In re Pettingill & Co.* (C. C. A., 1st Cir.), 14 Am. B. R. 757, 137 Fed. 840, 70 C. C. A. 338; *In re Samuel Wilde's Sons* (C. C. A., 2d Cir.), 16 Am. B. R. 386, 144 Fed. 972, 75 C. C. A. 60. Text quoted with approval in *In re Lane Lumber Co.* (D. C., Idaho), 30 Am. B. R. 749, 206 Fed. 780.

tive acts of referees, of which the approval of the choice of a trustee is a typical example, should not be disturbed by the court, unless a plain and injurious error of law or abuse of discretion is disclosed.⁶⁹

f. What must be certified for review.—The record usually consists of a certificate,⁷⁰ prepared and signed by the referee, which should state the question⁷¹ on which the review has been asked and the ruling of the referee, and, either in the certificate or in a schedule annexed to it, give the evidence or a summary of it,⁷² and a copy of the order,⁷³ if any. He is not required to certify objections made to his rulings upon the admissibility of evidence, where the reference was to ascertain facts above designed to aid the court in determining whether a bankrupt should be discharged.⁷⁴ All ambiguities are resolved against the person seeking the review, and the burden is upon him to make his right and the referee's error appear.⁷⁵ The practice in the several districts necessarily varies as to the formalities to be observed in seeking a review by the judge of the orders or other proceedings of a referee; in some districts it is held sufficient to set out the substance of the matter in dispute without requiring the filing of formal exceptions to the referee's findings or rules.⁷⁶ Documents also may be handed up; if so, they should be numbered and either referred to or summarized in the certificate. This subdivision implies that the evidence must be agreed upon by the parties to the review. It is presumable that, if they do not agree, the referee will either settle the record as justice requires or send up the whole case. He must make up this record himself. It seems he is entitled to no additional compensation for so doing. By analogy with other clauses of the law and the general orders, however, he is entitled to his expenses in preparing the same and to an indemnity therefor.⁷⁸

69. *Matter of Rosenfeld-Goldman Co.* (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921.

70. See Hagar & Alexander's *Forms in Bankruptcy*, 2d ed., No. 125. See also Am. B. R. Dig., § 92.

71. The precise question ruled upon must be certified; this requirement is not complied with by a mere transmission to the clerk of the notes of testimony, the referee's opinion and the creditor's petition for review. In *re Kurtz* (D. C., Pa.), 11 Am. B. R. 129, 125 Fed. 992.

Effect of insufficient report of referee.—Where, upon a petition for review of an order of a referee, his report does not state the facts with sufficient definiteness to enable the court to pass upon the questions which may arise, the case should be sent back to the referee, with instructions to grant a rehearing. *Matter of Hawley, etc., Furnace Co.* (D. C., Pa.), 32 Am. B. R. 635, 214 Fed. 500.

72. The procedure prescribed by section 39 of the act, and General Order 27, should be followed. It is not an "appeal," but a petition to review, and is heard upon the certificate of the referee and such evidence as he sends to the judge. "A case on appeal" and a "counter case" are not required. *Matter of Humphreys* (D. C., N. Car.), 34 Am. B. R. 655, 221 Fed. 997 (citing text).

General Order XXVII requires the referee to certify the question presented, "a summary of the evidence relating thereto, and the finding and order of the referee thereon." It has been

held that the plain meaning of this order is to require the referee to make a summary of the evidence in order to save the judge "the labor of examining what is often a mass of testimony on many different questions, and of extracting so much as may be relevant to the point immediately in hand." In *re Kurtz* (D. C., Pa.) 11 Am. B. R. 129, 125 Fed. 992; *Matter of Hook Smelting Co.* (D. C., Pa.), 15 Am. B. R. 83, 125 Fed. 954. Petitioners should not be deprived of the opportunity to be heard upon questions of substantial right because the referee omitted to summarize the evidence. *Crim v. Woodford* (C. C. A., 4th Cir.), 14 Am. B. R. 302, 126 Fed. 84.

The evidence taken before a referee should be taken and recorded, and in case of an appeal returned to the reviewing court; it should include that deemed irrelevant as well as that deemed competent, so that the appellate court may determine whether the evidence rejected should have been received. From this rule evidence clearly privileged or incompetent may be excepted. *Missouri Elec. Co. v. Hamilton Brown Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 270, 165 Fed. 253.

Agreed statement.—The bankruptcy court will not review a determination of a referee on an agreed statement of facts made by the parties. *Matter of Petersen* (D. C., Nev.), 4 Am. B. R. 637, 252 Fed. 846.

73. For the necessary recitals in referee's orders, see General Order XXIII.

74. In *re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 138 Fed. 837.

75a. *Matter of Auge* (D. C., Mont.), 28 Am. B. R. 39, 238 Fed. 621.

75. In *re Swift* (D. C., Mass.), 9 Am. B. R. 237, 114 Fed. 947.

76. See General Order X.

g. **Hearing of reviews.**—The referee must certify up a review “forthwith.” It is usually brought on for hearing on notice of motion, and heard on any rule day, or, by consent of the judge, at any time.” The practice here is often fixed by district rules. Jurisdiction “to consider, confirm, modify, or overrule or return, with instructions for further proceedings,” is conferred on the district court by § 2 (10). The order then made is entered in such court and a copy of it, with the papers on review, transmitted to the referee.⁷⁸

77. For an interesting case on practice, see *In re De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328.

On a reargument the court can consider only that which is contained in the certificate for revision; it cannot therefore consider an amended petition not before the ref-

eree. *Matter of Levy* (D. C., Pa.), 44 Am. B. R. 248, 261 Fed. 432.

78. For the use of this record on a petition or appeal from the judge to the Circuit Court of Appeals, see *Cunningham v. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 192, 103 Fed. 932.

SECTION FORTY.

COMPENSATION OF REFEREES.

§ 40. **Compensation of Referees.**—*a* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of* *fifteen*† dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and *twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration,*‡ and from estates which have been administered before them one per centum commissions on‡ *all moneys disbursed to creditors by the trustee,*‡ or one-half of one per centum on the amount to be paid to the creditors upon the confirmation of a composition.

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

c In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

Analogous provisions: In U. S.: Act of 1867, §§ 4, 5, 10, 47, R. S., §§ 4990, 5008, 5124, 5125; General Order XXX; Act of 1841, §§ 6, 13; Act of 1800, § 47.

In Eng.: § 129.

In Can.: None.

Cross-references: To the law: Composition, offer to include costs of proceedings, § 12.

Clerk to collect fees of referee and pay them over within ten days, § 51(2) (4).

Report of expenses of administration of estate, § 62.

Cost of administration, priority of payment, § 64-b(3). No fees to be allowed except as authorized by the act, § 72.

To the General Orders: Referee may require indemnity for expenses of administration, X.

Referee to keep an account of expenses, and return same monthly, XXVI.

Payment of moneys deposited on check or warrant, XXIX.

Compensation of referee in full for services, XXXV.

* Here the word "fifteen" was substituted for the word "ten" by the amendatory act of 1903.

† Amendments of 1903 in italics.

‡ Here the words in italics were substituted for the words "sums to be paid as dividends and commissions" by such amendatory act.

SYNOPSIS OF SECTION.

COMPENSATION OF REFEREES.

I. Compensation of Referees in General, 677.

- a. *Comparative legislation*, 677.
- b. *Under the original law*, 677.
- c. *In pauper cases*, 678.
- d. *While sitting as special master*, 678.
- e. *In compositions*, 678.

II. Compensation for Specified Services, 679.

- a. *Amendment of 1903*, 679.
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- c. *The claim fee*, 679.
- d. *Commissions on disbursements to creditors*, 680.
- e. *"Full compensation"*, 681.
- f. *Allowance for expenses*, 682.

III. Compensation on Reference to Two or More Referees, 683.**I. COMPENSATION OF REFEREES IN GENERAL.¹**

a. *Comparative legislation*.—In England, the registrars receive salaries, not fees.² Under previous laws in this country, the officers corresponding to the present referees have always been paid by fees, fixed sometimes by rules, sometimes by the statute, sometimes by both.³ The fee bills under the law of 1867 grew so long and proved so onerous that they were largely responsible for the repeal of that law.⁴ The difference between the two laws in this respect is marked; precedents will be found of little value. Then compensation depended largely on the number of hearings had and papers drawn; now, besides the fixed filing fee, the compensation of referees is determined by the number of claims proven and the amount of assets administered.

b. *Under the original law*.—Prior to the amendatory act of 1903, the inadequacy of the referee's compensation was conceded. Indeed, this condition was met in some districts by rules that went outside the law and authorized the collection of fees for filing and allowing claims and a *per diem* for hearings, or the like.⁵ The amendments of 1903 have made this practice no longer possible, whether or not previously excusable; and such rules, where in force, have, for the most part, been revoked. As the law stood originally, indeed, as it was interpreted and emphasized by General Order XXXV, a referee was entitled to compensation in the following ways and amounts only:⁶

1. See also Am. B. R. Dig. §§ 95-98.

2. Eng. Act of 1883, § 129(1).

3. Consult "Analogous Provisions," *ante*. See also Owen on Bankruptcy (1842), Appendix, p. 22.

4. Thus, see in the Congressional debates, on the pending bankruptcy bill in February, 1868, lurid phrases like: "the pillage of the fee-fiend," and "the rodents who burrow around the places of justice."

5. See in re Price (D. C., N. Y.), 1 Am.

B. R. 419, 91 Fed. 635; In re Todd (D. C., N. Y.), 6 Am. B. R. 88, 109 Fed. 266. But compare In re Pierce (D. C., Col.), 6 Am. B. R. 747, 111 Fed. 516; In re Barker (D. C., Iowa), 7 Am. B. R. 132, 111 Fed. 501. For another means to increase compensation, based doubtless on the practice under the law of 1867, see In re Dixon (D. C., Cal.), 9 Am. B. R. 145, 114 Fed. 675.

6. See in particular General Order XXXV (2).

(a) a filing fee of \$10 in all cases save those in which a pauper oath accompanied the petition, and (b) one per cent. commission on all sums paid "as dividends and commissions."⁷ It was held that the term "dividends" did not include commissions on moneys paid secured creditors.⁸ The reasons behind these—in our jurisprudence—rather novel ways of compensating Federal judicial officers were apparent: the filing fee was intended to cover ordinary services in no-asset cases, the commission on dividends was a *pro rata* reward dependent, not, as in 1867, on work done, but on the results of that work. The amendments of 1903 are merely an extension of this general policy.

c. *In pauper cases.*—By analogy with the State laws applicable to pauper litigants, the statute permits the indigent bankrupt to secure the services of clerk, referee, and trustee without the payment of the filing fee. This subject and the cases considering it are discussed elsewhere.⁹

d. *While sitting as special master.*—Under this section it was formerly held that the referee was entitled to extra compensation where he acted as a special master.¹⁰ The contrary was also held.¹¹ But since the amendment of § 72 in 1903, increasing the compensation of the referee, and adding the stringent prohibition against the receipt or allowance of "any other or further compensation for their services than that expressly authorized and prescribed in the act," extra compensation will not be allowed,¹² especially in the absence of an appointment as special master.¹³ Where, however, a referee performs services, not within his statutory duties, but of value to the bankrupt estate as a going concern, he may receive compensation therefor.¹⁴

e. *In compositions.*—The referee receives one-half of one per cent. "on the amount to be paid to creditors" upon the confirmation of a composition.¹⁵

7. The purpose of the law-making power is indicated by the following quotation from the analysis of the bill in its last form:

"Referees will receive a petty filing fee and a small commission on the net amount realized by estates administered before them. This arrangement will interest them in securing prompt and economical administrations."

8. *In re Utt* (C. C. A., 7th Cir.), 5 Am. B. R. 383, 105 Fed. 754.

9. See Bankr. Act, § 52; see also Am. B. R. Dig. § 285.

10. *Fellows v. Freudenthal* (C. C. A., 7th Cir.), 4 Am. B. R. 490, 102 Fed. 731; *In re Grossman* (D. C., Mich.), 6 Am. B. R. 510, 111 Fed. 507; *Bragassa v. St. Louis Cycle* (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77. See also Am. B. R. Dig. § 98.

11. *In re Troth* (D. C., Ohio), 4 Am. B. R. 780, 104 Fed. 291.

12. *In re Wilcox* (D. C., Mich.), 19 Am. B. R. 241, 156 Fed. 685, holding that a referee is not entitled to extra compensation upon a contested application for a discharge; *In re Sweeney* (C. C. A., 6th Cir.), 21 Am. B. R. 866, 168 Fed. 612; *Bray v. Johnson* (C. C. A., 4th Cir.), 21 Am. B. R. 383, 165 Fed. 57; *Matter of Nankin* (C. C. A., 2d Cir.), 40 Am. B. R. 459, 246 Fed. 811.

The case of *In re Goldville Manufacturing Co.* (D. C., S. C.), 10 Am. B. R. 552, 123 Fed. 679, does not hold to the contrary of this view. There the compensation was allowed because the service had been rendered before the act of 1903.

13. *Matter of McCubben Co.* (Sup. Ct. D. C.), 33 Am. B. R. 277, 42 Wash. L. Rep. 774.

14. *Matter of Hart & Co.* (D. C., Hawaii), 18 Am. B. R. 137. In this case the referee advised the trustee in regard to the finances of the bankrupt estate, examined the results of each day's work, and examined the weekly reports, auditing the same.

Additional compensation as special master.—The court will not hesitate, in cases where the business of the court demands it, to refer to a referee matters in bankruptcy not specially cognizable by him under the terms of a general reference. If, under the Act or the General Orders, provision is found for a permissive reference of such matters, no additional compensation will be allowed the referee. If, however, as to such special matters no authority or permission is found in the law for their reference to the referee as such, they will be referred to him, or to any other person specially qualified, as the circumstances may require, as special master, and the usual compensation allowed to special masters will be awarded. *Matter of Langford, Felts & Myers* (D. C., Cal.), 35 Am. B. R. 519, 225 Fed. 311.

15. For changes as to the trustee's fee in composition cases, see § 48, *post*.

In composition proceedings a referee is not entitled to compensation, as a special master, where he has held two meetings and has been well paid under the statute.

This standard of compensation has not been modified by the act of 1903. Whether "creditors" includes priority claimants is, perhaps, debatable.¹⁶ The "amount paid to creditors" includes the amount which the creditors are to receive as a result of the composition agreement, although part of the consideration is in obligations filed with the court, to be afterwards turned into money;¹⁷ it was not intended to limit the referee's commissions to money actually deposited for disbursement to creditors.¹⁸ In view of this situation where the actual disbursement was made by a referee who was appointed after the deposit was made, there should be an apportionment of the commission between the two referees in accordance with the services performed by each.¹⁹

II. COMPENSATION FOR SPECIFIED SERVICES.

a. Amendment of 1903.—As is indicated in the notes to this section, it was materially modified in respect to the compensation for certain services by the amendatory act of 1903. They have already been indicated. The reasons for them are clear. In brief, (a) the filing fee is increased, (b) commissions are reckoned on all moneys disbursed to creditors, not merely on dividends paid them, and (c) a small fee is allowed out of each estate for the filing and allowing of claims. These different kinds of compensation will be considered separately.

b. The filing fee.—The filing fee under this section as it now stands is \$15 and is paid to the clerk at the time a petition is filed.²⁰ The clerk pays it to the referee within ten days after the case is closed. The word "closed" has been liberally construed in some districts, and the filing fee has been paid the referee at the end of one or two months, even if the case is not technically at an end.²¹

c. The claim fee.—This fee is already familiar in several important districts, where its collection has been authorized by rules. Its origin is doubtless in the commissioner's fee under the law of 1841.²² That officer's duty

his fees amounting to forty dollars. In *re Talton* (D. C., N. C.), 14 Am. B. R. 617, 137 Fed. 178.

16. See Bankr. Act, § 64, generally. Compare discussion under this Section, sub-title, "Commissions on Disbursements to Creditors," *post*.

17. *Matter of Batterman Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 695, 231 Fed. 699. See Am. B. R. Dig. § 96.

Deposit in lieu of cash.—Where a bankrupt upon application for the confirmation of a composition has filed with the court certain obligations in lieu of a portion of the cash deposit required, and has agreed with the court to pay costs and expenses the same as if the money were actually in court, the referee is entitled to his commissions based upon the amount to be paid. *Matter of White & Co.* (D. C., Ga.), 35 Am. B. R. 670, 225 Fed. 796, distinguishing *Matter of Bacon & Sons* (D. C., Ky.), 34 Am. B. R. 825, 224 Fed. 764 (revd. 36 Am. B. R. 390, 224 Fed. 764) and *American Surety Co. v. Freed*, 35 Am. B. R. 103, 224 Fed. 333.

Basis of fees on composition.—Where in a composition proceeding creditors are offered an option of 25 per cent. cash, or 100 per

cent in the stock at par of a new corporation formed to take over the assets and business of the bankrupt, both offers are to be regarded as equivalent, and the referee's commissions should be computed on the basis of a 25 per cent. cash disbursement, in the absence of proof that the stock is worth more than the cash. *Matter of Mills Tea & Butter Co.* (D. C., Mass.), 37 Am. B. R. 711, 235 Fed. 815.

18. *Kinkead v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362, in which the court held that a referee is entitled to a commission of one-half of one per cent. on the amount "to be paid by the bankrupt to creditors" regardless of the fact that payment was not made directly by the bankruptcy court. The amount to be paid "may include sums to which certain note-holders were entitled by virtue of the composition proceedings." *Matter of Carless Ice Co.* (D. C., Miss.), 41 Am. B. R. 306.

19. *Kinkead v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362.

20. See Bankr. Act, § 51 (2) (4).

21. See Bankr. Act, § 51, *post*.

22. See § 6 and § 13 of that act, and consult *Owen on Bankruptcy* (1842), appendix. pp. 8, 22.

was "to take the proof of debts and to take testimony to be used in the circuit or district court," and, for performing the former duty, something similar to the taking of a deposition, he was entitled to \$1. Clearly, however, the referee, to earn this fee now, is not required or expected to draft or supervise the preparation of the proof of debt. The fee is intended merely to cover the extra time required in filing, allowing, and investigating claims.²³ The words "to be paid from the estate, if any, as a part of the cost of administration" are important. Thus, this fee is not chargeable to the creditor who files, and cannot be demanded in advance.²⁴ Nor is it payable where there are no assets. It is simply one part of "the cost of administration,"²⁵ and had priority with other disbursements within that phrase. The amount, twenty-five cents, is half the filing fee previously fixed by rule in a few important districts, and but a fourth of that allowed in still others. The words "every proof of claim" seems to mean that the fee will be earned even if the proof is on a debt entitled to priority or secured. It is equally clear that the charge is against the whole estate and not on the dividend of each claimant.

d. Commissions on disbursements to creditors.—The rate on disbursements to the creditors by the trustee is one per cent. The basis of the percentage is "all moneys disbursed to creditors by the trustee,"²⁶ and not upon the total assets received by the trustee,²⁷ and cannot be otherwise fixed by agreement with the creditors.²⁸ This means all sums which should be paid to creditors through the trustee, notwithstanding an outside agreement between the parties and attorneys.²⁹ The language covers, and evidently was intended to include, all moneys, lawfully disbursed by the trustee, and held by him as such, whether to creditors, secured or unsecured, or having priority, or to other persons. If to creditors it is immaterial whether the amounts lawfully paid them from the funds in court are paid as dividends or in satisfaction of a lien or liens on the fund.³⁰ No commissions are to be paid on moneys disbursed for other pur-

23. Thus, in the Analysis of the Amenda-
tory Bill of 1903 (Report No. 1698, 57th
Congress, 1st Session, p. 8) it is said:

"The other changes are in the line of in-
creasing efficiency and the securing of the
best talent for the important work committed
to these officers; thus . . . the fifty-cent
filing fee for referees, as probably the fairest
way properly to compensate them for the
great amount of extra work in hearing con-
tests on claims," etc.

24. The same report says:

"The collection of this filing fee in advance
seems to be permitted by the rules in many
districts, though without apparent sanction
of law. The suggested amendment ratifies
this practice, which has not proven burden-
some, while removing the chief objection to
it—the requirement that the fee be paid as
a condition of filing a claim at all—by re-
quiring that such fee be paid as a cost of
administration."

25. See discussion under Section Sixty-four
of this work, sub-title *sub nom*, "Cost of ad-
ministration," *post*.

26. In re Erie Lumber Co. (D. C., Ga.),
17 Am. B. R. 689, 701, 150 Fed. 817; Matter
of Lacey & Co. (D. C., Sup. Ct.), 35 Am.
B. R. 231, 43 Wash. L. Rep. 434.

Where a corporation is formed to take
over the business of the bankrupt under an
agreement that the creditors will accept stock
in the new corporation in payment of their
claims, the referee is entitled to have his
commission fixed on the amount disbursed
through a new corporation by means of its
shares of stock. Matter of The Breakwater
Co. (D. C., Pa.), 33 Am. B. R. 721, 220 Fed.
226.

27. Matter of Lacey & Co. (D. C., Sup. Ct.),
35 Am. B. R. 231, 43 Wash. L. Rep. 434; Matter
of Motridge (C. C. A., 9th Cir.), 44 Am. B. R.
175, 258 Fed. 220.

28. American Surety Co. v. Freed (C. C. A.,
3d Cir.), 35 Am. B. R. 103, 224 Fed. 333.

29. In re Sanford Furniture Mfg. Co. (D.
C., N. C.), 11 Am. B. R. 414, 126 Fed. 383.
holding that when property subject to liens
is sold by consent of parties holding such
liens, the referee and trustee are entitled to
commissions under the act, on the purchase
price in full.

30. In re Cramond (D. C., N. Y.), 17 Am.
B. R. 22, 30, 145 Fed. 966.

Where a secured creditor enforces his
security in a State court and the proceeds
do not come into the bankruptcy court, the
referee is not entitled to commissions on
sums paid to such creditor. In re Iowa Falls
Mfg. Co. (D. C., Ia.), 16 Am. B. R. 384.

poses than to creditors.³¹ And where pledged property is sold in bankruptcy proceedings the referee is entitled to commissions only on the surplus.³² The referee is not entitled to commissions on sums paid by the trustee in the conduct or administration of the business of the bankrupt continued for the purpose of completing contracts partly executed by the bankrupt.³³ The omission of the words "to creditors" in a similar provision of § 48 is significant.³⁴ At any rate, the numerous cases defining the meaning of the word "dividends,"³⁵ which occurred here in the original law,³⁶ are no longer valuable.

e. "Full compensation."—The significance of these words is apparent. They have been dropped out of § 48.³⁷ Not so here. They are emphasized by § 72, considered later. A referee in bankruptcy, acting as such, is entitled to no fee, compensation, or emolument for any service performed in that

140 Fed. 527. But it has been held that a secured creditor, whose lien, created more than four months before the bankruptcy, has been satisfied in full, will be compelled to pay commissions on the amount received by him. *Matter of Anders Push Button Telephone Co.* (D. C., N. Y.), 13 Am. B. R. 643, 136 Fed. 995.

Disbursements to lien holders.—Under section 40, as amended in 1903, allowing a one per cent. commission to referees "on all moneys disbursed to creditors by the trustee," a referee is entitled to commissions on the amount constructively disbursed by a trustee to lien holders out of the sum for which they have bid their security in. *Varney v. Harlow* (C. C. A., 4th Cir.), 31 Am. B. R. 339, 210 Fed. 824.

Under the law, prior to the amendment of 1903, commissions were based upon the sums "to be paid as dividends and commissions." This was held not to include sums paid to satisfy fixed liens on real estate sold by the trustee, even when sold free and clear of all incumbrances, and when such liens were satisfied from the proceeds of sale. *In re Hinckel Brewing Co.* (D. C., N. Y.), 10 Am. B. R. 692, 124 Fed. 702.

Sale free of lien.—A referee in bankruptcy is not entitled to be paid commissions out of the proceeds of property subject to a lien which is sold in the bankruptcy court free of such lien. *Gugel v. New Orleans Bank* (C. C. A., 5th Cir.), 39 Am. B. R. 160, 239 Fed. 676.

31. *In re Iowa Falls Mfg. Co.* (D. C., Ia.), 15 Am. B. R. 384, 140 Fed. 527, holding that, where a trustee receives a sum in compromise of a suit against a mortgagee who foreclosed in a State court, a mortgage upon property which never came into the hands of the trustee, the amount actually disbursed by him to creditors is the basis of computation of the referee's commissions; *Fielding v. Phillips & McEachin* (C. C. A., 5th Cir.), 31 Am. B. R. 542, 210 Fed. 889; *Matter of McCubbins Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277, 42 Wash. L. Rep. 774.

Property which comes to the possession of a trustee in bankruptcy through the fraud of the bankrupt, and is adjudged to be returned to the victim of the fraud, is not a part of the estate of the bankrupt, and the referee and trustee may not be allowed their statutory percentages out of it. *Gillespie v. Piles & Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 502, 512, 178 Fed. 886.

32. *Matter of Meadows* (C. C. A., 2d Cir.), 33 Am. B. R. 649, 211 Fed. 948, affg. 29 Am. B. R. 165, 199 Fed. 304.

Property sold to person holding security thereon.—Where a creditor, holding a valid security on the entire estate, purchased the property but was only required to give a bond for a part of the purchase money in which it was stipulated that the amount of the bond was the amount fixed by order of the court to meet the payment of all legal taxable costs in said cause and to meet the payment of all prior lien claims in said matter, the referee should only be allowed commission on the sum mentioned in the bond as the amount of money to be disbursed by the trustee. *Matter of Elk Valley Coal Mining Co.* (D. C. Ky.), 32 Am. B. R. 197, 213 Fed. 383.

33. *Bray v. Johnson* (C. C. A., 4th Cir.), 21 Am. B. R. 383, 165 Fed. 57, so held, though in all that he did, the referee was supported by the creditors and trustees and their counsel, and expended much time and performed great labor, showing the utmost fidelity to his trust; *Matter of Rourke Co.* (D. C., Tenn.), 31 Am. B. R. 788, 209 Fed. 677, citing text.

34. *Varney v. Harlow* (C. C. A., 4th Cir.), 31 Am. B. R. 339, 210 Fed. 824, as to the effect of failure to amend § 40 in the same manner as § 48, relative to commissions of trustees.

35. *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 322; *In re Fort Wayne Corporation* (D. C., Ind.), 1 Am. B. R. 706, 94 Fed. 103; *In re Coffin* (Ref., Tex.), 2 Am. B. R. 344; *In re Gerson* (Ref., Pa.), 2 Am. B. R. 352; *In re Fielding* (D. C., Mo.), 3 Am. B. R. 135, 96 Fed. 800; *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547; *In re Utz* (C. C. A., 7th Cir.), 5 Am. B. R. 383, 105 Fed. 754; *In re Barker* (D. C., Ia.), 7 Am. B. R. 132, 111 Fed. 501. See also *In re Smith* (D. C., N. C.), 5 Am. B. R. 559, 108 Fed. 39; *In re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731.

36. See foot-notes to text of § 40-a, showing words omitted.

37. For reason, see § 48.

capacity, unless such fee is within the intendment of the section.³⁸ Thus a referee cannot charge extra compensation for his own services, merely because they are performed away from home.³⁹ But the fact that a referee in good faith agrees prior to a sale to accept a less amount as commissions than he is actually entitled to, is not a bar to his claim for the amount so stated.⁴⁰

f. Allowance for expenses.—Under General Order XXXV expenses necessarily incurred by referees in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act, when allowed by special order of the judge, are not included in the full compensation allowed to referees under this section.^{40a} In some jurisdictions this has been held to authorize a charge for office expenses at a specified amount in each proceeding.⁴¹ The provision in regard to expenses of mailing notices, traveling and perpetuating testimony, refers to actual expenses; but a referee may make a general charge, which should be uniform in all cases, for blanks that may be used for notices to creditors, and for entering orders. He may make a similar charge for clerk hire, where the business is such that clerks are needed.⁴² Hotel bills and amounts paid stenographers may be allowed as expenses, when a detailed account thereof verified by the oath of the referee that they were necessarily and actually incurred, and showing the amount paid therefor, is returned to the bankruptcy court.⁴³

38. In re Mammoth Pine Lumber Co. (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731; American Surety Co. v. Freed (C. C. A., 3d Cir.), 35 Am. B. R. 103, 224 Fed. 333; Matter of Capital Security Co. (D. C., Tenn.), 41 Am. B. R. 184, 251 Fed. 927; United States v. Ward (C. C. A., 8th Cir.), 43 Am. B. R. 711, 257 Fed. 352.

Individual property of referee.—All the fees and compensations of a referee in bankruptcy coming into his possession are his individual property. United States v. Brainerd (D. C., Okla.), 41 Am. B. R. 342, 250 Fed. 1011.

Actions by United States to recover fees.—Erroneous orders of the bankruptcy courts under which compensation has been awarded to referees in bankruptcy may not be reviewed or corrected in purely collateral actions at law by the United States, nor may the bondsmen of the referees be held liable to an action thereon by the United States after the estate in which the orders were made and the fees paid to the referees are finally closed. United States v. Brainerd (D. C., Okla.), 41 Am. B. R. 342, 250 Fed. 1011.

A special allowance to a referee for services performed under the statute cannot be made, even with the consent of attorneys. Dressel v. North State Lumber Co. (D. C., N. C.), 9 Am. B. R. 541, 119 Fed. 531. Thus, a referee is not entitled to compensation for his own services in making copies of a petition for discharge. In re Dixon (D. C., Cal.), 8 Am. B. R. 145, 114 Fed. 675. But it was held prior to the amendment of 1903 that a reasonable compensation would be allowed for services outside the ordinary scope of the referee's duties. In re Todd (D. C., N. Y.),

6 Am. B. R. 88, 109 Fed. 265. An allowance of fees by a referee to himself is reviewable by the district judge. In re Allert (D. C. N. Y.), 23 Am. B. R. 101, 173 Fed. 691. *Contra*: In re Troth (D. C., Ohio), 4 Am. B. R. 780, 104 Fed. 291.

Compensation for auditing trustee's account.—A referee, who audits the trustee's account as a part of his regular duty, is not entitled to extra compensation therefor. Matter of Lacey & Co. (D. C., Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434; Matter of McCubbin Co. (Sup. Ct., D. C.), 33 Am. B. R. 277, 42 Wash. L. Rep. 774.

Ratification of illegal payments.—Payment by a trustee in bankruptcy to a referee of fees in excess of those legally allowable under the bankruptcy act, as construed in a prior decision, will not be allowed, although ratified by the creditors. Matter of Schreiber (D. C., Sup. Ct.), 35 Am. B. R. 241, 43 Wash. L. Rep. 500. See also Matter of Borger (D. C., Sup. Ct.), 35 Am. B. R. 233, 43 Wash. L. Rep. 436. Compare Matter of Lacey & Co. (D. C., Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434; Matter of Smith (D. C., Sup. Ct.), 35 Am. B. R. 237, 43 Wash. L. Rep. 436.

39. Matter of Elk Valley Coal Mining Co. (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383.

40. Matter of The Breakwater Co. (D. C. N. Y.), 33 Am. B. R. 721, 220 Fed. 226.

40a. The referee can be reimbursed for such specific expenses as are actually and necessarily incurred in the administration of the particular estate in which they are allowed, and upon due report of such specific expenses under oath. Matter of Capital Security Co. (D. C., Tenn.), 41 Am. B. R. 184, 251 Fed. 927.

III. COMPENSATION ON REFERENCE TO TWO OR MORE REFEREES.

The statute here needs no elucidation. When a case is transferred from one referee to another, or the order of reference is revoked before the case is concluded, or the proceeding has been specially referred, the judge is required to pro-rate "the fee and commissions." The words of these subsections have not been changed to fit the amendments to subsection a. The court has, however, ample power to pro-rate the new claim fee, without statutory authority, and, in given cases, will doubtless allow each referee twenty-five cents on each claim actually allowed by him.

Collateral attack on allowance.—The determination of expenses of a referee under the Bankruptcy Act is within the general jurisdiction of the bankruptcy court, which has power upon investigation to determine the actual expense of services performed and by order to authorize and charge therefor. Such orders and charges in conformity therewith cannot be collaterally attacked. *Matter of McNeil Corporation* (D. C., Mass.), 41 Am. B. R. 162, 249 Fed. 765.

41. *Matter of McCubbin Co.* (D. C., Sup. Ct.), 33 Am. B. R. 277, 42 Wash. L. Rep. 774. *Contra*, *Matter of Capital Security Co.* (D. C., Tenn.), 41 Am. B. R. 184, 251 Fed. 927.

Separate office.—Where a referee because of the amount of bankruptcy business is forced to maintain a separate office therefor, the cost thereof is an actual and necessary expense incurred by him in the performance of his duties, and payment thereof should be allowed. *Matter of McNeil Corporation* (D. C., Mass.), 41 Am. B. R. 162, 249 Fed. 765.

42. *Matter of McCubbin Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277, 42 Wash. L. Rep. 774; *In re Tebo* (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419; *In re Carolina Cooperage Co.* (D. C., N. C.), 8 Am. B. R. 154, 96 Fed. 950; *In re Pierce* (D. C., Colo.), 6 Am. B. R. 747, 111 Fed. 516. See *Matter of Elk Valley Coal Mining Co.* (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383, holding that the circumstances did not warrant an allowance for clerk and stenographer hire. *Matter of McNeil Corporation* (D. C., Mass.), 41 Am. B. R. 162, 249 Fed. 765. *Contra*, *Matter of Capital Se-*

curity Co. (D. C., Tenn.), 41 Am. B. R. 184, 251 Fed. 927.

Cost of publication of notices upon an application for a discharge and for stationery are expenses properly chargeable to the bankrupt or his estate; but the referee is not entitled to charge for his own services. *In re Dixon* (D. C., Cal.), 8 Am. B. R. 145, 114 Fed. 675.

Allowances for publication, notice, hearings, clerk hire, etc., are unauthorized when made by the referee to himself without order of the judge. *Matter of Lacey & Co.* (D. C., Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434.

Standing rule.—The District Court may authorize a referee to employ a clerk, and allow an expense for stationery, office rent, light, heat, and telephone, and these authorizations may be made by standing rule or order as well as by special order in a particular case. *United States v. Ward* (C. C. A., 8th Cir.), 43 Am. B. R. 711, 257 Fed. 372.

43. **General Order XXVI.** *In re Daniels* (D. C., Ia.), 12 Am. B. R. 446, 130 Fed. 597. See *Matter of Elk Valley Coal Mining Co.* (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383.

Expense of final meeting.—Where a referee in his discretion calls a final meeting after the acceptance of a composition by creditors has been confirmed by the court, expenses so incurred may be allowed. *Matter of McNeil Corporation* (D. C., Mass.), 41 Am. B. R. 162, 249 Fed. 765.

SECTION FORTY-ONE.

CONTEMPTS BEFORE REFEREES.

§ 41. **Contempts Before Referees.**—*a* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law. *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of the court.

Analogous provisions: In U. S.: Act of 1867, §§ 4, 5, 7, R. S., §§ 4999, 5002, 5005, 5006;

Act of 1800, §§ 14, 15.

In Eng.: Act of 1883, § 99 (4); General Rules 70, 85-88.

In Can.: Act of 1919, § 56.

Cross-references. To the law: Jurisdiction to enforce obedience to orders by fine or imprisonment, and punish persons for contempts before referees, § 2(13) (18).

Punishment for false oath, § 20.

Examination of bankrupt; conduct, § 7-a(9).

Examination of other witnesses, § 21.

Jurisdiction of referees in respect to examinations, § 38-a(2).

To the General Orders: Examination of witnesses before referee, XXII.

Imprisoned debtor produced on *habeas corpus*, XXX.

To the Forms: Subpoena to alleged bankrupt, No. 5.

Order for examination of bankrupt, No. 28.

Examination of bankrupt or witness; summons, Nos. 29, 30.

See also Supplementary Forms, *post*; Hagar and Alexander's *Bankruptcy Forms* (2d ed.).

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I. SCOPE OF SECTION.

While the referee is a court of original jurisdiction, he has not the power to commit for contempt.¹ Neither has the registrar in England,² or Canada,^{2a} nor had the register under the former law.³ Contempts in bankruptcy are, however, usually committed before the referee. Hence, it seems, this section. Were the law silent as to what are contempts before a referee, the latter is doubtless sufficiently a court⁴ to take notice of any contempt which might be so held if committed before the court proper. Congress having, however, defined what shall be contempts before referees, no acts or omissions not within the meaning of this section should be certified to the judge as contempts.⁵ This section sets forth the only authority conferred by the bankruptcy act for punishing for contempt in proceedings before a referee.⁶ But it should always be remembered that this section does not give bankruptcy courts broader powers to punish for contempt than are possessed by other Federal courts.⁷ The scope of the jurisdiction of a court of bankruptcy to punish a bankrupt for interfering with the bankruptcy proceedings, by giving false testimony and by failing to give correct information regarding the actual assets of his estate, depends upon the interference with that jurisdiction and not upon the injury to the public welfare and morals which is the basis of the crime of perjury.⁸

1. See Bankr. Act, § 41-b.

2. Eng. Act of 1883, § 90(4).

2a. Can. Bankr. Act of 1910, § 65(3).

3. Act of 1867, § 4, R. S., § 4090; *In re Woodward*, Fed. Cas. 18,000.

4. See Bankr. Act, §§ 1 (7) and 38 (4). See also *In re Speyer*, Fed. Cas. 13,230.

5. Compare *In re McBryde* (D. C. N. C.), 3 Am. B. R. 729, 99 Fed. 686; *Ex parte Buskirk*, 72 Fed. 410.

6. *Magen v. Campbell* (C. C. A., 3d Cir.),

26 Am. B. R. 594, 186 Fed. 675, revg. 24 Am. B. R. 63, 179 Fed. 572.

7. *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131.

8. *In re Wiesebrock* (D. C. N. Y.), 26 Am. B. R. 745, 188 Fed. 757. See also *Magen v. Campbell* (C. C. A., 3d Cir.), 26 Am. B. R. 594, 186 Fed. 675, revg. 24 Am. B. R. 63, 179 Fed. 572.

II. CONTEMPTS BEFORE REFEREES.

a. Disobedience or resistance of orders.⁹—(1) **IN GENERAL.**—The words of subdivision 1 are general. If it is an order that is disobeyed or resisted, it must be a "lawful" order.¹⁰ To "disobey or resist" will include any act in opposition to the order of the referee, which impedes or obstructs the performance of a duty, as where a person induces a bidder to withdraw his bid at a trustee's sale.¹¹ There is no such qualification of the words "writ" and "process;" yet the caution of the courts in asserting this remedy will probably make this omission immaterial. Disobedience may be charged of any one, bankrupt, creditor, or stranger. In most of the reported cases, the bankrupt has been haled to court on an order requiring him to surrender property belonging to his estate.¹² A bankrupt is not in contempt for disobedience of

9. See also Am. B. R. Dig., § 1160.

10. **Lawful order.**—In re Tudor (D. C., Col.), 2 Am. B. R. 808, 96 Fed. 942; In re McCormick (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566; In re Soloway & Katz (D. C., Conn.), 28 Am. B. R. 225, 195 Fed. 100.

11. **Matter of Boyd** (D. C., Tenn.), 26 Am. B. R. 497, 228 Fed. 1003, in which the court says: "I am constrained to conclude that to secretly buy off an actual bidder at a trustee's sale is an act of opposition to the order of the referee directing the sale, which impedes the trustee in its execution, and partially frustrates its primary purpose, and that hence it is to be regarded as a resistance thereto, as distinguished from a direct disobedience, coming within both the letter and the spirit of this inhibition."

12. **Civil contempt.**—An order on a bankrupt to turn over money to his trustee, if followed by a contempt proceeding, would be a civil contempt as distinguished from a criminal one. *Henkin v. Fousek* (C. C. A., 8th Cir.), 40 Am. B. R. 701, 246 Fed. 285.

The act of a bankrupt in withholding property from his schedules or in concealing property from his trustee will not be punished as a contempt, but may be punished under section 29b in a regular criminal proceeding on indictment found. *Matter of Elias* (D. C., N. Car.), 39 Am. B. R. 441, 240 Fed. 448.

Effect of prior sentence for concealment.—The fact that a bankrupt has been indicted, tried and sentenced for concealing assets and has served out his term is no defense in a proceeding to punish him for contempt of an order to turn over the assets he concealed. *Matter of Sobol*, 39 Am. B. R. 252, 242 Fed. 487.

Commitment for contempt ordered.—Where a bankrupt, at the time the petition was filed against him, and when the subpoena was served, was in the exclusive possession of certain property, but which he claimed to be using as bailee, and which two or three days afterwards he delivered to the person claimed by him to be the real owner, and failed to comply with a subsequent order of the court directing him to turn it over to the receiver, he is guilty of contempt, and should be committed to jail upon further failure to deliver such property to the receiver. In re Pottelger (D. C., Pa.), 24 Am. B. R. 648, 181 Fed. 640.

Where the bankrupt, a woman, fails to account for a relatively large amount of goods which she had purchased prior to bankruptcy, to keep any books of accounts, and to make any explanation of the great discrepancies in the amount turned over to the trustee and the amount which she should have had on hand, and where the husband and son, who carried on business for her, have testified that they did not appropriate or have the goods or the money, she must either account for this money

or pay the penalty of being committed for contempt until she accounts for and turns over to the trustee the sum which, after making all possible allowances in her favor, represents the amount unaccounted for. In re Deuell (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 633.

Where it appears that, upon a sale of property by a debtor within a month of his adjudication as an involuntary bankrupt, he turned over all the proceeds to his wife, she will be regarded as holding the money as his agent, and for disobedience of an order to turn over said money to his trustee, the bankrupt will be adjudged guilty of contempt, except as to such portion of said proceeds paid out by the wife, prior to the filing of the petition in bankruptcy, to one to whom she was indebted on a note and presumably an adverse claimant. In re Middleman (D. C., Ky.), 19 Am. B. R. 45, 154 Fed. 160.

When a bankrupt has in his possession and control cash belonging to the bankrupt estate, the court may, within the meaning of the bankrupt act, make a "lawful order" directing him to turn the same over to the trustee, and on his failure to do so may commit him for contempt until he complies with the order. In re Purvine (C. C. A., 8th Cir.), 2 Am. B. R. 787, 96 Fed. 192.

Where the property of a bankrupt estate is traced to the recent control or possession of the bankrupt, it is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance. Evidence considered and held to justify the granting of an order committing the bankrupt to jail for disobedience of an order to pay over to his trustees certain money in his possession or under his control, though the bankrupt, by affidavit, denied that he had the money. In re Laaky (D. C., Ala.), 20 Am. B. R. 729, 163 Fed. 99.

Where, upon consideration of all the record of the bankrupts' testimony upon their examination, it appears that they were carrying on business fraudulently for several months before their failure and must have had knowledge at the time of such examination of many details about which they professed ignorance or lack of recollection, even though allowance be made for a vicious method or lack of method in the conduct of their affairs, the bankrupts should be ad-

an order to deliver books to a receiver, where the person demanding the delivery thereof did not show that he was authorized to act for the receiver.¹³ Likewise in a proceeding to compel a bankrupt to turn over assets, some definite order that certain property should be turned over is necessary before a contempt of that order can occur.¹⁴

(2) INABILITY TO COMPLY WITH ORDERS OR TO RESTORE PROPERTY.¹⁵—A court of bankruptcy cannot lawfully order a bankrupt to deliver to his trustee money or property he has not got in his possession or under his control, and imprison him if he does not comply with the order, as that would be imprisonment for debt, and the order would not be relieved of that illegal and odious quality by calling it "imprisonment for contempt." Such orders are invalid.¹⁶ The court will not commit for contempt if convinced that the

judged guilty of contempt and committed to jail. In *re Magen and Magen* (D. C., Pa.), 24 Am. B. R. 63, 179 Fed. 572, revd. 26 Am. B. R. 594, 186 Fed. 675, on the ground that the trustee erred in not framing his petition so as to set forth a case of contempt under § 41.

Where, upon a proceeding to punish a bankrupt for contempt in refusing to obey an order of the referee in bankruptcy to turn over to the trustee money found by the referee to be in his possession which he had omitted from his schedules, it appears that the money was unquestionably in his possession just prior to his adjudication, that he made no attempt to explain what he did with it except by saying "I don't know" or "I can't remember," when questioned with reference thereto and that his whole course of conduct for several months prior to adjudication was evidence of a scheme to swindle his creditors by converting all of his assets he could into money, and first refuse to pay any creditors and then after the bankruptcy to defy the bankruptcy court by the false statement that he did not know how to account for the deficit in his assets, he will be committed to jail for four months, subject to such future order as may seem proper in the event he complies with the order of the referee. In *re Richards* (D. C., Ark.), 25 Am. B. R. 176, 183 Fed. 501.

The following cases have also held the acts or omissions charged to amount to contempt: In *re Tudor* (D. C., Colo.), 2 Am. B. R. 808, 96 Fed. 942; In *re McCormick* (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 563; In *re Friedman* (Ref., N. Y.), 2 Am. B. R. 301; In *re Schleisinger* (D. C., N. Y.), 3 Am. B. R. 342, 97 Fed. 930; In *re Anderson* (D. C., S. C.), 4 Am. B. R. 640, 103 Fed. 854; *Ripon Knitting Mills v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810; In *re Levin* (D. C., N. Y.), 6 Am. B. R. 743, 113 Fed. 498.

Commitment refused in the following cases: In *re Ogeles* (Ref., Tenn.), 2 Am. B. R. 514; In *re McBryde* (D. C., N. Car.), 3 Am. B. R. 729, 90 Fed. 686; In *re Mayer* (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839; In *re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562, revg. s. c., 2 Am. B. R. 746, 96 Fed. 305; *Louisville Trust*

Co. v. Comlingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421, affg. *Sinsheimer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898; *Matter of Iron Clad Manufacturing Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 566, 201 Fed. 66. Consult also for "contempts," discussion under § 2, and "stays," under § 11, and cases cited *infra*, subd. 11.

13. *Skubinsky v. Bodek* (C. C. A., 3d Cir.), 22 Am. B. R. 699, 172 Fed. 340.

14. *Matter of Kalmanowitz* (D. C., N. Y.), 32 Am. B. R. 210, 211 Fed. 167.

Sufficiency of order.—Where property is withheld by a bankrupt the order of the referee directing him to turn it over should specify particularly the property in the possession of the bankrupt or under his control and which he is required to turn over, or, if money is directed to be turned over, the order should specify the amount and the source from which it is derived. *Matter of Elias* (D. C., N. Car.), 39 Am. B. R. 441, 240 Fed. 448.

15. See also Am. B. R. Dig., § 1166.

16. *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 333, 116 Fed. 131; *Epstein v. Steinfield* (C. C. A., 3d Cir.), 32 Am. B. R. 6, 210 Fed. 236; *Matter of Stern* (D. C., N. J.), 32 Am. B. R. 281, 215 Fed. 979; *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873; *Gavilan v. Lugo* (D. C., Porto Rico), 39 Am. B. R. 326, 9 P. R. Fed. 344; *Matter of Elias* (D. C., N. Car.), 39 Am. B. R. 441, 240 Fed. 448; *Matter of Myerson* (D. C., Pa.), 42 Am. B. R. 337, 253 Fed. 510.

Unless a bankrupt has the power to turn over property, no order requiring him to do so is valid. In *re Nisenson* (D. C., N. J.), 24 Am. B. R. 915, 182 Fed. 912. In *American Trust Co. v. Wallis* (C. C. A., 3d Cir.), 11 Am. B. R. 360, 126 Fed. 404, the court said: "In the absence of fraud or concealment, the bankruptcy court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. If it shall appear that he is not physically able to deliver the property required by the order, then, confessedly, the proceedings for contempt, by fine or imprisonment, would result in nothing, certainly not in compliance with the order. The contempt in this case could only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is in consistent with the principles of individual liberty."

Inability to comply with order.—"All the cases are practically harmonious in the declaration that, if the court is convinced that the bankrupt is unable to comply with the order, he should not be committed for contempt. Without the physical ability to comply, there can be no contempt. Un-

bankrupt is unable to pay, whether his inability is due to his criminal act,¹⁷ or misappropriation or any other reason; but a bare denial of ability to pay is by no means controlling.¹⁸ It has been held, however, that where a bankrupt denies that he had possession or control of money at the time he was ordered to pay it over to his trustee, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, he cannot be punished for contempt.¹⁹ It is not enough to show that the referee's order has not been obeyed. It must be made to appear affirmatively that when the order was made the bankrupt had power to obey it and that the failure to obey was wilful.²⁰ The fact that a bankrupt had the property at one time may carry a

questionably that is the rule in this [3rd] circuit." In re Marks (D. C., Pa.), 23 Am. B. R. 911, 176 Fed. 1018. As laid down in the case of In re Chiles, 22 Wall. 157, 22 L. Ed. 819, where punishment for contempt is employed to compel the performance of some act or duty required of the respondent by the court, it must appear not only that he refuses to obey, but also that it is in his power to obey, and where an order is made, an attempt to punish for contempt in disregard of it before it is made, is "*ex post facto* legislation and judicial enforcement at the same moment." Where the assignee for the benefit of creditors, in explaining his failure to turn over a certain balance to the trustee, stated that he had retained part of the said balance as his commission as assignee in reliance upon the belief that he was entitled to that amount, that he had used the money believing it to be his and had none of it left, that he is a man of no means and is unable to raise money to pay the sum into court, and that the remainder of the balance was paid to his attorneys for their professional services rendered to him as assignee, and that he is unable to pay over such sum for the reasons thus stated, the court will not compel an impossibility whether the inability to do the thing required may be in consequence of the respondent's own fault arising from a misconception of his rights, or committed before the court took jurisdiction of the matter, because there would be no way of enforcing such mandate of the court but imprisonment from which there could be no prospect of relief but by reiteration of the same facts, which would be unavailing. *Sinshelmer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898.

17. *Matter of McNaught* (D. C., Mass.), 35 Am. B. R. 609, 225 Fed. 511.

18. In re Cummings (D. C., Pa.), 20 Am. B. R. 130, 186 Fed. 1020; *Gavilan v. Lugo* (D. C., Porto Rico), 39 Am. B. R. 328, 9 P. R. Fed. 344; *Matter of Myerson* (D. C., Pa.), 42 Am. B. R. 337, 253 Fed. 510.

Bare denial of ability.—If he cannot pay, and if this inability is the result of his own criminal act, he may, of course, be punished by the criminal law, although no civil remedy may be available in the situation. Even if he has misappropriated the money, the court has not the power to imprison him in a proceeding for contempt; for this would deprive him of his constitutional right to submit the charge of misappropriation to a jury in the

proper criminal court, and would deprive him, also, of the inseparable right to be exempt from imprisonment for such an offense until he shall have been lawfully convicted. And it is also true that he cannot be imprisoned in a proceeding for contempt, if for any other reason he cannot produce the money; for the court cannot imprison as a punishment. It can only imprison to compel obedience to its order. But with an order to pay in force against him, and with the need to overcome the presumption of his ability to comply, it will no doubt happen at times that a bankrupt may fail to meet the burden of proof, and may be obliged to go to jail until he satisfies the court that he was telling the truth when he pleaded poverty. Certainly his bare denial of present ability to pay may be properly regarded with suspicion, and he may be required to satisfy the court with clearness that obedience to the order is wholly beyond his power. Such situations must be dealt with as they arise. No general rule can be laid down, and each case must stand upon its own facts. In re Marks (D. C., Pa.), 23 Am. B. R. 911, 176 Fed. 1018; if evidence shows denial to be false or fraudulent, bankrupt should be committed. *Matter of Kramer & Muchnick* (D. C., Pa.), 31 Am. B. R. 525, 210 Fed. 977.

Denial of possession insufficient.—Where, upon the application of the trustee to compel a director of a bankrupt corporation to turn over assets, testimony was taken upon which the referee found that such director was concealing a certain sum which he ordered to be turned over to the trustee, and no attempt was ever made to review such order, the affidavit of the director denying that he ever had such sum, without other explanation, is not a sufficient defense to an application to punish him for contempt for failing to obey the turn-over order. In re Weber Co. (C. C. A., 2d Cir.), 29 Am. B. R. 217, 200 Fed. 404.

19. *Matter of Stern* (D. C., N. J.), 33 Am. B. R. 281, 215 Fed. 979.

20. In re Cole (C. C. A., 1st Cir.), 20 Am. B. R. 761, 163 Fed. 180. 90 C. C. A. 50; In re Goodrich (C. C. A., 1st Cir.), 25 Am. B. R. 787, 184 Fed. 5; In re Soloway & Katz (D. C., Conn.), 28 Am. B. R. 225, 195 Fed. 100; *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873, holding that the evidence must clearly demonstrate

presumption that he still has it, but the presumption may be rebutted by proof of a subsequent disposition.²¹ The settled rule is that, when property of a bankrupt estate is traced to the possession of one who receives it upon the eve of the bankruptcy of its owner, it is presumed that it remains in his possession or under his control until he satisfactorily accounts to the court of bankruptcy for its disposition or disappearance; that the burden is upon him to satisfactorily so account for it; and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate.²² This is a presumption of fact, varying in weight with the circumstances of each particular case.²³ The burden is upon the bankrupt to satisfactorily account for the non-production of property, in assuming which, however, he is entitled to the benefit of a reasonable doubt.²⁴ The bankrupt cannot escape an order for the surrender of such property by merely denying upon oath that he has it in his possession or under his control; it is still the duty of the referee and of the court, if satisfied beyond a reasonable doubt²⁵ that such property is in his possession or under his control, to

a present ability and wilful refusal to obey; citing *Samel v. Dodd* (C. C. A., 6th Cir.), 16 Am. B. R. 163, 142 Fed. 68; *Stuart v. Reynolds* (C. C. A., 6th Cir.), 29 Am. B. R. 412, 204 Fed. 709.

The power to punish for contempt should be cautiously exercised, and in cases only where wilful disobedience by the bankrupt is proved beyond a reasonable doubt, as in criminal cases. Where the disobedience charged is disobedience to the orders of a referee directing the bankrupt to pay money to the trustee, the better practice is to direct the bankrupt to be brought before the judge for a further examination upon petition as to whether or not he has made a full disclosure of the facts. In re *McCormick* (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566. Contempt proceedings are quasi criminal in their nature and it should be made clearly to appear that the persons charged knowingly and wilfully disregarded or set at defiance the order of the court. *Subkinsky v. Bodek* (C. C. A., 3d Cir.), 22 Am. B. R. 699, 172 Fed. 340.

21. *Matter of Heyman* (D. C., Pa.), 34 Am. B. R. 108, 225 Fed. 1000; *Matter of Edelman* (D. C., Md.), 42 Am. B. R. 220, 251 Fed. 420.

Presumptions.—The fact that a bankrupt had goods or money in his possession at the time of his bankruptcy which he failed to turn over to his trustee does not of itself justify a finding, in contempt proceedings, that he had the same goods in his possession nearly a year afterwards. *Matter of Elias* (D. C., N. Car.), 30 Am. B. R. 441, 240 Fed. 448.

22. *Gavilan v. Lugo* (D. C., Porto Rico.), 30 Am. B. R. 326, 9 P. R. Fed. 344; In re *Meier* (C. C. A., 8th Cir.), 25 Am. B. R. 272, 182 Fed. 799; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 406, 7 Am. B. R. 224; *Boyd v. Gluckhsh* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 135-143, 63 C. C. A. 451; *Schweer v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 328, 64 C. C. A. 574; *Matter of Dixon* (D. C., Mass.), 35 Am. B. R. 482, 224 Fed. 624; In re *Salkey*, Fed. Cas. Nos. 12,253 and 12,254. The principle there stated is sound, absolutely indispensable to the practical enforcement of the bankruptcy law, and it is the law of this circuit. In re *Richards* (D. C., Ark.), 25 Am. B. R. 176, 183 Fed. 501.

An order of a referee adjudging that a bankrupt turn over certain property to his trustee is a conclusive determination that at the time such order was made the bankrupt was in possession of the property directed to be turned over, and the time for review having expired, the bankrupt is estopped from denying such

fact upon a motion to punish him for contempt for refusing to obey. The only issue open to the respondent in such case is to show what he had done with the property since the date of the order. In re *Frankel* (D. C., N. Y.), 25 Am. B. R. 920, 184 Fed. 539.

Upon what attachment must rest.—An order to compel a bankrupt to pay over assets which he has concealed may be wholly based upon the antecedent condition of facts existing at the time of the petition in bankruptcy; but an attachment for contempt for non-compliance with the order must rest upon conditions as the time of commitment, which is justified only by a finding of a present mental attitude of contumacy. *Matter of Heyman* (D. C., Pa.), 34 Am. B. R. 108, 225 Fed. 1000.

23. In re *Nisenon* (D. C., N. J.), 24 Am. B. R. 915, 182 Fed. 912; *Power v. Fuhrman* (C. C. A., 9th Cir.), 34 Am. B. R. 418, 220 Fed. 787.

24. *Power v. Fuhrman* (C. C. A., 9th Cir.), 34 Am. B. R. 418, 220 Fed. 787; In re *Nisenon* (D. C., N. J.), 24 Am. B. R. 915, 182 Fed. 912; *Matter of Chavkin* (C. C. A., 3d Cir.), 41 Am. B. R. 36, 249 Fed. 342.

25. **Reasonable doubt of ability to restore** should relieve bankrupt of contempt. In re *Dickens* (D. C., Ala.), 23 Am. B. R. 660, 175 Fed. 808. And see In re *Marks* (D. C., Pa.), 23 Am. B. R. 911, 176 Fed. 1018.

Test of ability.—Upon a petition for an order directing a bankrupt to turn over property, the test is whether, by a fair preponderance of the testimony, it appears that the bankrupt has assets which have not been turned over, and the court need not be satisfied beyond any reasonable doubt that the property is in fact in the bankrupt's possession. *Matter of Dixon* (D. C., Mass.), 35 Am. B. R. 482, 224 Fed. 624.

order him to surrender it to the trustee and to enforce that order by confinement as for contempt.²⁶ Repeated refusals to explain or account for the disappearance of the property ordered to be turned over may lead to a belief that such property is in the bankrupt's possession or control,²⁷ but the rule should not be applied irrespective of the circumstances of the particular case.²⁸ The power to punish for a disobedience of an order to turn over assets should not be exercised in doubtful cases.²⁹ Where the bankrupt changes his mind and subsequently testifies truthfully, he ought not to be punished for contempt.³⁰

b. Misbehavior.—Subdivision 2 clearly refers to any act or omission at a session of the referee court or near its place of sitting, amounting to disrespect or contumacy. No accurate definition of the word "misbehave" is possible.³¹ But it must be during a hearing, or, if not, in the presence of the referee, amount to an obstruction of the hearing. This contempt may be committed by any person.³²

c. Contempts by witnesses.³³—(1) **IN GENERAL.**—Subdivisions 3 and 4 supplement subdivision 1. Subpoenas are writs. Neglect to produce "any pertinent document" in response to subpoena is a contempt.³⁴ Refusal to appear after being subpoenaed is equally so.³⁵ A bankrupt who has no excuse or explanation to make as to his repeated disobedience of orders of a referee in bankruptcy to appear for examination and to produce his books of account will be committed for contempt upon the certificate of the referee.³⁶ But a witness cannot be adjudged guilty of contempt where he has neither been tendered witness fees, nor served with a subpoena *duces tecum*.³⁷ The

26. In re Shachter (D. C., Ga.), 9 Am. B. R. 499, 119 Fed. 1010; Boyd v. Glucklich (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131; In re Greenberg (D. C., N. Y.), 5 Am. B. R. 840, 106 Fed. 496; In re Schlesinger (C. C. A., 2d Cir.), 4 Am. B. R. 361, 42 C. C. A. 207, 102 Fed. 117; In re Deuell (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 633; In re Mayer (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 830; In re McCormick (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566; Matter of Stavahn (C. C. A., 2d Cir.), 23 Am. B. R. 163, 174 Fed. 330; In re Krall (D. C., Conn.), 24 Am. B. R. 941, 182 Fed. 191; In re Greenberg & Bro. (D. C., N. Y.), 24 Am. B. R. 943, 179 Fed. 413; In re Lippman (D. C., N. Y.), 25 Am. B. R. 874, 184 Fed. 551; Matter of Krichensky (D. C., Pa.), 34 Am. B. R. 362, 219 Fed. 347; Matter of Marquette, Jr., Inc. (C. C. A., 2d Cir.), 42 Am. B. R. 555, 254 Fed. 419.

27. In re Levy (C. C. A., 2d Cir.), 15 Am. B. R. 166, 142 Fed. 442; In re Nisenon (D. C., N. J.), 24 Am. B. R. 915, 182 Fed. 912; Matter of Dixon (D. C., Mass.), 35 Am. B. R. 482, 224 Fed. 624.

"I don't know," "I don't remember."—Such answers do not conceal the falsehood they are intended to hide. In re Meier (C. C. A., 8th Cir.), 25 Am. B. R. 272, 182 Fed. 799; In re Richards (D. C., Ark.), 25 Am. B. R. 176, 183 Fed. 501.

28. In re Davidson (D. C., R. I.), 16 Am. B. R. 337, 143 Fed. 673.

29. Samel v. Dodd (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68; In re Gordon (D. C., N. Y.), 21 Am. B. R. 290, 187 Fed. 239; In re Bogowski (D. C., Ga.), 21 Am. B. R. 553, 166 Fed. 163.

Order based on alternative finding.—An order to turn over property, which the bankrupt has failed to deliver to his trustee, based on an alternative finding that the bankrupt has either the property or the money received from the sale thereof, cannot be made the basis of an order of commitment for contempt for failure to comply therewith. Matter of Elias (D. C., N. Car.), 39 Am. B. R. 441, 240 Fed. 448.

30. Recantation of false testimony.—As a general rule, in cases in which the bankrupt has begun by giving even intentionally false testimony, if, during the course of the same examination, he changes his mind and testifies truthfully, he ought not to be punished for contempt. In exceptional cases, or in cases where the recantation does not take place until adjourned dates, and, in the meanwhile, because of his false testimony any injury has happened to the estate, a different conclusion may be reached. Matter of Gordon (D. C., N. Y.), 21 Am. B. R. 290, 167 Fed. 239. See also In re Wiesebrook (D. C., N. Y.), 26 Am. B. R. 745, 188 Fed. 757.

31. Consult Blight v. Fisher, Fed. Cas. 1,542; U. S. v. Carter, Fed. Cas. 4,740; Sharon v. Hill, 24 Fed. 726. See also Am. B. R. Dig., § 1163.

32. The statute does not limit contempt proceedings to the bankrupt only but includes any "person." Matter of Bronstein (Ref., N. Y.), 24 Am. B. R. 524.

33. See also Am. B. R. Dig., § 1165.

34. In re Fixen & Co. (D. C., Cal.), 3 Am. B. R. 822, 96 Fed. 748; In re Howard (D. C., Cal.), 2 Am. B. R. 582, 95 Fed. 413. See also Am. B. R. Dig., § 1164.

35. In re Ellerbe, 13 Fed. 530; In re Spoford, 62 Fed. 443.

36. Matter of Sorkin (D. C., N. Y.), 20 Am. B. A. 637, 166 Fed. 831.

37. In re Johnson v. Knox Lumber Co. (C. C. A., 7th Cir.), 18 Am. B. R. 50, 151 Fed. 207.

emphasis laid upon "pertinent" should be noted. "Refuse" here probably includes "neglect." The restriction stated in the proviso clause is important. A referee's subpoena is really the district court's in effect, and, therefore, reaches as far as one issued in a case pending in such court. So, it is thought, of a mere order to appear, even if issued by the referee. Such a subpoena or order may be effective outside the judicial district, if the residence of the witness is not more than one hundred miles away;³⁸ but the witness cannot be compelled to appear before a referee outside of the State in which such witness resides.³⁹ If the party summoned is the bankrupt he may be ordered to appear if his residence, whether in the district or the State, is no more than one hundred and fifty miles away.⁴⁰ The proviso that no person shall be required to attend as a witness before a referee at a place outside of the place of his residence does not limit the general provisions of the United States revised statutes relating to the taking of depositions and the attendance of witnesses.⁴¹

(2) "SUBPENAED."—The connection between this word and the last clause of subsection *a* seems close. A witness who refuses to appear may excuse himself in commitment proceedings if his lawful mileage and fee for one day's attendance was not paid or tendered him.⁴² The subsequent attempt to purge themselves of contempt, by offering themselves for examination should be considered in the infliction of punishment.⁴³

(3) REFUSAL TO BE SWORN OR TO TESTIFY.—This is as much a contempt as refusal to appear. A bankrupt who leaves the office of the referee before the completion of his testimony may be punished for contempt.⁴⁴ The refusal of a witness to answer questions because of their incriminating nature is discussed elsewhere.⁴⁵ After having taken the oath, as required, a refusal to answer questions at all subjects the witness to punishment for contempt for a refusal "to be examined according to law."⁴⁶ A witness who persists in using insulting and offensive language, not responsive to the questions put to him, and entirely irrelevant, should be punished for contempt.⁴⁷ The authorities are uniform that intentionally, testifying falsely or vaguely and contradictorily, constitutes a contempt of court under this section.⁴⁸ Where

38. See R. S., § 876. Consult *In re Hamstreet* (D. C., Ia.), 8 Am. B. R. 760, 117 Fed. 568.

39. *In re Cole* (D. C., Me.), 13 Am. B. R. 300, 133 Fed. 414. See also Am. B. R. Dig. § 49.

40. Compare under § 7.

41. *Matter of Washington Steel & Bolt Co.* (D. C., Wash.), 32 Am. B. R. 153, 210 Fed. 984.

42. For the mileage and fee, see R. S., §§ 848, 849, and, if in certain of the Western States, Act of August 3, 1892.

43. *In re Farkas* (D. C., N. Y.), 30 Am. B. R. 337, 164 Fed. 343.

44. *In re Vogel*, 5 N. B. R. 393, Fed. Cas. 16,984.

45. See Bankr. Act, § 7.

46. *In re Gitkin* (D. C., Pa.), 21 Am. B. R. 113, 164 Fed. 71.

47. *Ohio Valley Bank v. Mack* (D. C., Ohio), 20 Am. B. R. 919, 922, 163 Fed. 155.

48. *In re Fellerman* (D. C., N. Y.), 17 Am. B. R. 785, 149 Fed. 244; *Matter of Bick*

(C. C., N. Y.), 19 Am. B. R. 68, 155 Fed. 908; *Matter of Gordon* (D. C., N. Y.), 21 Am. B. R. 290, 167 Fed. 239; *Matter of Schulman* (D. C., N. Y.), 21 Am. B. R. 288, 167 Fed. 237; *Matter of Singer* (D. C., Pa.), 23 Am. B. R. 28, 174 Fed. 208; *Matter of Bronstein* (Ref., N. Y.), 24 Am. B. R. 524.

Refusal to make direct answers.—Where a bankrupt, under examination before a referee, persistently answers "I don't know" to questions about his property, which he must and evidently does know, and could answer fully, he refuses "to be examined according to law," and is guilty of "contempt" within the meaning of section 41-a, and punishable thereunder. *In re Gitkin* (D. C., Pa.), 21 Am. B. R. 113, 164 Fed. 71. Where a bankrupt, under examination before the referee, persistently evaded making direct answers to questions concerning the recent sale of a house, about which he could not have been ignorant, and it becomes necessary, because of such conduct, to suspend the examination, he will be committed to jail for

a bankrupt's whole examination is a perfectly transparent case of duplicity, intentional evasion and refusal to make any explanation of the facts connected with his bankruptcy, under the pretense of ignorance and stupidity, and he manifests a deliberate determination to conceal all the material facts within his knowledge, an order adjudging him guilty of contempt of court and committing him to jail will be affirmed.⁴⁹ Likewise where a bankrupt on his examination before the referee gives wilful false testimony as to his property, he may be summarily punished for contempt by the district judge.⁵⁰

III. PRACTICE AND PUNISHMENT.

a. In general.—This section makes it plain that the power to commit for contempt before a referee was not conferred upon the latter but was conferred on the judge of the court of bankruptcy before whom the matter must be certified in accordance with its provisions; and in order that the court may take cognizance of the offense and punish the offender, he must be proceeded against strictly in accordance with the mode pointed out by the bankruptcy act, and any deviation from that procedure the bankrupt may take advantage of on a motion to dismiss the proceedings. The statutory procedure being full and complete must be strictly followed and a failure to do so will be fatal.⁵¹

b. Notice to person charged.—The person charged with contempt for failure to comply with an order of the referee should not be punished before he is given an opportunity to prove his inability to do so.⁵² He should have notice of the motion to punish him for such disobedience and have his day in court,⁵³ and the fact that the bankrupt, upon proceedings for contempt, is allowed to be cross-examined does not cure the defect of want of notice.⁵⁴

contempt. *In re Singer* (D. C., Pa.), 23 Am. B. R. 28, 174 Fed. 208.

Testifying falsely on hearing before referee.—Evidence on motion to punish a witness for contempt held to sustain a finding that his conduct was contemptuous in testifying falsely in a proceeding wherein an endeavor was made to show that a sale by bankrupt of a stock of goods a few days before bankruptcy was collusive, and that he should be punished therefor. *In re Michaels* (D. C., N. Y.), 28 Am. B. R. 38, 194 Fed. 552.

49. *Matter of Schulman* (C. C. A., 2d Cir.), 23 Am. B. R. 909, 177 Fed. 191; *United States v. Appel* (D. C., N. Y.), 31 Am. B. R. 154, 211 Fed. 493; *Matter of Shear* (D. C., N. Y.), 32 Am. B. R. 833, 188 Fed. 677; *Matter of Rosenblum* (D. C., Mo.), 45 Am. B. R. 384, — Fed.

50. *Matter of Shear* (D. C., N. Y.), 32 Am. B. R. 833, 188 Fed. 677.

51. *In re Gitkin* (D. C., Pa.), 21 Am. B. R. 113, 164 Fed. 71.

The difference in the issues of a turnover proceeding and a contempt proceeding and the dependence of the latter upon the former compel their separate consideration and determination. *Frederick v. Silverman* (C. C. A., 3d Cir.), 42 Am. B. R. 24, 250 Fed. 75.

52. *In re Hausman* (C. C. A., 2d Cir.), 10 Am. B. R. 64, 121 Fed. 984; *In re Cole* (C. C. A., 1st Cir.), 16 Am. B. R. 302, 144 Fed. 392; *First Nat'l Bank of Biddeford v. Cole* (C. C. A., 1st Cir.), 10 Am. B. R. 302, 144 Fed. 302.

53. *In re Cole* (C. C. A., 1st Cir.), 20 Am. B. R. 761, 163 Fed. 180; *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562; *rev'd*, 2 Am. B. R. 746, 96 Fed. 308; *In re Stavahn* (C. C. A., 2d Cir.), 23 Am. B. R. 168, 174 Fed. 330; *In re Hausman* (C. C. A.,

2d Cir.), 10 Am. B. R. 64, 14 Fed. 984; *In re Baum* (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410. See also *Am. B. R. Dig.* §§ 1171, 1172.

Entitled to hearing.—Where a person has been duly ordered to pay over to the trustee money found to be due the estate and he fails to do so, he is nevertheless entitled to be heard on the question whether he should be committed to jail for such failure, and an *ex parte* order, judging him in contempt, of the application for which he had no notice stating when or where such application would be made, will be reversed. *Matter of Banai Mfg. Co.* (C. C. A., 2d Cir.), 25 Am. B. R. 497, 183 Fed. 298. Where an order requiring a bankrupt to turn over property to his trustee was based upon alleged disclosures of the bankrupt when under examination prior thereto, without notice to him that his examination was to be used against him, and upon further testimony taken without notice to him and without giving him an opportunity to appear and cross-examine the witnesses, he being in fact detained elsewhere by order of the referee at the instance of the trustee while such testimony was being taken, such order deprived the bankrupt of his legal rights and should be annulled. *In re Frank* (C. C. A., 8th Cir.), 25 Am. B. R. 486, 182 Fed. 794.

54. *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562.

c. The certificate of the referee.—The judge alone can punish for a contempt committed before the referee.⁵⁵ He is notified of the contempt by a certificate, signed and usually prepared by the referee.⁵⁶ The certification of the record to the district judge is not a jurisdictional condition but only a matter of procedure, and, the court having power under section sixteen, subdivision two, to punish persons for contempts committed before referees an order committing a person for contempt, granted without such certification, is not subject to collateral attack by *habeas corpus*.⁵⁷ This certificate must give "the facts" and show the commission of one of the contempts enumerated in subdivision a. The certificate should be filed with the clerk of the court. Where a referee rules that certain evidence is improper he may refuse to certify the matter for contempt proceedings to the judge.⁵⁸ The certificate is not binding upon the bankruptcy court nor does it conclude the court's action in any way.⁵⁹

d. Pleading and evidence.⁶⁰—On the filing of the referee's certificate, the matter is customarily brought up on petition and order. If by petition, the facts stated should bring it clearly within subdivision a, and the order should be in the nature of an order to show cause.⁶¹ A petition, alleging in substance that bankrupts during their examination knowingly and wilfully committed perjury on many occasions, does not state a case of contempt under this section.⁶² A copy of the petition should be served with the order. Attachment may also be asked, and, in exceptional cases, granted.⁶³ Although, perhaps, the bankrupt or person charged with contempt need not plead, it is often advantageous to set out the defense in a definite manner so that the court may pass on it intelligently with a view of bringing the issues clearly before the appellate tribunal. This, of course, should not be allowed to permit unnecessarily, one set of pleadings after another, or in any way to

55. *Smith v. Belford* (C. C. A., 6th Cir.), 5 Am. B. R. 291, 106 Fed. 658; *Bank of Ravenswood v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463; *In re Gitkin* (D. C., Pa.), 21 Am. B. R. 113, 164 Fed. 71, holding that a witness may not be punished for contempt before a referee unless the matter is certified to district judge, as required by this section.

56. *In re Salkey*, Fed. Cas. 12,254; *In re Graves*, 29 Fed. 60; *Ohio Valley Bank Co. v. Mack* (D. C., Ohio), 20 Am. B. R. 919, 163 Fed. 155; *In re Wiesebrock* (D. C., N. Y.), 26 Am. B. R. 745, 188 Fed. 757.

A referee has the right to enter an order directing the bankrupt to surrender to the trustee any money or property which he has found to be in the possession or under the control of the bankrupt, opportunity having been given to such bankrupt to be heard upon this question; upon the refusal or neglect of the bankrupt to obey the order thus made, the referee may enter upon the record the fact of such disobedience, and the fact that the bankrupt is therefore in contempt of court; the facts must then be certified to the district judge, who will then deal with the question as if the case had originally arisen in the district court. *In re Miller* (D. C., Ia.), 5 Am. B. R. 184, 105 Fed. 57. See

also *In re Oliver* (D. C., Cal.), 2 Am. B. R. 73, 96 Fed. 85.

57. *U. S. ex rel. Birbaum v. Henkel* (C. O., N. Y.), 26 Am. B. R. 199, 185 Fed. 553.

58. *In re Romine* (D. C., W. Va.), 14 Am. B. R. 786, 138 Fed. 837.

59. Conclusiveness of referee's findings.—A referee's findings that bankrupt was withholding property in a certain sum, deduced from statements of account which were in several respects but an approximation, and which were not based solely upon book entries or other controlling data, or made upon conflicting evidence depending upon the credibility of witnesses, will not operate as an estoppel or otherwise conclude the bankruptcy court, in proceedings to punish bankrupt for contempt in failing to obey an order of the referee to turn over to the trustee the sum so found to be due. *In re Haring* (C. C. A., 6th Cir.), 29 Am. B. R. 387, 203 Fed. 229, affg. 27 Am. B. R. 285, 193 Fed. 168.

60. See also *Matter of Elias* (D. C., N. Car.), 39 Am. B. R. 441, 240 Fed. 448.

61. See also Am. B. R. Dig., §§ 1170, 1173.

62. *Creditors v. Cossens*, Fed. Cas. 3,378; *U. S. v. Berry*, 24 Fed. 780; *In re Swan*, 150 U. S. 637, 37 L. Ed. 1207.

63. *Magen v. Campbell* (C. C. A., 3d Cir.), 26 Am. B. R. 594, 186 Fed. 675, revg. 24 Am. B. R. 63, 179 Fed. 572.

63. *In re Phelan*, 62 Fed. 817.

cause protracted delay.⁶⁴ The ability to turn over assets is not a matter of affirmative allegation in the petition; the inability to restore is rather a matter of defense.⁶⁵ On the return of the order or appearance of the alleged contemnor, the judge must "in a summary manner, hear the evidence of the acts complained of," and punish or refuse to punish in the same manner as if the contempt had been committed before him. The district judge, in a proceeding for the punishment of a bankrupt for refusing to obey the order of a referee may refer to such order and whatever prior proceedings occurred before the referee. He should also receive all material proofs relating to matters preceding the referee's report, as well as those following it.⁶⁶ In the review of such an order of the referee the ordinary rule as to the force of findings of fact is not applicable for the reason that the determination is not governed by the weight of testimony, as the enforcement of the order devolves upon the reviewing court, and with it the duty of ascertaining if a sufficient cause exists.⁶⁷ Formerly, it was held that the respondent's answer must be taken as true.⁶⁸ This, however, seems not now the law.⁶⁹ The issue raised by the response or answering affidavits may be referred to a referee as special master;⁷⁰ but not, it is thought, to the referee before whom the contempt was committed. Where the district judge allows the bankrupt five days after the entry thereof to comply with the order of the referee, such order is to be deemed affirmed.⁷¹

c. Punishment.—If found guilty, the contemnor may be fined or imprisoned, or both; but not punished in any other way.⁷² There seems to be no limit on the time of imprisonment. Usually the order provides that he stand committed until he performs the act for failure of which he is declared to be in contempt. A commitment of this kind has been held not a violation of the constitutional prohibition against imprisonment for debt.⁷³ But it is not the

64. In re Goodrich (C. C. A., 1st Cir.), 25 Am. B. R. 787, 184 Fed. 5.

65. Allegation as to ability.—Where it has been determined, after a full hearing, that a bankrupt has concealed the proceeds of a sale of certain real estate, a petition by the trustee to punish him, as for contempt, for disobedience of an order requiring him to turn over such proceeds, need not allege the bankrupt's present ability to comply with said order. Matter of Stavrah (C. C. A., 2d Cir.), 23 Am. B. R. 168, 174 Fed. 330.

66. In re Goodrich (C. C. A., 1st Cir.), 25 Am. B. R. 787, 184 Fed. 5; In re Cole (C. C. A., 1st Cir.), 20 Am. B. R. 761, 163 Fed. 180, 90 C. C. A. 50.

Where a district judge has made no examination to find whether any valid reasons exist for not punishing a bankrupt for contempt of an order to turn over assets concealed, an order denying an application to punish for contempt should be reversed. Matter of Sobol (C. C. A., 2d Cir.), 39 Am. B. R. 252, 242 Fed. 487. See also Matter of Elias (D. C., N. Car.), 39 Am. B. R. 441, 240 Fed. 448.

Notes of testimony given by bankrupts on examination at creditors' meeting which was not completed because of their refusal to answer, are admissible in evidence in a proceeding to punish them for contempt, although neither were read to or signed by them, as required by General Order No. 22, especially where their accuracy is proved by the stenographer who made them. Matter of Kaplan Bros. (C. C. A., 3d Cir.), 32 Am. B. R. 308, 213 Fed. 783.

67. In re Mayer (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 889. See also In re Tudor (D. C., Col.), 2 Am. B. R. 808, 96 Fed. 942; Matter of Elias (D. C., N. Car.), 39 Am. B. R. 441, 240 Fed. 448.

68. See the minority opinion of Judge Shelby in In re Purvine (C. C. A., 8th Cir.), 2 Am. B. R. 787, 96 Fed. 192. And see In re May, 1 Fed. 737.

69. In re Pitman, Fed. Cas. 11,184.

70. In re McCormick (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566; In re Speyer, Fed. Cas. 13,239. The contempt must be proved beyond a reasonable doubt. In re Cashman (D. C., N. Y.), 31 Am. B. R. 384, 168 Fed. 1008.

71. In re Herashkowitz (D. C., N. Y.), 14 Am. B. R. 86, 136 Fed. 950.

72. Bankr. Act, § 3 (13).

73. Imprisonment for debt.—In re Anderson (D. C., S. Car.), 4 Am. B. R. 640, 163 Fed. 854; Ripon Knitting Mills v. Schreiber (D. C., Wash.), 4 Am. B. R. 399, 101 Fed. 810; In re Schlesinger (C. C. A., 2d Cir.), 4 Am. B. R. 361, 103 Fed. 117; Matter of Lator (C. C. A., 2d Cir.), 15 Am. B. R. 290, 143 Fed. 960; In re Rosser (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 563, rev'd. 2 Am. B. R. 746, 96 Fed. 308; In re Epstein (D. C., Pa.), 30 Am. B. R. 387, 206 Fed. 588. Compare Bogart v. Supply Co., 27 Fed. 722.

An order to pay over money, or to surrender other property as the case may be, in the possession of the bankrupt and forming part of his estate, is not an order for the payment of a debt, but an order for the

intention of the law that a contemnor should be perpetually imprisoned where it appears that he is actually unable to respond; he will ordinarily be released after the court is satisfied that he has been adequately punished for his contumacy.⁷⁴ If the offense is a criminal contempt, that is, against the authority of the court, the commitment may be for a specified term.⁷⁵ The practice after the filing of the certificate conforms to that in the Federal courts and the numerous precedents and text-books may be consulted with profit.⁷⁶ The remedy of the contemnor after commitment is habeas corpus.⁷⁷ An order of commitment, granted without the referee certifying to the judge facts constituting a contempt, is not subject to collateral attack by habeas corpus.⁷⁸ Where a bankrupt has been confined for failing to comply with an order requiring him to pay a large sum of money to his trustee, he will be discharged where he shows that he has no money or property, either in possession or under his control, and none is held for his benefit, and that he is never likely to be able to pay.⁷⁹

surrender of assets of the bankrupt placed in *custodia legis* by the adjudication; and his commitment upon refusing to comply with the order is not imprisonment for debt. *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68. And see *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 412, 204 Fed. 709, affg. 27 Am. B. R. 200, 190 Fed. 967.

74. *In re Karp* (D. C., N. Y.), 28 Am. B. R. 559, 196 Fed. 998.

Failure of bankrupt to deliver assets.—A bankrupt, against whom an application for an attachment is made because of his failure to deliver assets to his trustee, should not be subject to an indefinite term of imprisonment based upon the finding of a serious controverted fact reached without the sanction and support of the verdict of a jury. *Matter of Heyman* (D. C., Pa.), 33 Am. B. R. 837.

75. *Matter of Rosenblum* (D. C., Mo.), 45 Am. B. R. 384, — Fed. —; *Matter of Kaplan Brothers* (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 Fed. 753, holding that a contempt of a bankrupt in refusing to be examined may be punished by a definite term of imprisonment, where the proceeding is carried on against the defendants by and before officials representing the public.

Civil and criminal contempt distinguished.—The character and purpose of the punishment distinguish civil and criminal contempts, the punishment for a civil contempt being remedial and for the benefit of the complainant in the contempt proceedings, while the punishment for a criminal contempt is punitive, to vindicate the authority of the court; if imprisonment be imposed in a civil proceeding it must be coercive in its nature and the committal must stand only unless and until the defendant performs the affirmative act required by the court's order, but when inflicted in a criminal proceeding it is fixed and certain as a punishment for completed disobedience of orders or for other past wrongdoing. *In re Kahn* (C. C. A., 2d Cir.), 30 Am. B. R. 322, 204 Fed. 581, citing *Gompers v. Buck Stove Co.*, 221 U. S. 418, 55 L. Ed. 797, 31 Sup. Ct. 492.

76. Compare under § 2.

77. Compare *In re Houston* (D. C., Ky.), 2 Am. B. R. 107, 94 Fed. 119.

78. *United States ex rel Birbaum v. Henkel* (C. C., N. Y.), 26 Am. B. R. 199, 185 Fed. 553.

79. *In re Cummings* (D. C., Pa.), 26 Am. B. R. 477, 188 Fed. 767; *In re Epstein* (D. C., Pa.), 30 Am. B. R. 387, 206 Fed. 568.

SECTION FORTY-TWO.

RECORDS OF REFEREES.

§ 42. **Records of Referees.**—*a* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Analogous provisions: In U. S.: Act of 1867, § 4, R. S., § 5000.

In Eng.: None.

In Can.: None.

Cross-references: To the law: Certified copies of proceedings before referee admitted as evidence, § 21-d.

Duty of referee to make up records embodying evidence or substance thereof § 39-a(5); duty to preserve evidence taken before him, § 39-a(9).

To the General Orders: Referee to indorse papers filed with him, II.

Proof of claims and other papers filed with referee, XX.

Examination of witnesses before referee, how conducted; depositions to be taken and signed by witness, XXII.

Orders of referee to recite as to notice, etc., XXIII.

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SYNOPSIS OF SECTION.

RECORDS OF REFEREES.

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a. How kept, 696.

b. What are records, 697.

c. When and how certified to the clerk, 697.

I. RECORDS OF REFEREES.

a. How kept.—Section 39 (5) (7) requires the referee to keep records and transmit them to the clerk; this section should be construed therewith. The records should conform in general to the records of equity cases in the district courts. The former law required that a short memorandum be made

of the proceedings, and a copy of it sent each day to the clerk.¹ This is not required now. By analogy, however, some referees make typewritten memoranda of meetings or orders on separate sheets of paper, filing them in a temporary cover from time to time and binding the whole into a book at the end of the case.² No papers are actually recorded;³ and formal orders are not inserted in the record books. They should be drawn and filed by the attorneys in charge. After reference, all papers should be filed with the referee,⁴ and he should indorse them with "the day and hour of filing and a brief statement" of their character.⁵

b. What are records.—As provided in subsection b, the record of a case consists of the referee's record book and "the papers on file;" all testimony taken should form a part of the record book. Some referees have adopted a record wrapper into which are bound the sheets constituting the record book, the whole, at the conclusion of the case, wrapped about the papers that have been filed, thus making a compact bundle. Others make up what may be called a roll of the proceeding. The records constitute the case and when through, copies, introduced in evidence in other courts, are *prima facie* proof of the facts stated therein.⁶ Testimony taken, as authorized by the referee, is a part of the record in the proceedings, and creditors generally have access to it while it remains in the custody of the referee.⁷

c. When and how certified to the clerk.—Under subsection c, when the case is concluded before the referee, his records must be certified to by him and transmitted to the clerk. This means when the case is administered; whether the bankrupt has his discharge or not is not material. It is thought too, that when a trustee is appointed but fails to qualify, or qualifies, and files a report of no assets but does not ask for a final meeting, the case, after a sufficient lapse of time,—as, for instance, when no claims have been filed and a year elapsed⁸—will be deemed "concluded." The records should be accompanied by a brief certificate by the referee to the effect that the case is closed and that the papers handed up constitute his records.⁹ It is often attached to or forms the filing cover of the record books. When thus filed, the referee's records become a part of those of the district court itself. From that time, the referee ceases to have jurisdiction of the case.¹⁰

1. Act of 1867, § 4, R. S., § 5000.

The Bankruptcy Act is strict in requiring a paper constituting a part of the record to be carefully and formally kept. *Matter of Lacey & Co.* (D. C., Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434.

2. For an elaborate and satisfying system of records, see that suggested in 1 N. B. N. 459-461.

3. Compare R. S., § 4992.

4. General Order XX.

5. General Order II.

6. Bankr. Act, § 21-d. Compare Act of 1867, § 38; *In re Spencer*, Fed. Cas. 13,229; *In re Crane*, Fed. Cas. 3,352.

7. *In re Sammelsohn* (D. C., N. Y.), 23

Am. B. R. 528, 174 Fed. 911, citing *Collier on Bankruptcy* (7th ed.), p. 522.

8. See Bankr. Act, § 57-n.

9. For a form, see 1 N. B. N. 120, Form N.

10. The record to be certified on appeal in bankruptcy cases is the record of the case in the bankruptcy court, and an appeal will not be heard until a complete record, containing, in itself and not by reference, all the papers, exhibits, depositions and other proceedings necessary to the hearing in the appellate court, has been prepared by the clerk at the direction of counsel. *Cook Inlet Coal Fields Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475. See also Am. B. R. Dig. §§ 1242, 1266.

SECTION FORTY-THREE.

REFEREE'S ABSENCE OR DISABILITY.

§ 43. **Referee's Absence or Disability.**—*a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Analogous provisions: In U. S.: Act of 1867, § 5, R. S., 5007.

In Eng.: None.

In Can.: None.

Cross-references: To the law: Reference of cases after adjudication to referee within territorial jurisdiction, § 22.

Appointment, terms and districts of referees, § 34(1).

Compensation and fees of referee, § 40.

To the General Orders: Filing petitions against bankrupt in two or more districts VI.

I. REFEREE'S ABSENCE OR DISABILITY.

This section supplements § 34 (1), and confers jurisdiction on the judge to appoint a new referee when the referee of a specified jurisdiction is absent or disqualified or the office is vacant. In any of such cases, (1) the judge may act, or he may (2) appoint another referee or (3) he may designate a referee of the same judicial district to fill the vacancy. The section is often availed of when a referee is disqualified¹ in a specified case. It could, it is thought, be used where a referee suffered from a prolonged illness or became insane, he being then "absent" from his duties as much as if out of the country. If not, the judge could remove him under the authority given by § 34. The power to transfer cases from one referee to another,² and the pro-rating of fees³ in that event, are considered elsewhere. This section seems to imply that, subject to the exception in § 22-b, all cases arising in a referee district must in the first instance be referred to that referee.⁴ Except where specially appointed under this section to fill a vacancy temporarily, the jurisdiction of a referee does not extend outside the district of his appointment.⁵

1. See under § 39 of this work.

2. Bankr. Act, § 22-b.

3. Bankr. Act, § 40-b.

4. Compare Bankr. Act, § 22-a.

5. In re Schenectady Engineering & Const. Co. (D. C., N. Y.), 17 Am. B. R. 279, 147 Fed. 868.

SECTION FORTY-FOUR.

APPOINTMENT OF TRUSTEES.

§ 44. Appointment of Trustees.—*a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

Analogous provisions: In U. S.: Act of 1867, §§ 13, 18, R. S., §§ 5034, 5036, 5038, 5039, 5040, 5041, 5042; Act of 1841, § 3; Act of 1800, §§ 6, 7.
In Eng.: Act of 1883, §§ 21, 84; as to official receiver being trustee, §§ 54 (1), 121.
In Can.: Act of 1919, §§ 6, 14.

Cross-references: To the law. Trustee includes all of the trustees of an estate, § 1(26).

Jurisdiction of bankruptcy court to appoint trustees, § 2(17).

Qualifications, death or removal of trustee, §§ 45, 46.

Duties of trustees, generally, § 47; compensation, § 48.

Accounts and papers; bonds, §§ 49, 50-b, c, k.

Meetings of creditors, how conducted, § 55; voting at creditors' meetings, § 56.

Proof and allowance of claims, § 57; provable debts, § 63.

To the General Orders: Appointment of trustee subject to approval of referee or judge, XIII.

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Special duties of trustee, XVII.

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To the Official Forms: Appointment of trustee by creditors, No. 22; by referee, No. 23.

Notice to trustee of his appointment, No. 24; official bond, No. 25; order approving bond, No. 26.

Order that no trustee be appointed, No. 27.

Petition for removal of trustee, No. 52; notice of petition, No. 53; order for removal, No. 54; order for choice of new trustee, No. 55.

See also Supplementary Forms, *post*; Hagar and Alexander's Bankruptcy Forms, 2d Ed., Nos. 173, 194, 195, 197, 198.

SYNOPSIS OF SECTION APPOINTMENT OF TRUSTEES.

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I. HISTORY AND COMPARATIVE LEGISLATION.

a. *Scope of section*.—This section should be read with § 63, on what are provable debts, with § 1 (9), on who are creditors and their agents, proxies, etc., with § 56, on who may vote and what constitutes a voting majority at creditors' meetings, and with § 45, on the qualifications of trustees. None of the matters belonging to those subjects are discussed here. This section has to do only with the kindred topics indicated in the synopsis, *supra*.

b. *Comparative legislation*.—(1) *IN ENGLAND*.—One of the storm centers of bankruptcy legislation has been the method of appointing the officers of administration.¹ The English system has see-sawed from administration by the court through commissioners of its own appointment,² to that by trustees chosen by the creditors. The present system³ is midway between the two, the official receiver, who is an officer of the board of trade, taking charge of the estate until the creditors can choose; and even then the board of trade may certify objections to their choice to the high court, which the latter may hold sufficient. If no appointment is made by the creditors within four weeks, the board of trade may itself appoint a trustee, subject to the creditors' right

1. For the different methods of appointment in Europe, see "Bankruptcy; a Study in Comparative Legislation," by Dunscomb, Vol. II, No. 2, Columbia College Studies in History, etc.

2. Thus, from 1831 to 1869.

3. Eng. Act of 1883, § 21.

subsequently to appoint some one in his stead. This is, in effect, appointment by the creditors, with a qualified veto by the board of trade. The corresponding officer under the French system is the syndic. As in England, a temporary official syndic is appointed, and the creditors may then advise the court as to their wishes. But their advice is not binding. The result is, as has been said, that the syndic "is generally a person enjoying the confidence of the court who has made the settlement of bankruptcy estates his special profession." This method seems to pertain in most of the continental countries.⁴

(2) **IN THE UNITED STATES.**—The history of bankruptcy legislation in this country reveals the same changes. Our administrators have been called, successively, either assignees or trustees. Not until our law of 1867 was the principle that insolvent estates are really trusts and the creditors, as beneficiaries, entitled to choose the trustees, recognized by our law.⁵ Even under that law, the recognition was somewhat half-hearted.⁶ The choice in the first instance, though by the creditors as now, was subject to the approval of the judge; and yet, in case an assignee failed to qualify or the office became vacant, the judge or register might ignore the creditors and "fill the vacancy." The judge could "for any cause needful or expedient" either appoint additional assignees or order a new election. We have never adopted the asset-saving device of a temporary official trustee,⁷ but continue to limp along with, when "absolutely necessary for the preservation of estates," a court-chosen receiver.⁸

(3) **IN CANADA.**—In Canada the Governor in Council, upon the application of the Secretary of State appoints the trustees whose authority is limited territorially to the whole or part of one or more bankruptcy districts. A majority in number of the creditors who hold half or more in amount of the proved debts of twenty-five dollars or upwards may substitute any authorized trustee for the one named in the receiving order.^{8a}

II. APPOINTMENT OF TRUSTEES.

a. **In general.**—The present law goes further than any bankruptcy statute either here or elsewhere in giving creditors the right to choose the trustees. The section under discussion declares: "The creditors shall . . . appoint one trustee or three trustees." There is nothing here giving the judge or referee the right to approve or disapprove. Nor is there anything in § 2 (17) conferring on them such a power; though some have thought it is inherent in the court under the last sentence of § 2. Trustees in bankruptcy are creatures of the statute. Viewed as Congress left it therefore, the law of 1898 vests in the creditors an unqualified right to appoint their own trustees.⁹ Indeed § 44, which declares they "shall appoint," under familiar canons of construction, must be taken as controlling on the earlier and more general words of § 2 (17), giving courts of bankruptcy power to "appoint trustees," pursuant to the recommendations of creditors.

b. **By creditors at first meeting.**—Both the statute and the forms indicate that the creditors must appoint a trustee or trustees "at their first meeting."¹⁰ This means the meeting called under the notice known as Form No. 18. It includes any regular continuance of such meeting, a practice often resorted

4. See Mr. Dunscomb's admirable monograph, referred to above.

5. There was even an official assignee appointed by the court, under the laws of 1841.

6. Thus, see Act of 1867, § 13, R. S., § 5034.

7. Eng. Act of 1883, § 66.

8. Compare Bankr. Act, § 2 (3).

8a. Can. Bankr. Act of 1919, §§ 14, 15.

9. In re Lewensohn (D. C., N. Y.), 3 Am. B. R. 299, 98 Fed. 576.

10. See In re Jones, Fed. Cas. 7,447; In re Lake Superior, etc., Fed. Cas. 7,997; In re Back Bay Automobile Co. (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33. See also Am. B. R. Dig. §§ 312-317.

to,¹¹ although the selection of a trustee may not be tied up indefinitely by obstructive tactics which are obviously for the purpose of delay.¹² It has been suggested that the provision that trustees be elected at the first meeting is directory and not mandatory.¹³ Form No. 23 should be used when the referee appoints; Form No. 22 may be used when the creditors do the same. If, however, there is no contest among them, a simple order similar to Form No. 23, declaring such fact and that the creditors present appointed the trustee named and that the referee approved their choice, is suggested as time-saving and proper.¹⁴

c. **Voting for trustees.**—Subsection *a* of § 56, provides that creditors shall pass upon all matters submitted to them by a majority vote "in number and amount of claims of all creditors, whose claims have been allowed and are present."¹⁵ The most important act to be performed by creditors is the election or appointment of a trustee.¹⁶ Creditors may vote in person or they may be represented at the meeting by duly authorized agents, attorneys or proxies.¹⁷ It appears to be established by the weight of authority that an attorney admitted to practice in a court of bankruptcy may not represent his client, who is a creditor of the bankrupt, in the election of a trustee, unless he presents and files a written power of attorney.¹⁸ The method of voting at meetings of creditors generally and the power of proxies to vote is considered elsewhere.¹⁹

11. **Meeting continued by adjournments.**—Where the vote at a creditors' meeting showed no choice of a trustee, one candidate having a majority in number and another a majority in amount, and the supporters of both candidates informed the referee that an agreement was hopeless, and there was nothing to show that reasonable opportunity for choice by the creditors at the regular time had not been afforded, it was not error for the referee to deny a request, not unanimous, for an adjournment of two weeks for the purpose of allowing the creditors to vote again. *In re Goldstein* (D. C., Mass.), 29 Am. B. R. 301, 199 Fed. 665. *In re Nice & Schreiber* (D. C., Pa.), 10 Am. B. R. 639, 123 Fed. 987, it was expressly held that the first meeting of creditors may be continued by proper and reasonable adjournments so as to give the creditors every reasonable opportunity to exercise the power conferred upon them to choose a trustee; so where a majority of the creditors both in number and amount ask for a reasonable postponement in order that the differences existing among the creditors may be disposed of their request should be granted.

Where the bankrupt proposes an offer of composition at the first meeting of creditors, the referee, in a proper case, should postpone the choice and appointment of a trustee, to give opportunity for the filing of such proposed composition, and, if it is filed, should further postpone such choice and appointment until the entry of an order refusing to confirm such agreement. *In re Rung Bros.* (Ref., N. Y.), 2 Am. B. R. 620.

12. *In re Sumner* (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224; *In re Malino* (D. C. N. Y.), 8 Am. B. R. 205, 118 Fed. 368. The referee should proceed with the election where those who object to claims presented fail to file objections, or to offer evidence in support of those made orally. *In re Syracuse Paper & Pulp Co.* (D. C., N. Y.), 21 Am. B. R. 174, 164 Fed. 275.

13. *In re Fisher* (D. C., N. J.), 14 Am. B. R. 366, 135 Fed. 223, wherein it was held that the election of a third trustee in addition to the two elected at the first meeting was valid, and the three trustees could join in a petition for an order directing the sale of the bankrupt's property.

14. A form will be found in "Supplementary Forms," post. See also Hagar and Alexander's Bankruptcy Forms (2d Ed.).

15. See Bankr. Act, § 56a, and discussion thereunder, post.

16. *Bollman v. Tobin* (C. C. A., 8th Cir.), 38 Am. B. R. 504.

17. Creditor includes "his duly authorized agent, attorney or proxy." Bankr. Act, § 1 (9). See *Matter of Capital Trading Co.* (D. C., N. Y.), 36 Am. B. R. 339, 229 Fed. 506; *Matter of Wilson* (C. C. A., 1st Cir.), 29 Am. B. R. 419, 242 Fed. 479.

18. *Matter of Capital Trading Co.* (D. C., N. Y.), 36 Am. B. R. 339, 229 Fed. 506; *In re Henschel* (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 443; *In re Lazaris* (D. C., Wla.), 16 Am. B. R. 31, 120 Fed. 716; *In re Scully* (D. C. Pa.), 5 Am. B. R. 716, 108 Fed. 873; *In re Hagler & Crisp* (D. C., N. Car.), 3 Am. B. R. 722, 99 Fed. 733.

19. See under § 56 of this work.

d. Appointment by the court or referee.²⁰—(1) FAILURE TO AGREE.—Only in case a majority in number and amount do not appoint can the judge or the referee appoint.²¹ If the creditors are deadlocked, or for any other reason the creditors may not agree upon the selection of a trustee, the statute protects the interests of all the creditors by requiring the court to appoint the trustee.²² Where there is a sharp conflict or a close vote, resulting in a majority in amount one way and in number the other, the choice of one not a candidate and, if possible, who has had experience in the management of estates, is thought the part of wisdom.²³ But there can be, under the present law, no official or general trustee as seems to have been the practice under the law of 1841.²⁴ In making the appointment the court is governed by the limitations as to qualifications of trustees contained in § 45.²⁵

(2) DELAY IN APPOINTMENT.—A delay of more than a year cannot have the effect of taking away the power of the court to appoint a trustee.²⁶ When the creditors "neglect to recommend the appointment" of a trustee, the judge or referee may appoint.²⁷

20. See also Am. B. R. Dig. §§ 318, 319.

21. See Bankr. Act, § 56; Matter of Knox (C. C. A., 6th Cir.), 34 Am. B. R. 461, 221 Fed. 36; In re Henschel (D. C., N. Y.), 6 Am. B. R. 305, 109 Fed. 861.

The word "court" as used in section 44 necessarily includes referee. In re Brooke (D. C., Pa.), 4 Am. B. R. 50, 100 Fed. 432.

When court may appoint.—Where defective proofs of debt presented by creditors, representing a majority in number of claims, at a meeting held for the purpose of selecting a trustee, though corrected, are also objected to upon the ground that said creditors are represented in this by the attorney for the bankrupt and the only effect in the end will be to prevent an election, neither of the two persons voted for having a majority in number and amount, the court may appoint a trustee and relieve the referee of that duty. In re Morris (D. C., Pa.), 18 Am. B. R. 828, 154 Fed. 211. Where at the first meeting of creditors no creditors were present, no trustee was appointed for want of assets and but one creditor proved his debt, and the final report of the referee recited that the estate had been fully administered and so far as referred to him was closed, the court, after the lapse of more than a year, has jurisdiction to appoint a trustee upon the petition of the assignee of the creditor alleging that the bankrupt had died leaving various properties which he had fraudulently disposed of with intent to defraud creditors. Clark v. Pidcock (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745.

When referee may appoint.—Where the bankrupt's former attorney had a majority in number of the creditors, while his opponent had a majority in amount, and no request was made for a second ballot, the referee may appoint the trustee. In re Machin (D. C., Pa.), 11 Am. B. R. 449, 128 Fed. 315; In re Richards (D. C., N. Y.), 4 Am. B. R. 631, 103 Fed. 849. Unless it appears that the election has

been so conducted as to jeopardize the interests of the creditors, the choice of a majority of the creditors in number and amount should be permitted to stand. In re Eastlack (D. C., N. J.), 16 Am. B. R. 529, 145 Fed. 68. The referee may appoint a trustee upon the failure of the creditors to obtain a majority vote for any one approved. In re Kennedy & Co. (D. C., Ind.), 14 Am. B. R. 611, 136 Fed. 451.

22. Matter of Forestier (D. C., Cal.) 35 Am. B. R. 51, 222 Fed. 537; Matter of Knox (C. C. A., 6th Cir.), 34 Am. B. R. 461, 221 Fed. 36; In re Stadley & Co. (D. C., Ala.), 26 Am. B. R. 149, 187 Fed. 285.

23. In re Machin (D. C., Pa.) 11 Am. B. R. 449, 128 Fed. 315; In re Nice & Schreiber (D. C., Pa.), 10 Am. B. R. 639, 123 Fed. 987. General Order XIV.

24. Compare Rule 51, Southern District of New York, under Act of 1841; Owen on Bankruptcy, Appendix, p. 11.

25. In re Seider (D. C., N. Y.), 20 Am. B. R. 708, 163 Fed. 139.

Appointment of unsuccessful candidate.—There is no presumption against the character or fitness of unsuccessful candidates for trustee when there is no election because no candidate received a majority in number and amount of claims voted, and such candidates are not necessarily ineligible to appointment by the referee or judge, although it may generally be wise not to appoint them. Matter of F. & D. Co. (C. C. A., 2d Cir.), 39 Am. B. R. 378, 242 Fed. 69, revg. 38 Am. B. R. 285, 237 Fed. 895.

26. Clark v. Pidcock (C. C. A., 3d Cir.), 12 Am. B. R. 309, 315, 129 Fed. 745.

27. Matter of Knox (C. C. A., 6th Cir.), 34 Am. B. R. 461, 221 Fed. 36; In re Clay (C. C. A., 1st Cir.), 27 Am. B. R. 715, 193 Fed. 830; Matter of Forestier (D. C., Cal.), 35 Am. B. R. 51, 222 Fed. 537; In re Brooke (D. C., Pa.), 4 Am. B. R. 50, 100; In re Kuffler (D. C., N. Y.), 3 Am. B. R. 162, 97

(3) **DISPUTED CLAIMS.**—If at the first meeting all claims offered for proof are in dispute, and it is impracticable at that time to settle the dispute, it appears to be within the discretion of the referee to appoint a trustee.²⁸ So if the determination of disputes involving claims representing more than a majority in amount, will necessarily delay the election, so that the interests of the estate will be prejudiced, a referee would be justified in appointing a trustee.²⁹

c. **Approval or disapproval.**³⁰—(1) **BY JUDGE OR REFEREE.**—(I) *In general.*—The bankruptcy act of 1867 contained a provision that: "All elections or appointments of assignees shall be subject to the approval of the judge, and when, in his judgment, it is for any cause needful or expedient, he may appoint additional assignees or order a new election." The present bankruptcy act contains no provision like the one above quoted from the act of 1867, but the Supreme Court has promulgated an order (General Order 13), reading as follows: "The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only." It is evident that the Supreme Court intended by this order to establish a rule concerning the approval or disapproval of elections by creditors similar to that which existed under the act of 1867. The decisions under the present law on this point show that such has been the understanding of our Federal courts.³¹ Judges and referees have ample power to prevent the appointment of incompetent or improper trustees by the discretion given them to determine who are creditors,³² coupled with their power to continue meetings and notify and bring in absent claimants.³³

Fed. 187, holding that, where the creditors of the bankrupt have held two sessions, one lasting six hours, in attempting to choose a trustee, and where at the second session they were still disagreed and unable to make a choice, it appearing that there was immediate need of the appointment of a trustee, it was proper for the referee to make an appointment. Where creditors fail to appoint a trustee and acquiesce in the appointment made by the referee, they cannot complain.

28. *Matter of Cohen* (D. C., Mass.), 11 Am. B. R. 439, 131 Fed. 391.

29. *Matter of Knox* (C. C. A., 6th Cir.), 34 Am. B. R. 461, 221 Fed. 36, in which the court said: "The objections to claims had already caused six weeks' delay, and the end was not in sight. The circumstances demanded an immediate selection of a trustee. The referee was put to a choice of three courses: (1) To continue the existing condition indefinitely, to the detriment of the estate; or (2) to have an election at which the majority of creditors in amount would be disfranchised; or (3) to make an appointment himself. Presumably the testimony thus far taken did not make likely the ultimate rejection of this majority in amount of claims, and, if such was the situation, the referee was not bound by any hard and fast rule to disfranchise this majority. Although the creditors are, by the Bankruptcy Act, given control of the election under normal circumstances, and such control should not

lightly be disturbed, yet in case of emergency the referee has, in our judgment, ample power to appoint a trustee—a power, however, which should be most sparingly exercised. The following authorities sustain more or less effectively the existence of such power: *In re Cohen* (D. C., Mass.), 11 Am. B. R. 439, 131 Fed. 391; *In re Miha*, *Turnbull & Co.* (D. C., N. Y.), 20 Am. B. R. 248, 159 Fed. 280; *In re Goldstein* (D. C.), 199 Fed. 665."

30. See also Am. B. R. Dig. § 316.

31. *In re Eastlack* (D. C., N. J.), 16 Am. B. R. 529, 145 Fed. 68; *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 299, 98 Fed. 576; *In re Rekersdres* (D. C., N. Y.), 5 Am. B. R. 811, 108 Fed. 206; *Falter v. Reinhard* (D. C., Ohio), 4 Am. B. R. 782, 104 Fed. 292, on review in C. C. A. *In re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57; *In re Kreuger* (D. C., Ky.), 27 Am. B. R. 440, 196 Fed. 705; *Kiser Co. v. Georgia Cotton Oil Co.* (C. C. A., 5th Cir.), 31 Am. B. R. 376, 208 Fed. 548.

32. See Bankr. Act, §§ 56, 57 and 63; General Order XXI.

33. The election will be set aside and a new election ordered where a creditor has not been notified of the meeting, although the court had determined that he was entitled to participate in the proceedings. *In re Evening Standard Pub. Co.* (D. C., N. Y.), 21 Am. B. R. 156, 164 Fed. 517.

(II) *Grounds for disapproval.*—The approval or disapproval of the appointment of a trustee rests largely in the discretion of the judge or referee, depending upon circumstances dealing primarily with the competency of the person selected and conditions under which he was selected.³⁴ The purpose of the statute is to secure the election of a "competent" person as trustee; any determination by the referee that a person was prejudiced in favor of the bankrupt, or that fraud might result, should be respected and sustained if the evidence is sufficient. The choice of the creditors is entitled to consideration and should not be overruled without substantial reasons.³⁵ The court or referee should permit free expression of the creditors' will and should not arbitrarily exercise the power of disapproval.³⁶ A determination that the person chosen was disqualified because he had represented creditors, or because he had voted for himself, cannot be upheld.³⁷ The question as to whether there is collusion with the bankrupt should be definitely disposed of before the appointment, and if there is reasonable grounds for the belief that such collusion exists the referee may decline to approve the election.³⁸ The election of a trustee by the creditors is not to be disapproved, unless there is good reason for believing that the election has been directed, managed, or controlled by the bankrupt or his attorney, or by some influence opposed to the creditors' interests.³⁹ The bank-

34. *Matter of Wilson* (D. C., Mass.), 37 Am. B. R. 513; *Matter of Rosenfeld-Goldman Co.* (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921, holding that rights of creditors in the selection of a trustee are important, but the decision as to the selection ought to rest largely with the referee.

35. *Ballman v. Tobin* (C. C. A., 8th Cir.), 38 Am. B. R. 504; *Matter of Merritt Construction Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 616, 219 Fed. 555.

36. *Wilson v. Continental Building & Loan Assn.* (C. C. A., 9th Cir.), 37 Am. B. R. 444, 232 Fed. 824.

37. *In re Margolies* (D. C., N. Y.), 27 Am. B. R. 398, 191 Fed. 369.

38. *In re Dayville Woolen Co.* (D. C., Conn.), 8 Am. B. R. 85, 114 Fed. 674, holding that, upon the refusal of counsel for a majority of the creditors, who had been attorney for the bankrupt, to answer whether any of the claims attempted to be devoted by him for trustee were held in the interest of the bankrupt, it is the duty of the referee to put the question and permit a full investigation into the relations of the attorney to the bankrupt and the creditors, and if there appears to be reasonable cause to believe any such collusion exists, the referee should either decline to receive the collusive votes or to approve the election.

39. *In re Eastlack* (D. C., N. J.), 16 Am. B. R. 529, 145 Fed. 68; *In re Lloyd* (D. C., Wis.), 17 Am. B. R. 96, 148 Fed. 92.

Interest of creditors.—Where the person appointed trustee of a bankrupt estate receives his appointment, in part, at least, as a result of the active efforts in the solicitation and voting of claims by a creditor which is his corporate employer and in which he is a stockholder, and such creditor holds security for a part of its debt and is charged with having preferences, such

person's appointment will be disapproved. *Matter of Anson Mercantile Co.* (D. C., Tex.), 25 Am. B. R. 429, 185 Fed. 993. In an involuntary bankruptcy the withholding by the referee of his approval of the trustee chosen by the creditors is not justified because he had incurred the hostility of the bankrupt, or as receiver had unreasonably delayed an accounting and distribution of funds to creditors. *In re Mangan* (D. C., Pa.), 13 Am. B. R. 303, 133 Fed. 1000.

At solicitation of attorneys.—A referee should not refuse to approve the election of a trustee upon the ground that a firm of attorneys who will be employed by the trustee if elected also represent a creditor of the bankrupt who is claiming the return of certain merchandise delivered to the bankrupt upon an alleged consignment, where it was stated to the referee that if it should afterwards appear that there was any conflict between the interests of the creditor and the trustee, the attorneys would not represent the creditor, and that the trustee would be represented also by other attorneys. *Matter of Archbold & Hamilton* (D. C., Cal.), 38 Am. B. R. 256.

Solicitation of claims by receiver for the purpose of being appointed trustee.—In the absence of affirmative evidence of collusion with the debtor, it is no objection to the appointment, as trustee, of the receiver in bankruptcy, who received a majority in number and amount of the claims allowed, that he sent a letter to various creditors signed by him as receiver, asking that they send their proofs of claims, and containing directions as to the manner and form of proof, it appearing that the schedules had been filed and that he had no better opportunity to obtain the proofs than any one else. *In re Crocker Co.* (Ref., Mass.), 27 Am. B. R. 241

rupt's former attorney should not be appointed, especially where it appears that they continue in close relations to each other.⁴⁰ And a referee is justified in disapproving the appointment of a person who was an assignee of the bankrupt under a common law assignment and whose account as assignee is unsettled,⁴¹ and he is likewise justified in disapproving the appointment of a member of a law firm which acted as counsel for such assignee.⁴² An appointment of a trustee by the creditors should not be disapproved by the referee solely upon the ground that he is a non-resident of the county in which the bankrupt's estate is located,⁴³ or because he had an office with an attorney who represented certain stockholders of the bankrupt who claimed to be creditors, but whose claims were to be contested and who were former clients of the trustee.⁴⁴ If the trustee is otherwise competent it does not follow that his election should be disapproved by the referee because of his friendliness to the debtor.⁴⁵

(III) *Effect of disapproval.*—A referee cannot ignore the appointment of a trustee by creditors and proceed summarily to appoint without holding another election. If he disapproves of the appointment it is his duty to make an order in writing to that effect, and direct that another meeting be held to fill the vacancy.⁴⁶ A referee who disapproves of the creditors' choice of trustee may not appoint one of his own selection; but he must call another meeting of the creditors.⁴⁷ A trustee elected by creditors does not take office until his selection is approved, and until that time there is a vacancy which may only be filled by the creditors.⁴⁸ Whenever a referee disapproves of a choice of trustee made by creditors, another opportunity must be permitted them to make a selection of one who is free from any "entangling alliances" that might interfere with the proper discharge of the duties devolving upon him.⁴⁹

(IV) *Review of approval.*—An order of a referee approving the creditors'

40. In re Wink (D. C., Md.), 30 Am. B. R. 298, 206 Fed. 348.

The uninfluenced votes of creditors in favor of one for trustee who had formerly been the attorney for the bankrupt are not a nullity so that the opposing candidate for trustee must be declared elected. In re Machin (D. C., Pa.), 11 Am. B. R. 449, 128 Fed. 315.

41. In re Clay (C. C. A., 1st Cir.), 27 Am. B. R. 715, 192 Fed. 830.

42. In re Clay (C. C. A., 1st Cir.), 27 Am. B. R. 715, 192 Fed. 830.

43. Matter of Jacobs and Roth (D. C., Pa.), 18 Am. B. R. 728, 157 Fed. 988.

44. In re Blue Ridge Packing Co. (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619.

45. Matter of Turner & Co. (Ref. Mass.), 20 Am. B. R. 646.

The true rule on this subject is well illustrated in the case of In re Eastlack (D. C., N. J.), 16 Am. B. R. 529, 537, 145 Fed. 68, 74, in which there is a review of the authorities, and where the court says: "Harmony of action between an honest bankrupt and an honest trustee tends to promote creditors' interests, and there is no law against the election of a person as trustee merely because he is acceptable to the bankrupt."

46. In re Mackellar (D. C., Pa.), 8 Am.

B. R. 669, 116 Fed. 547; In re Mangan (D. C., Pa.), 13 Am. B. R. 303, 133 Fed. 1000; In re Hare (D. C., N. Y.), 9 Am. B. R. 520, 119 Fed. 246; In re Van De Mark (D. C., N. Y.), 23 Am. B. R. 760, 175 Fed. 287.

Effect of disapproval.—Where a referee in bankruptcy disapproves of the appointment as trustee, of the person elected by the creditors, a vacancy exists which calls for a second election, and an immediate appointment of another person, by the referee, cannot be made. In re Margolies (D. C., N. Y.), 27 Am. B. R. 398, 191 Fed. 369.

47. In re Lewensohn (D. C., N. Y.), 3 Am. B. R. 299, 98 Fed. 576; In re Mackellar (D. C., Pa.), 8 Am. B. R. 669, 116 Fed. 547.

48. Matter of Clay (C. C. A., 1st Cir.), 27 Am. B. R. 715, 192 Fed. 830.

Vacancy created.—The effect of the disapproval by a referee of the person first selected by creditors as trustee is to vacate the election, not to throw out the votes for the person elected but disapproved. Matter of Wilson (D. C., Mass.), 37 Am. B. R. 512.

49. In re Van De Mark (D. C., N. Y.), 23 Am. B. R. 760, 175 Fed. 287, citing Collier on Bankruptcy (6th ed.), p. 379.

appointment of a trustee is subject to review by the district judge,⁵⁰ but a defeated candidate for trustee is not entitled to a petition for review because of the exclusion of certain votes by the referee. The only persons who can appeal by petition for review are those whose votes have been cast out.⁵¹ Individual creditors who conceive themselves aggrieved by the action of the referee in approving the election of a trustee may take review in their own names.^{51a}

(2) **UNDUE ACTIVITY ON THE PART OF THE BANKRUPT.**—Undue activity on the part of a bankrupt in the selection of a trustee has always been discountenanced by the courts, and where it appears the appointment of the trustee should not, as a rule, be approved.⁵² It is well settled by all the authorities that the trustee represents the creditors, and not the bankrupt, in the administration of the estate; and that it is improper that the bankrupt shall actively interfere with the matter of his selection and appointment; and that, if he does interfere and the person aided by him is appointed by votes procured by such interference, the appointment should for that reason be

50. See Bankr. Act, § 38; In re Hanson (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 417; Matter of Parsons Mfg. Co. (D. C., Mass.), 39 Am. B. R. 853, 247 Fed. 120.

Review of findings as to disputed claims.—Where upon a petition to review the election of a trustee upon the ground that certain claims were not entitled to be voted, there is no evidence presented as to the disputed claims, the referee's findings of fact as to all claims must be confirmed. Matter of Snow (D. C., Mass.), 41 Am. B. R. 482, 248 Fed. 205.

51. It was so held on a petition for review taken by a receiver who was a candidate for trustee and was defeated by the exclusion of votes cast for him by a commissioner of deeds acting under a power of attorney acknowledged before himself. The commissioner of deeds himself might have appealed by reason of his representation of creditors who were the real parties in interest. Matter of Grossman (D. C., N. Y.), 34 Am. B. R. 32, 225 Fed. 1020.

51a. Matter of Parsons Mfg. Co. (D. C., Mass.), 39 Am. B. R. 275, 247 Fed. 120.

52. "Interference by the bankrupt, the voting of claims in his interest or at his direction has always been discountenanced by the courts and held to invalidate a choice of trustees thus secured." In re McGill (C. C. A., 6th Cir.), 5 Am. B. R. 155, 161, 106 Fed. 57, citing In re Wetmore, Fed. Cas. No. 17,466 and In re Bliss, Fed. Cas. No. 1,543, decided under the act of 1867. Where it appears that the election was a close one, that the person elected received the votes of bankrupt's counsel, brother-in-law and clerk, that, upon objections of the bankrupt, claims, which would have made such selection impossible, were thrown out and it was evident that the person selected had received advance information from the bankrupt that the petition had been filed and who were the general creditors, and, undoubtedly upon the suggestion of the bankrupt or his attorney, had immediately become a candidate for trustee and actively engaged in sending out letters to creditors of the bankrupt, soliciting their claims, his election will be set aside. In re Ployd (D. C., Pa.), 25 Am. B. R. 194, 183 Fed. 791. Bankrupt had an estate of only \$3,500, to be divided, after paying expenses, amongst creditors having claims aggregating \$9,000, over \$7,000 of which were claims said to be owing to near relatives of the bankrupt or members of the family. One of the bankrupt's attorneys presented the claims of and had powers of attorney from about 80 per cent. of these claimants at the first meeting of creditors, thus controlling the appointment of the trustee and

he insisted, over the objection of the other creditors upon the selection of an attorney as trustee, who had an office in the building occupied by bankrupt's attorneys. It was held that the referee was justified in disapproving as contrary to public policy, a selection which would allow the bankrupt and his relatives to administer the estate. In re Sitting (D. C., N. Y.), 25 Am. B. R. 682, 182 Fed. 917.

Canvassing of creditors to secure votes.—The trustee appointed by the referee, after his election by a majority of creditors, both in number and amount, had offices in the same suite as bankrupt's attorney and the evidence showed that he had prior to the filing of the schedules, solicited votes on claims, a number of claims having been sworn to before him as a notary. It was held, that while the practice of soliciting votes was to be condemned as it did not appear that the selection of the trustee was in the interest of the bankrupt, in order to control the administration of the estate for her benefit without regard for the interests of creditors, the appointment should be confirmed. Matter of Fisher (D. C., Pa.), 26 Am. B. R. 793, 193 Fed. 104. The votes of creditors for trustees cast upon proxies solicited by the bankrupt are properly rejected. In re Machin & Brown (D. C., Pa.), 11 Am. B. R. 449, 128 Fed. 315. Where it appears that the election of a trustee by a large majority of all the creditors is accomplished by the vote of an attorney in fact holding proxies obtained from creditors, acting in combination with the bankrupt, his election should be disapproved by the referee. In re Henschel (Ref., N. Y.), 6 Am. B. R. 25. Where the creditors, all of whom had proved their claims and were unpreferred, had received 100 per cent., the fact that some of them voted for a new trustee at the bankrupt's solicitation is not sufficient to disturb the appointment, the court being satisfied that the person selected will make a suitable trustee and that the bankrupt's solicitation for votes was not by way of improper in-

disapproved.⁵³ However high the character of a proposed trustee may be, the active interference of the bankrupt in his favor will render him ineligible for appointment, and such appointment will for that reason be disapproved.⁵⁴ This does not prevent the appointment of a person who is acceptable to the bankrupt. It is the activity of the bankrupt in bringing about the selection that is prohibited.⁵⁵ The creditors of a bankrupt corporation should be permitted to vote for a trustee without interference from its officers.⁵⁶

f. Appointment to fill vacancies.—(1) **IN GENERAL.**—Here again the policy of the law is different from its predecessor. Immediately a vacancy occurs either, (1) in the office of trustee, or (2) after an estate has been reopened, or (3) a composition has been set aside, or (4) a discharge has been revoked, or (5) "if there is a vacancy in the office of trustee," the creditors must be summoned in the usual way; and they appoint the trustee.⁵⁷ The value of

ducement. *In re Morton* (D. C., Mass.), 9 Am. B. R. 508, 118 Fed. 908. The election of an apparently competent and indifferent person approved by the referee, sustained, against an objection that the election was the result of a conspiracy between the attorney for a majority of the creditors and an officer of the bankrupt. *In re Ketterer Man'g Co.* (D. C., Pa.), 19 Am. B. R. 225, 155 Fed. 987.

Where one of three directors of a corporation, who was also its president, treasurer, clerk and manager, favored a composition and reorganization, and the receiver in bankruptcy and the other directors favored adjudication, and both factions went beyond what was proper in soliciting claims so as to control the election of the trustee, the claims of the president should not be disfranchised and the other claims allowed to be voted, where his plan does not appear to have involved any fraud. *Matter of Parsons Mfg. Co.* (D. C., Mass.), 39 Am. B. R. 858, 247 Fed. 128.

Furnishing list of creditors before filing schedules.—Where, upon the review of an order appointing a trustee whose election was alleged to have been procured by his action in securing the proofs and votes of certain creditors by means of a list of creditors which he solicited from the bankrupt before the filing of the schedules, it is found as a fact that, acting entirely in behalf of creditors, he requested the list of creditors without the solicitation of the bankrupt or for its benefit, and that his action and that of others in procuring claims and voting the same was justifiable, the order of appointment as trustee will not be disturbed. *Matter of James H. Turner & Co.* (Ref., Mass.), 20 Am. B. R. 646, dist'g *In re Lloyd*, 17 Am. B. R. 96, 148 Fed. 92, which held that no attorney should be permitted to vote any claim on the choice of trustee, that has come to him through the instrumentality of the bankrupt, in furnishing him with a list of the creditors before the schedules are filed, but the attorney is not disqualified from voting upon the claims of other creditors who employed him in the regular way and had no concern with the bankrupt in the matter.

^{53.} *In re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57; *In re Hanson* (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 417; *In re Ployd* (D. C., Pa.), 25 Am. B. R. 194, 183 Fed. 791. The election of a trustee, obtained through the active efforts of the bankrupt, should be disapproved. *Matter of Rothleder* (D. C., N. Y.), 37 Am. B. R. 116, 232 Fed. 398.

"All the creditors of a bankrupt estate have the right to be fairly cared for in the administration of the estate. All the

creditors have the right to a fair and an impartial trustee, one not under the influence of the bankrupt or of his attorney to any substantial degree, especially where there are or may be conflicting interests, questions as to claims and the conduct of the bankrupt prior to and after bankruptcy." *In re Sitting* (D. C., N. Y.), 25 Am. B. R. 682, 183 Fed. 917. The beneficiaries are not the bankrupt, but the creditors. For that reason the law gives to them alone the choice of trustee; the bankrupt has no part in it because presumably he has no interest in it. *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 299, 93 Fed. 576. The trustee should not be nominated in fact by the bankrupt or his attorney, because he must be free from all entangling alliances or associations that might in any way control his independence and responsibilities. *In re Rekersdres* (D. C., N. Y.), 5 Am. B. R. 811, 108 Fed. 204.

^{54.} *In re Hanson* (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 417; *In re Kreuger* (D. C., Ky.), 27 Am. B. R. 440, 96 Fed. 705.

Interest of bankrupt or others in his behalf.—Neither the bankrupt himself, nor his attorney, nor any assignee, nor his attorney can be permitted to control the selection of a trustee. If creditors knowingly join with such parties in an effort to elect a trustee, the remedy is to reject their selection and permit the creditors who are not in the combination to make the selection. *Matter of Stowe* (D. C., Cal.), 38 Am. B. R. 76.

^{55.} *In re Eastlack* (D. C., N. J.), 16 Am. B. R. 529, 145 Fed. 68; *In re Ployd* (D. C., Pa.), 25 Am. B. R. 194, 183 Fed. 791; *In re Walker & Co.* (D. C., Ala.), 29 Am. B. R. 499, 204 Fed. 132.

^{56.} *In re Day & Co.* (D. C., N. Y.), 23 Am. B. R. 56, 174 Fed. 164, holding that where the election of a trustee for a bankrupt corporation has been caused by the interference of its officers, an order will be entered declaring that there was a failure to elect a trustee, and ordering a new election.

^{57.} See General Order XXV, and compare *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R.

the words just quoted, unless they refer to a case where at the first meeting no trustee was appointed,⁵⁸ does not seem clear. The purport of the clauses on vacancies is, however, beyond the domain of discussion. All vacancies must be filled as if at a first meeting. It is thought, however, that, when a trustee duly appointed fails to qualify or dies before he can do so, on motion or consent of all the creditors who voted at the meeting when he was chosen, they may appoint a substitute trustee, without calling another meeting for that purpose.⁵⁹ If a trustee embezzles the funds of the estate and absconds, his action amounts to an abandonment of his office and a new trustee may be appointed without proceedings for removal or notice to the absconding trustee.⁶⁰

(2) **AFTER AN ESTATE HAS BEEN REOPENED.**—Where an estate is reopened the office of trustee is vacant and the court may appoint where the creditors have failed to do so;⁶¹ but the appointment of a trustee being vested in the court upon certain conditions, a failure to comply with such conditions does not deprive the court of its jurisdiction, and the validity of the appointment of a trustee after an estate is reopened cannot be attacked in a collateral action.⁶² The continuance of the former trustee in office pending the appointment of a new trustee by the creditors, is an inequality, but does not necessarily affect his official acts.⁶³

g. Number of trustees.—Under the former law, the creditors chose "one or more assignees."⁶⁴ Now, there can be but one or three trustees. Votes for two trustees should, therefore, be refused.⁶⁵ It seems also that where one of three trustees dies, a meeting should be called to fill the vacancy.⁶⁶ At such a meeting the creditors may of course vote to continue the survivor alone, or elect him as a single trustee.

h. When no trustee.—By General Order XV, in no-asset cases, provided there are no appearances by or for creditors, the judge or referee may "direct that no trustee be appointed." This practice is new; it is a boon to bankrupts and referees. Its validity may, however, be doubted.⁶⁷ If the creditors do not appoint, "the court shall do so." If there is no trustee, the difficulty of setting off exempt property is apparent.⁶⁸ Efforts have been made to overcome this difficulty by local rules,⁶⁹ but their validity is also doubtful. If no trustee is appointed at such a first meeting a trustee may still be appointed

299, 98 Fed. 576; *In re Hare* (D. C., N. Y.), 9 Am. B. R. 520, 119 Fed. 246.

Election to fill vacancy caused by removal.—Where a trustee in bankruptcy has been removed because of his employment of the attorney for an assignee for the benefit of creditors, by which attorney he had been employed, such attorney should not be allowed to control the election of a new trustee. *Matter of Forestier* (D. C., Cal.), 35 Am. B. R. 51, 222 Fed. 537.

⁵⁸ See General Order XV.

⁵⁹ *In re Wright* (Ref., N. Y.), 2 Am. B. R. 497.

⁶⁰ *Schofield v. United States ex rel. Bond* (C. C. A., 6th Cir.), 23 Am. B. R. 259, 174 Fed. 1.

⁶¹ *In re Newton* (C. C. A., 8th Cir.), 6 Am. B. R. 52, 46 C. C. A. 399, 107 Fed. 429; *Matter of Rochester Sanitarium and Baths Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 355, 222 Fed. 22, quoting the language of the text.

⁶² *Fowler v. Jenks* (Sup. Ct., Minn.), 11 Am. B. R. 255, 90 Minn. 74, citing *Harvey v. Tyler*, 2 Wall. (U. S.) 238, 17 L. Ed. 871, and *Lamprey v. Nudd*, 29 N. H. 299.

⁶³ *Matter of Rochester Sanitarium and Baths Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 355, 222 Fed. 22.

⁶⁴ Act of 1867, § 13, R. S., § 5034.

⁶⁵ See *In re Fisher* (D. C., N. J.), 14 Am. B. R. 366, 135 Fed. 223.

⁶⁶ See last paragraph. Compare *In re Scheiffer*, Fed. Cas. 12,445.

⁶⁷ Thus, see, under the former law, *In re Cogswell*, Fed. Cas. 2,959; *In re Graves*, Fed. Cas. 5,709.

⁶⁸ This must be done by a trustee. Bankr. Act, § 47-a(11). Exempt property does not pass directly to the claimant. See under § 6.

⁶⁹ Thus see rule in jurisdiction of Referee *Hotchkiss* (Erie Co., N. Y.), 1 N. B. N. 115.

later, "if the court shall deem it desirable."⁷⁰ In cases covered by this general order, further meetings may by order be dispensed with. Form No. 27 should be used, with such additions⁷¹ as to the setting apart of exemptions as the court feels it has power to grant.

i. **Notification, bond, qualification, etc.**—The referee must immediately notify the trustee of his appointment.⁷² Form No. 24 indicates the method. The notice is, however, often given orally, and should be, if the trustee-elect is present at the meeting. The trustee should notify the referee of his acceptance or declination. He rarely does. The presentation of the bond, or a failure to present within the required time is thought sufficient. The requirements as to trustee's bonds⁷³ and duties⁷⁴ are discussed elsewhere.

III. REMOVAL OF TRUSTEES.⁷⁵

a. **For cause.**—The creditors have, however, no control over the removal of trustees, other than to initiate proceedings to that end. The former law⁷⁶ gave them such control "with consent of the court." Now the court is given sole power to remove,⁷⁷ but this must be done by the judge, not the referee.⁷⁸ The district rules which confer on the referees jurisdiction to perform all the functions of the judge usually except such powers as have been withdrawn from them by the General Orders. Numerous cases on the removal of trustees under the former law will be found in point.⁷⁹ The practice on removals is suggested by Forms Nos. 52, 53, 54, and 55.⁸⁰ Removal is a matter of discretion⁸¹ and is, therefore, not reviewable;⁸² but, being a judicial discretion, should be exercised only when there is sufficient cause.⁸³ Where a trustee, by concealment or false representation, induces creditors to agree to a composition contrary to their interests, he should be removed.⁸⁴ It is not necessary

70. *Clark v. Pidcock* (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745. In this case a trustee was appointed more than a year after the creditors' meeting.

71. See also "Supplementary Forms," *post*; Hagar and Alexander's *Bankruptcy Forms* (2d Ed.).

72. General Order XVI.

73. See under § 50 of this work.

74. See Bankr. Act, § 47. See also Am. B. R. Dig. § 325.

75. See also Am. B. R. Dig., § 323.

76. Act of 1867, § 18, R. S., § 5039.

77. Bankr. Act, § 2 (17).

78. General Order XIII.

Approval of judge.—An order of a referee in bankruptcy removing a trustee, which has not been affirmed by a judge who under General Order No. 13, has sole power of removal, is void, and another provision of the order appointing a new trustee, and a subsequent order directing the old trustee to turn over assets must also fall as having no legal foundation. *Matter of Berree & Wolf* (D. C., Pa.), 34 Am. B. R. 549, 185 Fed. 224.

79. In re *Sacchi*, 43 How. Pr. (N. Y.) 250; In re *Mallory*, Fed. Cas. 8,990; *Ex parte Perkins*, Fed. Cas. 10,982; In re *Blodgett*, Fed. Cas. 1,552; In re *Price*, Fed. Cas.

11,409; In re *Perry*, Fed. Cas. 10,998; In re *Grant*, Fed. Cas. 5,692.

80. A petition seeking the removal of a trustee in bankruptcy and also the revocation of certain orders allowing applications to sell or redeem securities belonging to the bankrupt's customers which had been pledged by the bankrupt, a stockbroker, examined and held, insufficient, the manner and extent of the petitioner's damage not being set forth and it appearing that the petitioners delayed unreasonably in making the application. In re *Carothers & Co.* (D. C., Pa.), 27 Am. B. R. 682, 192 Fed. 691.

81. In re *Day & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 252, 178 Fed. 545, affg. 23 Am. B. R. 56, 174 Fed. 164.

82. In re *Dewey*, Fed. Cas. 3,849; In re *Adler*, Fed. Cas. 82.

83. In re *Mallory*, Fed. Cas. 8,990. See also Am. B. R. Dig., § 323.

Cause for removal.—A trustee in bankruptcy who is employed in the office of the attorney for an assignee for the benefit of creditors, which attorney is also acting for him, should be removed upon the ground that the interests of the trustee and the assignee may conflict. *Matter of Forestier* (D. C., Cal.), 35 Am. B. R. 51, 228 Fed. 537.

The fact that a trustee in bankruptcy had prior to his appointment, acted for the bankrupt and his wife, pursuant to an agreement under which they had conveyed to him all their property for the benefit of themselves and creditors is insufficient to justify his removal. *Matter of Holden* (D. C., N. Y.), 44 Am. B. R. 161, 258 Fed. 720.

84. In re *Wrisley* (C. C. A., 7th Cir.), 13 Am. B. R. 193, 133 Fed. 388.

to justify a trustee's removal that he be guilty of personal dishonesty; he may have so conducted the business or affairs of the estate as to have lost the confidence of the creditors and thus prevented their co-operation with him, in which case it will be for the benefit of the estate that he be removed.⁸⁵ The fact that a trustee has changed his legal residence to another district is not ground for his removal, where the change neither makes it impossible for him to perform his duties as trustee, nor difficult for the creditors to locate and communicate with him.⁸⁶

b. *By resignation.*—The statute does not, as did its predecessor,⁸⁷ provide for such a contingency. A trustee can unquestionably resign, but, it is thought, his resignation is still ineffectual, save "with the consent of the judge" or referee.⁸⁸

85. *Bullman v. Tobin* (C. C. A., 8th Cir.), 38 Am. B. R. 504, holding that where a trustee has not only failed to carry out the wishes of the creditors by whom he was chosen, but has placed himself in direct antagonism to them without being able to assign any good reason for so doing, he should be removed, especially where the co-operation

of the creditors is indispensable to the efficient administration of the trust.

86. *In re Seider* (D. C., N. Y.), 20 Am. B. R. 708, 163 Fed. 139.

87. Act of 1867, § 18, R. S., § 5038.

88. But see *Hull v. Barr* (Fla. Sup. Ct.), 28 Am. B. R. 837, 64 Fla. 83, 59 So. 787.

SECTION FORTY-FIVE.

I. QUALIFICATIONS OF TRUSTEES.¹

§ 45. **Qualifications of Trustees.**—*a* Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

Analogous provisions: In U. S.: Act of 1867, § 18, R. S., § 5035.

In Eng.: Act of 1883, § 21 (1) (2).

In Can.: None.

Cross-references: To the law: Appointment and removal of trustee, § 44.

Bonds of trustees, § 50.

First meeting of creditors, how conducted, § 55.

Voters at meetings of creditors, § 56.

SYNOPSIS OF SECTION.

I. Qualifications of Trustees, 712

a. *In general*, 712.

b. *Statutory qualifications*, 712.

c. *Disqualifications*, 713.

I. QUALIFICATIONS OF TRUSTEES.¹

a. *In general.*—The only statutory disqualification under the former law seems to have been that the proposed trustee had received a preference. At the same time, the action of the creditors being subject to the approval of the judge, many disqualifications were in effect recognized by the courts. Since only those qualified may be appointed, votes should not be received for any nominees not clearly within the terms of this section. When the objection is that the proposed trustee is not competent² to perform the duties of the office, however, votes should be received, and, if they result in his appointment, his ability to perform such duties should be investigated before he is allowed to qualify.

b. *Statutory qualifications; corporations as trustees.*—Trustees may be either individuals or corporations. In either case, they must have offices within the

1. See also Am. B. R. Dig. § 320.

2. Compare, under former law, § 18, R. S. § 5035.

judicial district. Under the former law, it was held that they must reside in such district.³ It is evident that actual presence is intended by the phrase "reside or have an office," rather than a legal or voting residence. The having of a fixed place of abode would seem to be what is intended by the statute.⁴ This restriction seems to make it necessary to appoint a different trustee in an ancillary proceeding in another district.⁵ If a corporation is chosen, only those authorized by charter or by law "to act in such capacity" can be appointed trustee. This manifestly applies to trust companies and other corporations which are permitted by law to do a trustee business. If a trust company is named as trustee, it should appear that the company has no connection or relationship with the bankrupt which would make the position of any particular advantage to the company.⁶ An alien may be chosen as a trustee if he resides or has an office in the district.⁷

c. *Disqualifications.*—So long as General Order XIII continues in force,⁸ certain disqualifications, based on precedent and common sense, rather than the statute, will also be recognized by the courts. Thus, under the present law, it is thought, one who is palpably the bankrupt's choice will be held disqualified, or, more correctly, his appointment will not be approved;⁹ although there is no statute against the election of a trustee merely because he is acceptable to the bankrupt.¹⁰ Mere hostile animus against the bankrupt does not positively disqualify the trustee,¹¹ but he should be a person free from prejudices and entirely disinterested.¹² The fact that a trustee has business

3. In *re Havens*, Fed. Cas. 6,231; In *re Loder*, Fed. Cas. 8,459.

4. *Residence or office in judicial district.*—In the case of *In re Seider* (D. C., N. Y.), 20 Am. B. R. 708, 163 Fed. 139, Judge Chatfield said: "A person might be domiciled or reside a greater portion of the year, and perhaps pay taxes in the county of Kings and in the eastern district of New York, and vote at a legal residence in another portion of the State, or even in a different State altogether. So with reference to the question of an office. A lawyer might have an office at his home in Brooklyn, and an office in one of the down town buildings in the Borough of Manhattan, and a third office in Jersey City, in the State of New Jersey, and any one of the three might be sufficient to meet the requirements of § 45."

It seems that a person having a place of business within the judicial district may be appointed a trustee although he resides without such district. In *re Loder*, Fed. Cas. 8,459.

5. Compare *In re Boston H. & E. R. R. Co.*, Fed. Cas. 1,678.

6. A trust company named as trustee in many deeds of trust securing obligations owing to the bankrupt, and having as a director the principal counsel of the bankrupt, should not be appointed trustee of the bankrupt as its interests might conflict with those of the other creditors. *Wilson v. Continental Building & Loan Association* (C. C. A., 9th Cir.), 37 Am. B. R. 444, 232 Fed. 824.

7. In *re Coe* (D. C., N. Y.), 18 Am. B. R.

715, 154 Fed. 162, holding that the term "individuals" is very broad and includes aliens as well as corporations.

8. See p. 704, *ante*.

9. See p. 707, *ante*; *Falter v. Reinhard* (D. C., Ohio), 4 Am. B. R. 782, 104 Fed. 232; In *re Rakerdres* (D. C., N. Y.), 5 Am. B. R. 811, 108 Fed. 206. On review in C. C. A., In *re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57.

The active interference of the bankrupt in favor of the appointment of a trustee will render such trustee ineligible to appointment. In *re Hanson* (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 717.

10. In *re Eastlack* (D. C., N. J.), 16 Am. B. R. 529, 145 Fed. 68, approving an election where it appeared that the name of the trustee was suggested to one of the creditors by the bankrupt's attorney, and such creditor sent letters to all the other creditors recommending the election of the person so suggested.

Office with bankrupt's attorney.—The fact that a party occupies the same suite of offices as the attorney for a bankrupt, does not disqualify him from acting as trustee in the bankruptcy proceedings. *Matter of Fisher* (D. C., Pa.), 26 Am. B. R. 793, 193 Fed. 104.

11. In *re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 299, 98 Fed. 576; In *re Mangan* (D. C., Pa.), 13 Am. B. R. 303, 133 Fed. 1000.

12. *Matter of Ballentine* (D. C., N. Y.), 37 Am. B. R. 111, 232 Fed. 271.

relations with the referee is not sufficient to disqualify him.¹³ The fact that a person appointed trustee was formerly a receiver of the bankrupt estate, designated by the court, is evidence of his fitness and competency,¹⁴ and it has also been held that the fact that the trustee advised an assignment for the benefit of creditors, constituting the act of bankruptcy complained of, and was himself the assignee, does not disqualify him from acting as trustee.¹⁵ A stockholder or officer of a corporation is not *ipso facto* incompetent to act as trustee of the bankrupt corporation,¹⁶ and the fact that the proposed trustee is a stockholder in a corporation appearing as a creditor is not a disqualification,¹⁷ but a stockholder who had been intimately associated as legal adviser with those formerly in control will be deemed disqualified and his appointment should be set aside.¹⁸ A bankrupt who has not been discharged is not a proper person to act as trustee to another bankrupt.¹⁹ The former attorney for the bankrupt, whose relations, business and social, remain close, should not be appointed,²⁰ but the attorney for a petitioning creditor is not disqualified.²¹ Under the former law, that the assignee-elect was the bankrupt's choice warranted a refusal to confirm;²¹ so also where the candidate made it a regular business to solicit creditors' votes,²² or was a near relative,²³ or a bookkeeper of one of the bankrupts,²⁴ or had a direct adverse interest to the creditors,²⁵ or where the choice was secured by an agreement to pay certain voting creditors in full. But, it seems, a general creditor was eligible,²⁶ and that the bankrupt's attorney was not positively disqualified, if he at once severed his relations as such.²⁷

13. In re Brown, 2 N. B. 590.

14. In re Huddleston (D. C., Ga.), 31 Am. B. R. 669, 167 Fed. 428. See also In re Crooker Co. (Ref., Mass.), 27 Am. B. R. 241.

15. In re Blue Ridge Packing Co. (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619.

16. Matter of Merritt Construction Co. (C. C. A., 2d Cir.), 33 Am. B. R. 616, 219 Fed. 555.

17. In re Lazoris (D. C., Wis.), 10 Am. B. R. 31, 120 Fed. 716.

18. In re Gordon, etc. Co. (D. C., Pa.), 12 Am. B. R. 94, 129 Fed. 622.

19. In re Smith (Ref., N. Y.), 1 Am. B. R. 37.

20. In re Wink (D. C., Md.), 30 Am. B. R. 298, 206 Fed. 348.

20a. Liller Bldg. Co. v. Reynolds (C. C. A., 4th Cir.), 40 Am. B. R. 371, 247 Fed. 90.

21. In re Bliss, Fed. Cas. 1,543; In re Wetmore, Fed. Cas. 17,466.

22. In re Doe, Fed. Cas. 3,957; In re Smith, Fed. Cas. 12,971; In re Haas, Fed. Cas. 5,884.

23. In re Bogart, Fed. Cas. 1,600; In re Zinn, Fed. Cas. 18,216.

24. In re Powell, Fed. Cas. 11,354.

25. In re Clairmont, Fed. Cas. 2,781.

26. In re Clairmont, Fed. Cas. 2,781; Liller Bldg. Co. v. Reynolds (C. C. A., 4th Cir.), 40 Am. B. R. 371, 247 Fed. 90.

27. In re Barrett, Fed. Cas. 1,043; In re Lawson, Fed. Cas. 8,150; In re Clairmont, Fed. Cas. 2,781. See also cases cited in re Rung (Ref., N. Y.), 2 Am. B. R. 620. The uninfluenced votes of creditors in favor of one for trustee who had formerly been the attorney for the bankrupt are not a nullity so that the opposing candidate for trustee must be declared elected. In re Machin (D. C., Pa.), 11 Am. B. R. 449, 128 Fed. 315.

SECTION FORTY-SIX.

DEATH OR REMOVAL OF TRUSTEES.

§ 46. **Death or Removal of Trustees.**—*a* The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

Analogous provisions: In U. S.: Act of 1867, §§ 13, 14, 16, 18, R. S., §§ 5036, 5039, 5042, 5048.

In Can.: None.

Cross-references: To the law: Death or insanity of bankrupt not to abate proceedings, § 8.

Jurisdiction of bankruptcy courts as to suits or proceedings, § 23.

One or three trustees to be appointed, § 44.

I. NO ABATEMENT ON DEATH OR REMOVAL OF TRUSTEE.

This is but a re-enactment of provisions found in the former law.¹ Prior to that law, it had been held that such cause of action vested in his personal representatives;² also that, if the assignee was defendant, the right of action abated.³ It was to meet these rulings that the section was inserted in the present law. It applies to all suits or proceedings, and as well if the trustee is a defendant as if a plaintiff. It applies also no matter how the trustee's removal is brought about, though it is a question whether it would if he resigned.⁴ In that case, the court could doubtless order a resigning trustee to continue such a suit. Removals of trustees are discussed elsewhere;⁵ likewise the effect of the death of one of three trustees.⁶

1. Act of 1867, § 16, R. S., § 5048.

2. *Richards v. Maryland Ins. Co.*, 8 Cranch, 84.

3. *Hall v. Cushing*, 8 Mass. 521.

4. *Hull v. Burr* (Fla. Sup. Ct.), 28 Am. B. R. 837, 64 Fla. 83, 59 So. 787, holding that where a sole trustee of a bankrupt estate institutes a suit to recover property of the estate, and resigns during the pendency

thereof, such suit does not abate on his resignation, but may be proceeded with by his successors when appointed just as though the same had been instituted originally by such successors.

5. See under § 44 of this work. See also Am. B. R. Dig. § 323.

6. *Id.*; also Bankr. Act, § 47-b.

SECTION FORTY-SEVEN.

DUTIES OF TRUSTEES.

§ 47. Duties of Trustees.— *a* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; *and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied;** (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where con-

* Amendments of 1910 in italics.

veyances of real estates are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the costs and disbursements of the proceedings.*

Analogous provisions: In U. S.: As to deposits of money, Act of 1867, § 17, R. S., § 5059; Act of 1841, § 9; Act of 1800, § 54; As to accounting for interest, R. S., § 5062B; As to submission of accounts, Act of 1867, 28, R. S., § 5062B; As to setting apart exemptions, Act of 1867, General Order XIX; Also generally to many sections, prescribing other duties.

In Eng.: Generally to different sections prescribing duties.

In Can.: Act of 1919, §§ 17, 18, 19, 20, 21, 22, 23, 24, 26.

Cross-references: To the law: Trustee includes all the trustees of an estate, § 1 (26).

Jurisdiction of court of bankruptcy as to collection of estate, § 2(7).

Estates to be closed on approval of final accounts and discharge of trustees, § 2(8).

Allowance of exemptions to trustee, § 6.

Suits by and against trustee; intervention by trustee, § 11-b, c. d.

Certified copy of approval of bond of trustee, evidence of vesting title in him, § 21-a.

Suits by trustee; controversies between trustees and adverse claimants, § 23-a, b.

Arbitration of controversies by trustees, § 26.

Compromise of controversy arising in administration of estate, § 27.

Punishment of trustee for misapplication of property of estate, § 29-a.

Employment of stenographer on application of trustee, § 38(5).

Dividends sheets delivered to trustee by referee, § 39-a(1).

One or three trustees to be appointed, § 44.

Accounts and papers of trustees open to inspection, § 49.

Bonds of trustees, amount to be fixed, § 50.

Proof of claim by trustee against another estate, § 57-m.

Preferential transfer may be recovered by trustee, § 60-b.

Trustees to deposit funds in designated banks, § 61.

Expenses of administering estates; report, § 62.

Debts to be paid; order of payment, § 64.

Dividends, payment when declared, § 65; unclaimed to be paid into court by trustee, § 66.

Recovery of property fraudulently transferred, § 67.

Title to property vested in trustee; sales of property, etc., § 70.

To the General Orders: Duties of trustee, XVII.

Sales of property, how conducted, XVIII.

Proof of claims, duties as to; re-examination, XXI.

Redemption of property by trustee; settlement of claims or debt, XXVIII.

Payment of money by trustee on warrant, XXIX.

Application for arbitration of controversy, XXXIII.

To the Official Forms: List of claims and dividends to be delivered to trustee, No. 40.

Notice of dividends; creditor's letter, No. 41.

Petition and order for sale of real estate, No. 42; for redemption of property from lien, No. 43; for sale subject to lien, No. 44; for private sale, No. 45; for sale of perishable property, No. 46.

Report of exempt property, No. 47; return of no assets, No. 48.

Account of trustee, No. 49; oath to final account, No. 50; order allowing account and discharging trustee, No. 51.

See also Hagar and Alexander's Bankr. Forms (2d Ed.).

* Amendatory act of 1903 added subsection c.

SYNOPSIS OF SECTION.

DUTIES OF TRUSTEES.

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I. SCOPE OF SECTION.

a. *In general.*—The duties of the trustee enumerated in this section are not exclusive. Other duties are put on the trustee in many sections scattered through the law.¹ Further additional duties are prescribed in General Order XVII. Besides, the judge or referee, or the creditors by resolution, may direct still other things to be done by the trustee, provided they are within the customary functions of such officers. While the trustee is technically at all times under the direction of the court, he should be ready to act upon his own responsibility and intelligence in the administration of the estate, resorting to the court for advice and instructions where matters of a complicated nature and of great importance have arisen.² His paramount duty is to conserve and advance the interests of the estate entrusted to him, which he can only do by keeping himself clear of alliances which tempt to make the estate's interest subordinate to his own.^{2a}

II. COLLECTION OF ASSETS.

a. *Statutory provisions.*—Subdivisions 2 and 3 of this section make it the duty of the trustee to collect the assets of the bankrupt, reduce them to money, and deposit the proceeds in designated depositories. The amendatory act of 1910 amended subdivision 2 by conferring upon the trustee certain rights of creditors in respect to property belonging to the bankrupt estate, and making him more distinctively the representative of the creditor as to assets within and without the custody of the court. By subdivision 1 he must pay over and account for interest on the assets.

1. See "Cross-References," ante.

2. The privilege of trustees to apply for advice cannot be abused by running to the court to settle every question that may appear to an irresolute trustee to be desirable to have settled without responsibility of action on his part. Nor can this practice be resorted to for the purpose of carrying on litigation between himself and adverse parties in an informal and irregular way. Trustees in bankruptcy are *sui generis*. In re Baber (D. C., Tenn.), 9 Am. B. R. 406, 119 Fed. 520. It may be safely said that if a trustee bears in mind that he is the representative of the estate considered as a

whole, is bound to be vigilant and attentive in advancing its interests, and is under obligation to seek to carry out in the strictest good faith the provisions of the bankrupt act where they seem to apply plainly to the estate committed to his charge, he is not likely to go far wrong in doing, or in refusing to do, what may be asked of him by the creditors. In doubtful cases, the referee and the court will solve the perplexities of the trustee. In re Baird (D. C., Pa.), 7 Am. B. R. 448, 112 Fed. 960.

2a. Matter of Webster Loose Leaf Filing Co. (D. C., N. Y.), 42 Am. B. R. 125, 252 Fed. 959.

b. **Trustee for creditors.**—Vested with the title of the bankrupt,³ he is also the representative of the creditors,⁴ and should deal fairly between them and the bankrupt.⁵

c. **Quasi officer of court.**—He is, further, a quasi officer of the court.⁶ As in the case of other court officers, payments made to him under a mistake of law are recoverable.⁷

d. **Duties and liabilities of trustees, as to collection of assets.**—(1) **IN GENERAL.**—He must proceed to "collect and reduce to money the property . . . under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest."⁸ This he may do by, for instance, collecting accounts, even by suit or securing the necessary orders to compel the bankrupt to deliver over property belonging to the bankrupt estate,⁹ or selling goods or lands,¹⁰ or carrying out contracts entered into

3. Compare Bankr. Act, § 70-a.

4. In re Gray, 3 Am. B. R. 647, 47 N. Y. App. Div. 554; In re Griffith, 1 N. B. N. 546; In re Kindt, 2 N. B. N. Rep. 369. Compare Barker v. Bankers' Ass'n, Fed. Cas. 986; In re Rockford, R. I. & St. L. R. Co., Fed. Cas. 11,978; Crooks v. Stuart, 7 Fed. 800; also Eyster v. Gaff, 91 U. S. 521; Glenn v. Langdon, 98 U. S. 20; Dudley v. Easton, 104 U. S. 99; Batchelder & Lincoln Co. v. Whitmore (C. C. A., 1st Cir.), 10 Am. B. R. 641, 122 Fed. 355, where it was held that the trustee represents those who were creditors at the time the petition was filed. Trice v. Coolidge Banking Co. (D. C., Ga.), 39 Am. B. R. 843, 242 Fed. 175; Barber v. Wiemer (Ia. Sup. Ct.), 40 Am. B. R. 752, 165 N. W. 440.

5. In re Wrisley Co. (C. C. A., 7th Cir.), 13 Am. B. R. 193, 196, 133 Fed. 388, 390, the court said: "In all matters between creditors and bankrupt he should stand indifferent. His sole care should be to make the most out of the estate, and that primarily in the interest of the creditors. When he goes beyond that, and seeks to aid the bankrupt at the expense of the creditors, and by concealment or by false representations induces creditors to act contrary to their interest, he violates his duty, and should be removed."

Representative of creditors.—"By the clearest implication," says Judge McCormick, "he represents all the creditors, and as such representative has an interest in the just administration of the estate which belongs to the creditors." Atkins v. Wilcox (C. C. A., 5th Cir.), 5 Am. B. R. 313, 316, 105 Fed. 595.

6. In re Ryan, Fed. Cas. 12,182; United States v. Dewey, 89 Fed. 251; Gavilan v. Lugo (D. C., Porto Rico), 39 Am. B. R. 328, 9 P. R. Fed. 344.

Trustee as quasi officer.—As was said by Judge Purnell in the case of McLean v. Mayo (D. C., N. Car.), 7 Am. B. R. 115, 113 Fed. 106: "While the Bankruptcy Act creates the office of trustee in bankruptcy such trustee is a quasi officer of the court in a qualified sense. He is in reality elected by, and represents the creditors of, the bankrupt, under the provisions of the Bankruptcy Act. The bankruptcy court will protect the trustee in the discharge of his quasi official duties; but as the representative of the

creditors his duties as such representative must be discharged, not as an officer of the court, strictly speaking, but as provided in the Bankruptcy Act."

7. Carpenter v. Southworth (C. C. A., 2d Cir.), 21 Am. B. R. 390, 165 Fed. 423.

8. In re Stein (D. C., Ind.), 1 Am. & R. 662, 94 Fed. 124.

The trustee is an officer of the court, and as such is subject to its direction in all matters concerning money or property which may have come into his possession by virtue of his office. In re Howard (D. C., Cal.), 12 Am. B. R. 462, 130 Fed. 1004.

Trustees in bankruptcy, like executors and administrators, are bound to use due diligence to get in the assets of the estate—to secure possession of the tangible property and collect the debts. If they fail in their duty they may be charged in their accounts with the value of assets thereby lost. If they take no steps to secure property or collect debts, of which they have knowledge, they are presumptively negligent. Matter of Reinboth (C. C. A., 2d Cir.), 19 Am. B. R. 15, 157 Fed. 672.

9. An order that a bankrupt pay over money, which provides that in default thereof he be held guilty of contempt, and the marshal directed to arrest him and confine him in jail until he complies with said order, or is discharged, is erroneous, as leaving the question of default and contempt of court to the marshal, upon which question the bankrupt is entitled to a hearing on the return of an order to show cause upon such default. In re Baum (C. C. A., 8th Cir.), 22 Am. B. R. 235, 169 Fed. 418.

An order to compel a bankrupt jeweler to turn over property to his trustee to cover a shortage in his stock of jewelry, or its proceeds, which the bankrupt explained had been stolen from his rooms in his absence, will not be granted where the evidence is insufficient to substantiate the claim of robbery. In re Chamelin (D. C., Pa.), 25 Am. B. R. 578, 184 Fed. 553.

Pleadings.—A petition by a trustee in bankruptcy to compel the bankrupt to turn over to the trustee certain moneys is insufficient where it does not allege that the amount claimed has been received by the bankrupt or is or has been in his possession, or under his control or which does not state facts from which either possession or control can be inferred. Matter of Levy (D. C., Pa.), 43 Am. B. R. 530, 239 Fed. 316.

10. Compare Bankr. Act, § 70-b; General Order XVIII.

by the bankrupt prior to his adjudication,¹¹ or proceeding to set aside fraudulent transfers¹² or preferential liens,¹³ or by compromising claims by the acceptance of a smaller sum than the amount of the claim.^{13a} It is his duty, representing both the bankrupt and his creditors, to realize from the estate all that is possible for distribution among the creditors, and to this end he may assert claims, avoid preferences, and collect assets, even in some instances, where the bankrupt could not have acted, had bankruptcy not intervened.¹⁴ His chief duty is to make the estate available for general creditors.¹⁵

(2) **DUE DILIGENCE.**—Trustees, like executors and administrators, are bound to use due diligence to get in the assets of the estate,—to secure possession of the tangible property and collect the debts.¹⁶ An examination of the bankrupt's schedules, and a following up of all the leads naturally suggested thereby is the first step to be taken,¹⁷ and a failure on the part of the trustee in this respect will constitute negligence.¹⁸

(3) **SURCHARGED WITH LOSS CAUSED BY NEGLIGENCE.**—The trustee's failure to use proper efforts to realize upon collectible debts due the estate, subjects him to the risk of being surcharged to the extent of their value less reasonable costs and expenses of collection. His failure to pay taxes, when having in hand sufficient funds, by reason whereof the estate is subjected to interest and penalties, renders him liable to be surcharged to the extent of such interest and penalties.¹⁹ A trustee may be surcharged for loss arising from want of due diligence in reducing the property of the estate into money.²⁰

11. Carrying out bankrupt's contracts.—Where, prior to bankruptcy, the bankrupt had made certain contracts and had then assigned to claimant bank the money to become due under said contracts, and where after bankruptcy, the receiver and trustee had adopted and completed said contracts, it was proper to direct the trustee to pay to said bank the money accruing under the contracts. In re De Long Furniture Co. (D. C., Pa.), 26 Am. B. R. 460.

12. See, for instance, *Barker v. Franklin*, 8 Am. B. R. 468, 37 Misc. 292, 75 N. Y. Supp. 305, and under § 60.

13. See under Section Sixty-seven of this work.

13a. *Matter of Goldman Brothers* (D. C., Pa.), 30 Am. B. R. 58, 241 Fed. 385.

14. *Matter of Kessler* (C. C. A., 2d Cir.), 37 Am. B. R. 325, 186 Fed. 127, holding that a trustee in bankruptcy may pay a debt out of funds of the estate, where he finds that the collaterals deposited by the bankrupt for the security of the debt were in excess of the debt, and divide the balance realized from the transaction among the general creditors.

15. *Bunch v. Maloney* (C. C. C., 8th Cir.), 37 Am. B. R. 369, 233 Fed. 967.

16. *Matter of Reinboth* (C. C. A., 2d Cir.), 19 Am. B. R. 15, 157 Fed. 672; *Matter of Kuhn Bros.* (C. C. A., 7th Cir.), 37 Am. B. R. 97, 234 Fed. 277; *McMahon v. Pithan* (1a. Sup. Ct.), 33 Am. B. R. 125, 147 N. W. 920.

Duty of trustee to collect.—It is the duty of the trustee in bankruptcy to seek to recover assets belonging to the estate he represents from every source available and every party liable, when payment or delivery is not voluntarily made and the legal proceedings necessary promise results; that is, a substantial benefit to the estate. *Billings v.*

Miller & Son Co. (D. C., N. Y.), 35 Am. B. R. 846, 227 Fed. 185.

17. *Matter of Kuhn Bros.* (C. C. A., 7th Cir.), 37 Am. B. R. 97, 234 Fed. 277.

18. Negligence; personal liability.—A trustee, who fails to explain his failure to examine the schedules and follow up all leads naturally suggested thereby, must be charged with negligence and must respond for the consequences thereof. *Matter of Kuhn Bros.* (C. C. A., 7th Cir.), 37 Am. B. R. 97, 234 Fed. 277.

19. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 820. See Am. Bankr. Dig. § 333.

Duty to account for money received in settlement of criminal prosecution.—Where a trustee, after having successfully prosecuted a bankrupt and his confederates for concealing assets, effected a settlement whereby certain stocks of goods were transferred to him and an agreement made for the payment to him of a sum of money in the event that the defendants received suspended sentences, upon his receiving said sum, it should be considered as part of the bankrupt's general estate, notwithstanding an agreement, acquiesced in by the creditors, that such fund should be kept separate and used to defray the expenses of the prosecution and the cost of the bankruptcy administration; but the trustee should not be surcharged with such sum, it appearing that the fund was regarded by all parties, including the creditors, as a fund to be kept separate and used to defray the expenses of the prosecution and the administration of the bankrupt estate. *Matter of Di Cola* (C. C. A., 3d Cir.), 33 Am. B. R. 389, 217 Fed. 743.

20. Loss in sale of corporate stock.—In the case of assets of corporate stock, the

(4) **COMPELLING TRUSTEE TO ACT.**—He does not act judicially, but only administratively, and if he refuses to oppose a claim or to move for its reconsideration when he ought to do so, he may be compelled to act or to permit the objecting creditors to act in his name.²¹

(5) **WISHES OF CREDITORS.**—It is not necessarily the duty of the trustee to follow the wishes of a majority in number and amount of the creditors in prosecuting or defending suits. He is to exercise his own judgment. But when his own judgment concurs with that of a great majority of all the creditors who speak, all having the opportunity to speak, and also with that of the referee or court in charge, it would seem plain that such judgment should control.²² As a rule, however, save in the common and simpler steps of administration, he should consult the wishes of the creditors; in many matters the law requires him to do this.²³ The creditors usually decide. First meetings should be continued and kept alive for this purpose. The referee in charge may, in extreme cases, disapprove. Such action is, however, not usual.

c. Suits by trustees.—(1) **IN GENERAL.**—A trustee's duty as to suits already pending in the name of or against the bankrupt has already been considered.²⁴ So has the time limitation on suits brought by or against him.²⁵ Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to the property of the bankrupt, pass to the trustee, and he should assert them in the proper tribunal whenever necessary for the collection or preservation of the bankrupt estate.²⁶

(2) **RIGHT TO SUE.**—As a general rule the trustee alone has the power to sue to recover on a claim belonging to the estate.²⁷ The right to sue for the recovery of property transferred fraudulently belongs to the trustee and on his failure to sue, the right may not be transferred to a creditor.²⁸ It has been held in one case that the right to sue to set aside an alleged fraudulent transfer, made prior to the four months' period, may be assigned by the trustee

court may surcharge for the difference between the amount actually realized from sale and a fair maximum figure reached in the open market, and justified by conditions, during the time when the stock could have been sold by the trustee. *Matter of Omsted* (D. C., Hawaii), 32 Am. B. R. 344.

Liability for loss.—A trustee in bankruptcy, who examines the schedules and fails to discover certain notes listed therein, and, hence, fails to discover that said notes were secured by a mortgage, may be charged with losses sustained through its negligence. *Matter of Kuhn Bros.* (C. C. A., 7th Cir.), 37 Am. B. R. 97, 234 Fed. 277.

21. *In re Stern* (C. C. A., 8th Cir.), 16 Am. B. R. 510, 144 Fed. 956.

A proceeding for the re-examination of claims should be taken in the interests of all the creditors, and not be permitted at the instance of any one creditor unless demanded by the interests of all. If the trustee should without sufficient reason refuse to proceed, the court by its order may compel him to do so, or remove him for disobedience. *In re Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 538.

Where the trustee, upon the request of a creditor, has declined to appeal, the district court has power to either direct an appeal by the trustee or to make an order permitting the creditor to appeal in the name of the trustee.

Chatfield v. O'Dwyer (C. C. A., 8th Cir.), 4 Am. B. R. 813, 101 Fed. 797.

22. *In re Kearney Bros.* (D. C., N. Y.), 35 Am. B. R. 757, 184 Fed. 190.

23. Compare *Bankr. Act*, §§ 11-b-c, 2d, etc.; *In re Baber* (D. C., Tenn.), 9 Am. B. R. 406, 19 Fed. 520.

24. See under § 11 of this work.

25. *Id.*

26. See discussion under "Rights of Action" under § 70, *post*.

27. As to when suit should not be brought, *Reade v. Waterhouse*, 52 N. Y. 567; *Dulcher v. Bank*, Fed. Cas. 4203. See also *In re Baird* (D. C., Pa.), 7 Am. B. R. 448, 112 Fed. 900, where referee erroneously refused to direct trustee to sue until the moving creditor should indemnify the estate against expense of a possibly unsuccessful controversy. *Green v. Moore* (Cal. Dist. Ct. of App.), 44 Am. B. R. 326, 134 Pac. 506.

Intervention.—A district court in which a trustee in bankruptcy brings suit for the benefit of creditors, alone has jurisdiction to authorize other persons to intervene as parties and to apply for a writ of certiorari to the Supreme Court. *Babbitt v. Read* (C. C. A., 3d Cir.), 39 Am. B. R. 508, 240 Fed. 694.

28. *Ruhl-Koblegard Co. v. Gillespie* (W. Va. Sup. Ct.), 22 Am. B. R. 643, 61 W. Va. 554, 38 S. E. 898; *McMahon v. Pithan* (Sup. Ct. Iowa), 33 Am. B. R. 125, 147 N. W. 930; *Neuberger v. Felis* (Ala. Sup. Ct.), 43 Am. B. R. 703, 82 So. 172, citing *Collier on Bankruptcy* (11th ed.) 722.

tee to a creditor.²⁹ But this decision does not appear to have been based upon a proper consideration of the statutory limitation of the powers of a trustee, and the purpose and effect of the bankruptcy act. The trustee represents all the creditors. The avails of a suit to recover property alleged to have been fraudulently conveyed belongs to the bankrupt estate and should be distributed equally among the creditors. If a creditor has knowledge of facts which will aid in the prosecution of such a suit, it is his duty to disclose such facts, and he should not be encouraged to conceal them by being permitted to become possessed of the right to sue, and thus be enabled to profit by such knowledge to the exclusion of the other creditors.³⁰

(3) ORDER OF CONSENT OF REFEREE OR COURT.—Before a trustee institutes a suit he ought to submit the reasons for the suit to the creditors and secure an order, based on their action, from the referee.³¹ Such consent seems not to be necessary when a suit is brought against him.³² How far the question at issue shall be gone into on such a preliminary hearing is discretionary with the referee. He should at least be sure that there is a probable cause of action.³³ It would seem also that the proposed defendant, if a creditor and interested in the fund, may appear in opposition to a motion for permission to sue.³⁴ The trustee being required to collect and reduce to money the property of the estate would seem sufficient to justify a suit by the

²⁹ In re Downing (D. C., N. Y.), 27 Am. B. R. 309, 192 Fed. 683, *affd.* 29 Am. B. R. 228, 201 Fed. 93.

³⁰ In re Downing (D. C., N. Y.), 27 Am. B. R. 309, 192 Fed. 683 (*affd.* 29 Am. B. R. 228, 201 Fed. 93), in which the court recognizes the doubt as to expediency of permitting an assignment to a creditor of a cause of action to set aside such a transfer, by saying: "I think it would be far better practice to allow the creditor to prosecute the action in the name of the trustee at her own expense with an order that the recovery, if any, shall be for the benefit of the estate, but that out of such recovery the creditor shall be fully compensated for all costs and expenses including counsel fees before distribution. It may be and is a serious and close question whether a trustee in bankruptcy vested by statute with the right to prosecute an action to set aside a deed as fraudulent (one executed and delivered more than four months prior to the institution of bankruptcy proceedings) may assign the same. It is a statutory right pure and simple and is conferred on the trustee as such,—as an officer in fact of the court, to be exercised in the interest of and for the benefit of the creditors of the bankrupt. The interest he has in the real estate, if any, is held by him for the benefit of the creditors in the same way." It is difficult to reconcile this statement of the court with the final conclusion that a sale by a trustee of such a right of action may be ordered.

³¹ In re Mersman (Ref., N. Y.), 7 Am. B. R. 46. But compare *Chism v. Bank* (Sup. Ct., Miss.), 5 Am. B. R. 56, 27 So. 610. See also In re McCallum (D. C., Pa.), 7 Am. B. R. 596, 113 Fed. 393; In re Mallory, Fed.

Cas. 8,990; *Traders' Bank v. Campbell*, 14 Wall. 87.

³² Compare In re Kelly Dry Goods Co. (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

³³ Probable cause of action.—When a trustee applies for instruction relative to a suit which the creditors wish him to bring, it is sufficient to show that he will probably succeed; certainty of success need not be demonstrated. If a proposition of settlement has been offered the moving creditors should also show that they are likely to secure a better result by a suit than by accepting the proposed settlement. In re Phelps (Ref., N. Y.), 3 Am. B. R. 396.

Duty to sue.—The duties of the trustee are prescribed by the bankruptcy act, and he must institute litigations whenever it is necessary for the purpose of collecting or reducing to money the assets of the bankrupt estate. By this obligation is not meant that he should burden the assets of the estate with costs and expenses arising out of all manner of questions that may be presented for litigation. There should be probable cause at least for believing that a right of action exists before the bankrupt estate is so burdened. In re Meadows, Williams & Co. (D. C., N. Y.), 25 Am. B. R. 100, 181 Fed. 911, citing *Collier on Bankruptcy* (7th ed.), p. 541.

³⁴ In re Mersman (Ref., N. Y.), 7 Am. B. R. 46, in which Referee Hotchkiss held that a secured creditor whose security is the proposed object of attack, but who is also an unsecured creditor, may object to the granting of the trustee's application; but his objection should be given little weight unless clearly for the benefit of all the creditors.

trustee, even without the order or leave of the court or referee.³⁵ Other parts of the statute imply that the trustee is expected to bring suits,³⁶ and the implication from the statute as a whole is that the trustee may act upon his own responsibility in bringing a suit.³⁷ As above indicated, however, the better practice is to secure an order granting the desired leave.³⁸

(4) **SUITS BY TRUSTEES OF BANKRUPT CORPORATIONS.**—A trustee of a bankrupt corporation succeeds to the rights of the corporation as to all rights, contractual and statutory, existing for the benefit of the corporation, and as such trustee, it is his duty to enforce such rights.³⁹ The right of a corporation to make an assessment upon unpaid corporate stock passes to the trustee.⁴⁰ Where a call or assessment against stockholders for unpaid subscriptions is required, the trustee should petition the court for an order directing the call or assessment to be made.⁴¹ Before making the order the court will investigate the facts to determine whether there is a balance due on the stock, and whether the assets are insufficient to pay the corporate debts,⁴² and the pro rata share that the holders of such stock must pay, up to the par value thereof, in order to liquidate the indebtedness of the bankrupt company.⁴³ A trustee must bear the burden and present such proof as will enable the court to find with reasonable certainty the facts necessary to support his order.^{42b} The stockholders of a bankrupt corporation are in court from the inception of the bankruptcy proceedings and are bound by the finding of the court that there is a want of assets requiring an assessment.⁴³ Upon the order being issued, the trustee must proceed to collect the unpaid subscription, by suit if necessary, and upon such suit the stockholders may interpose any reasonable defense, alleging, for instance, that they have already met their obligations.⁴⁴ The obligations or liabilities of a stockholder or director to creditors of a corporation, under a state statute, are not, as a general rule, assets of the corporation, and are not therefore enforce-

35. *Traders' Ins. Co. v. Mann*, 11 Am. B. R. 269, 118 Ga. 381; *Chism v. Friars Point Bank*, 5 Am. B. R. 56, 27 So. 610; *Callahan v. Israel*, 186 Mass. 383, 71 N. E. 812; *Chalman v. Dodd* (Ga. Ct. of App.), 44 Am. B. R. 12, 99 S. E. 150.
36. Bankr. Act, §§ 11c and 23b.

37. *Porter v. Hughes* (Ala. Sup. Ct.), 38 Am. B. R. 596, 73 So. 400. In the case of *Callahan v. Israel*, 186 Mass. 383, 71 N. E. 812, the court said: "It was not the intention of Congress that a trustee could not make a demand for payment, receive money offered in payment, or take any of the usual means to collect and reduce to money the estate, the title of which had vested in him, without some specific directions so to do. The clause was merely intended to give the court power to direct the proceedings of its trustees, if occasion for such direction should arise in any specific instance, and not to place upon the court the burden of giving constant directions as to the reducing of the property to money." *Harlen v. American Trust Co.* (Ind. App. Ct.), 41 Am. B. R. 401, 119 N. E. 20.

Necessity for order of referee.—It being the duty of the trustee in bankruptcy to bring in everything he believes to be assets of the estate, an order of the referee, authorizing the trustee to collect the amounts due under conditional contracts of sale assigned by the bankrupt, is unnecessary. *Matter of Barker Piano Co.* (C. C. A., 2d Cir.), 37 Am. B. R. 271, 233 Fed. 522.

38. Trustee's right to sue is incidental to the performance of his duties, and it is not thought strictly necessary for him to first obtain the consent of the creditors or leave of the court, though perhaps the better practice is that he should do so. In *re Meadows, Williams & Co.* (D. C., N. Y.), 25 Am. B. R. 100, 181 Fed. 811, citing *Collier on Bankruptcy* (7th ed.), p. 541.

39. See discussion under § 70, post.

40. In *re Remington Automobile & Motor Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 389, 153 Fed. 345; *Kiskadden v. Steinle* (C. C. A., 6th Cir.), 29 Am. B. R. 346, 203 Fed. 375; In *re Newfoundland Syndicate* (D. C., N. J.), 28 Am. B. R. 119, 196 Fed. 443; In *re Monarch Corporation* (D. C., Conn.), 24 Am. B. R. 428, 177 Fed. 464; *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 223 Fed. 667; *Allen v. Grant* (Ga. Sup. Ct.), 14 Am. B. R. 349, 50 S. E. 494, 122 Ga. 552; *Demuth v. Faw* (Wash. Sup. Ct.), 42 Am. B. R. 151, 174 Pac. 18.

Nature of proceedings to assess and collect.—

In *Bergdoll v. Harrigan* (C. C. A., 3d Cir.), 44 Am. B. R. 633, 263 Fed. 279, the court said: "There are two separate and distinct branches of the proceedings to compel the payment by a stockholder of a bankrupt corporation of any moneys due on his stock, viz.: First, a determination by the court as to whether it is necessary to assess such stock for the purpose of paying the debts of the bankrupt and the necessary costs of administration, and if so, then the fixing of the rate of the assessment and the levying of the same upon whatever stock may appear *prima facie* to be subject thereto; and second, if a stockholder disputes his individual liability as *prima facie* determined, then the institution by the trustee of an appropriate suit or proceeding to fix definitely his liability or non-liability for the assessment and the amount thereof."

41. In *re Remington Automobile & Motor Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 389, 153 Fed. 345; *Matter of Munger Vehicle Tire Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 395, 166 Fed. 910; In *re Monarch Corporation* (D. C., Conn.), 24 Am. B. R. 428, 177 Fed. 464; *Matter of Miller Electrical Maintenance Co.* (D. C., Pa.), 6 Am. B. R. 70, 111 Fed. 515; In *re Eureka Furniture Co.* (D. C., Pa.), 22 Am. B. R. 395, 170 Fed. 435; *Matter of Mfgs. Box & Paper Co.* (D. C., N. Y.), 41 Am. B. R. 763, 251 Fed. 957; *Courtney v. Youngs* (Miss. Sup. Ct.), 42 Am. B. R. 67, 165 N. W. 441.

42. In *re Remington Automobile & Motor Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 389, 153 Fed. 345; In *re Monarch Corporation* (D. C., Conn.), 24 Am. B. R. 428, 177 Fed. 464; *Molise v. Scheibel* (C. C. A., 8th Cir.), 40 Am. B. R. 311, 245 Fed. 546; *Matter of Canister Co.* (C. C. A., 3d Cir.), 42 Am. B. R. 278, 253 Fed. 70, aff'd 41 Am. B. R. 625, 248 Fed. 557. Compare *Benzer v. Billings* (Wash. Sup. Ct.), 43 Am. B. R. 576, 181 Pac. 19.

Claims by purchasers of voting trust certificates.—Claims by purchasers in the open market of voting trust certificates of the bankrupt, allowed, and held that said purchasers are not subscribers for unpaid stock, so as to render them liable to an assessment in behalf of creditors of the bankrupt. *Clark v. Johnson* (C. C. A., 8th Cir.), 40 Am. B. R. 330, 245 Fed. 442.

42a. *Matter of Canister Co.* (D. C., N. J.), 41 Am. B. R. 625, 248 Fed. 557.

42b. *Matter of Canister Co.* (D. C., N. J.), 41 Am. B. R. 625, 248 Fed. 557.

able in a suit by the trustee for the benefit of all the creditors,⁴⁵ even though the directors have unlawfully diverted the funds of the corporation by declaring and paying dividends while it was insolvent.⁴⁶

(5) **SUITS FOR OTHER PURPOSES.**—There is a divergence of authority on the question as to whether a trustee of a tenant in common may maintain a suit for the partition of the real estate in which the bankrupt was a tenant in common with others. This divergence is probably accounted for by the difference in the various statutes which relate to the right to partition.⁴⁷ If an agreement be made between a party and a receiver of the bankrupt's property appointed in a State court, the trustee may not sue on such agreement.⁴⁸ It is not the duty of the trustee to bring suit for a small recovery which would not prove beneficial to the estate.⁴⁹ Section sixty should be consulted for suits to avoid preferences; section sixty-seven for suits to annul preferential or fraudulent liens; and section seventy for suits under State laws to avoid fraudulent transfers. The diverse character of the suits which may be brought by trustee is suggested by the cases in the foot-note.⁵⁰

43. *In re Newfoundland Syndicate* (D. C., N. J.), 28 Am. B. R. 119, 196 Fed. 443.

44. *Matter of Stipp Construction Co.* (C. C. A., 3d Cir.), 34 Am. B. R. 333, 221 Fed. 372.

Form of action.—The bankruptcy court has no jurisdiction of a suit in equity by the trustee in bankruptcy of a corporation to enforce the unconditional liability of the stockholders on their unpaid stock subscriptions. The appropriate remedy is a separate action at law against each stockholder. *Kelley v. Gill* (U. S. Sup. Ct.), 40 Am. B. R. 421, 38 Sup. Ct. 38. Compare *Kelley v. Aarons* (D. C. Cal.), 39 Am. B. R. 115, 238 Fed. 996; *Grand Rapids Trust Co. v. Nichols* (Mich. Sup. Ct.), 40 Am. B. R. 301, 165 N. W. 667; *Courtney v. Youngs* (Miss. Sup. Ct.), 42 Am. B. R. 67, 168 N. W. 441.

Determination of liability by referee.—A stockholder who is also a creditor may appear and contest the necessity for the assessment and the advisability of making one without submitting himself to the jurisdiction of the referee to fix his individual liability for unpaid stock. *Bergdoll v. Harrigan* (C. C. A., 3d Cir.), 44 Am. B. R. 633, 263 Fed. 279.

Stockholder who is also creditor.—Where a stockholder who has not paid for his stock presents a claim against his company in bankruptcy, he is not entitled to recover thereon, as against other creditors, until he has first paid the amount so due and payable upon his stock. *Matter of Caledonia Coal Co.* (D. C., Mich.), 43 Am. B. R. 93, 254 Fed. 742; *Beaumen's Bank v. Laws* (C. C. A., 8th Cir.), 43 Am. B. R. 683, 257 Fed. 290.

Fraud of corporation.—In an action by a trustee in bankruptcy of a corporation on a note given for subscription to stock, a claim of fraud by the corporation in procuring the subscription, not mentioned until after the commencement of the action, is not a defense. *Smoot v. Perkins* (Tex. Civ. App.), 40 Am. B. R. 198, 195 S. W. 988.

Stock issued in violation of state law.—A trustee in bankruptcy of a corporation is entitled to recover on a note given for subscription of its stock, although such stock was issued in violation of the constitution and laws of the State. *Smoot v. Perkins* (Tex. Civ. App.), 40 Am. B. R. 193, 195 S. W. 988.

45. *Breck v. Brewster* (N. Y. App. Div.), 31 Am. B. R. 842, 153 N. Y. App. Div. 800, 138 N. Y. Supp. 821; *In re Beachy & Co.* (D. C., Wis.), 22 Am. B. R. 538, 170 Fed. 825.

Statutory liabilities of directors.—Where, by statute, the directors are personally made liable in case debts are contracted in excess of the fixed amount of the capital stock, or in any other contingency, the existence of this liability is no reason for a refusal to call in and collect unpaid stock subscriptions. Such liability is not an asset of the bankrupt corporations but is security for the creditors. The trustee in bankruptcy has no right to pursue this remedy. *In re Crystal Springs Water Co.* (D. C., Vt.), 3 Am. B. R. 194, 96 Fed. 945.

The liability of stockholders under the law of

Alabama, where subscriptions to the capital stock of the corporation have been paid by the transfer of property, alleged to have been fraudulently overvalued, is enforceable only by the creditors and not by the corporation, and hence does not constitute "property" passing to the trustee and is not enforceable by him. *Matter of Hoffman-Salvan Roofing Paint Co.* (D. C., Ala.), 37 Am. B. R. 426, 234 Fed. 798. See also *State Bank of Commerce v. Kennedy Band Instrument Co.* (Minn. Sup. Ct.), 44 Am. B. R. 91, 173 N. W. 560.

Compare *Billings v. Millar & Sons Co.* (D. C., Am. B. R. 317, 249 Fed. 177; *Compare Billings v. Millar & Sons Co.* (D. C., N. Y.), 35 Am. B. R. 846, 227 Fed. 185; *Miley v. Heaney* (Wis. Sup. Ct.), 42 Am. B. R. 345, 169 N. W. 64.

47. **May bring partition.**—*Harlen v. American Trust Co.* (Ind. App. Ct.), 41 Am. B. R. 401, 119 N. E. 20.

May not bring partition.—*Hobbs v. Frasier* (Sup. Ct., Fla.), 22 Am. B. R. 684, 56 Fla. 796; *Lindsay, as Trustee, etc., v. Runkle* (Sup. Ct., Ohio), 24 Am. B. R. 612, 92 N. E. 489.

48. *Love v. Export Storage Co.* (C. C. A., 6th Cir.), 16 Am. B. R. 171, 197, 143 Fed. 1.

49. **Suit to recover small amount.**—It is not the duty of a trustee in bankruptcy to institute legal proceedings, expensive in their very nature, for the sake of securing a small recovery, which evidently would not cover the expenses of the litigation, or for the purpose of having a legal proposition determined, which, when settled, while of general interest, maybe, would not result in benefit to the estate. *Billings v. Miller & Son Co.* (D. C., N. Y.), 35 Am. B. R. 846, 227 Fed. 185.

50. *Mather v. Coe* (D. C., Ohio), 1 Am. B. R. 504, 92 Fed. 333; *In re Brodline* (D. C., Mass.), 2 Am. B. R. 53, 93 Fed. 643; *In re Baudouine* (D. C., N. Y.), 3 Am. B. R. 55, 96 Fed. 536; *In re Cohn* (D. C., N. Y.), 3 Am. B. R. 421, 96 Fed. 75. Action by trustee in bankruptcy of a bank to recover money alleged to have been furnished by it to conduct a business under a contract with a manufacturing corporation. *Monroe v. Bushnell* (Sup. Ct., Mich.), 22 Am. B. R. 587, 122 N. W. 508.

Suit to recover for breach of bond conditioned for turning of assets over to trustee in event of adjudication, see *Moore Bros. v. Cowan* (Sup. Ct., Ala.), 26 Am. B. R. 902, 55 So. 903.

Proceedings to ascertain profits of corporation.—A trustee in bankruptcy is entitled to reach the property to which a bankrupt stockholder is equitably entitled in the undivided profits of a corporation, and the court may direct an investigation as to the profits reasonably applicable to dividends. *Matter of Brantman* (C. C. A., 2d Cir.), 40 Am. B. R. 18, 244 Fed. 101.

Avoidance of sale of assets by majority stockholders.—The bankrupt was a large stockholder of a corporation which, after the bankrupt's adjudication and before the appointment of his trustee, sold all of its assets with the consent of a majority of the stockholders, who

(6) **PRACTICE GENERALLY; SECURITY FOR COSTS.**—If a suit is ordered, it should be in the name of "John Doe," as trustee of "Richard Doe," a bankrupt. Whether in no-asset cases security may be demanded by the proposed defendant is for the court in which the suit is brought to determine.⁵¹ Costs may be allowed defendants payable out of the funds in the hands of the trustee, where the conditions warrant.⁵² A trustee will not be allowed to effect a settlement of a suit which a court of equity would not permit the bankrupt to make.⁵³ Compromise by a vote of a majority of the creditors of a suit brought by the trustee need not necessarily be accepted.⁵⁴ A suit brought in a State court will be tried the same as other actions, and according to the rules of evidence prevailing in the court where the suit is tried.^{54a}

knew of the bankruptcy, and that a trustee was imminent, and that the bankrupt estate had an interest in the property conveyed. Instead of accepting a consideration which was of value to the bankrupt estate, they accepted one which wholly disregarded his interests, except to cancel the debts of the bankrupt to the vendee, which created an illegal preference. It was held that the trustee, after his appointment, became beneficially interested as a stockholder and could file a stockholder's bill in equity to vacate the sale for alleged abuse by the majority. *Greenhall v. Carnegie Trust Co.* (D. C., N. Y.), 25 Am. B. R. 300, 180 Fed. 812.

Recovery of premium fraudulently paid by bankrupt.—The contract of an insurance company to pay a person an annuity of \$1,000 a year for life, beginning July 1, 1916, in consideration of \$2,830, paid by him in 1901 in fraud of creditors, is wholly executory, and his trustee in bankruptcy, in 1907, may elect to cancel the contract and recover the consideration for the benefit of creditors. *Smith v. Mutual Life Ins. Co.* (C. C., Mass.), 24 Am. B. R. 514, 178 Fed. 510, s. c., 19 Am. B. R. 707, 158 Fed. 365.

Fraudulent transfers.—A trustee in bankruptcy, of a firm and its members may maintain an action to set aside transfers made by the firm and its members with intent to hinder, delay and defraud creditors. *Barker v. Franklin*, 8 Am. B. R. 468, 37 Misc. 292, 75 N. Y. Supp. 805.

Sale of property by bankrupt and partner.—Where a bankrupt and his partner conducting a general soda fountain business sell their entire stock, business and fixtures to the father-in-law of the partner and the father continues the business under the original firm name, the trustee of the bankrupt cannot have the sale set aside because the vendee left the property in the possession of the partner who created a large amount of debts, credit being given on the strength of the possession of the property. *In re Young* (D. C., Ga.), 31 Am. B. R. 82, 206 Fed. 187.

51. Where the suit is on a cause of action antedating the adjudication, security for costs will be required in New York. *Joseph v. Makley*, 8 Am. B. R. 18, 73 N. Y. App. Div. 156.

Security for costs.—Where a trustee in bankruptcy has no assets except a claim upon which he is about to bring an action, and there seems to be no prospect of his succeeding, he should be required to give security for costs. *Uhr v. Coulter et al.* (N. Y. App. Div.), 37 Am. B. R. 795, 172 N. Y. App. Div. 413.

52. *Caten v. Eagle B. & L. Assn.* (D. C., Pa.), 23 Am. B. R. 130, 177 Fed. 996.

Liability of trustee for costs.—Where an action was brought by bankrupts' trustee over eighteen months after adjudication for an indebtedness alleged to be due the

bankrupts, against which a counterclaim was interposed by defendant, who prevailed not only on his counterclaim but also in entirely defeating the claim of the trustee, the trustee is responsible for the costs of the action. *Matter of Havens* (D. C., N. Y.), 25 Am. B. R. 116, 182 Fed. 367.

53. **Settlement by trustee.**—A judgment note was given by a bankrupt and entered within four months of the date of the petition in bankruptcy. The bankrupt thereafter conveyed certain property to another person by warranty deed, subject to certain mortgages, a portion of the purchase money being placed in the hands of the vendee's attorneys to hold in trust for the bankrupt until he had satisfied such judgment and then to turn the same over to the bankrupt i. e. s certain interest on the mortgages and unpaid taxes. The trustee in bankruptcy instituted proceedings in the court in which the judgment was entered to have it declared invalid as being an unlawful preference, with the result that the judgment was struck off; but upon appeal the lower court was reversed for lack of a jury trial. Being without funds to continue the litigation, the trustee negotiated for a settlement with the judgment creditor whereby the latter was to pay the costs and in addition a certain sum to the trustee, with a view of eliminating the trustee from the controversy and affirming the validity of the judgment lien upon such property. The effect of such settlement would have been to compel the purchaser to pay more than \$1,200 in addition to the money left in his attorneys' hands, whereas an offer by the purchaser to pay the cost and furnish counsel to proceed with the litigation seemed likely to be successful and for the interest of the bankrupt's creditors ultimately. It was held that as the settlement proposed to do what the bankrupt would never have been permitted to do by a court of equity—to take the money from the judgment creditor at the expense of the vendee in violation of his contract, by not reducing the amount of the judgment lien—it was inequitable to permit the trustee, who had no higher rights than the bankrupt, to do so and that the offer of the vendee should be accepted. *In re Geiselhart* (D. C., Pa.), 25 Am. B. R. 318, 181 Fed. 622.

54. **Compromise.**—Where creditors, representing a majority in number and amount

f. Property vested in trustees.—(1) **IN GENERAL.**—The property which constitutes the estate of the bankrupt, and vests in the trustee, is considered fully in the discussion under section seventy.

(2) **AMENDATORY ACT OF 1910.**—The amendatory act of 1910 amended subdivision 2 of subsection a by providing in effect that the trustee should have the same title to property in the custody of the court that a creditor, holding an execution or other lien by legal or equitable proceedings levied against that property, would have under a State law; and, as to property not in the custody of the court, that the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed against the assets in the same manner as a judgment creditor.⁵⁶

(3) **RULE EXISTING PRIOR TO AMENDMENT.**—Prior to the amendment of 1910 the trustee was not clothed with the privileges of a judgment creditor.⁵⁶ The trustee's title as against a claim under an unrecorded conditional sale, though the State law required record, did not prevail.⁵⁷ This rule still applies where property was acquired by the bankrupt on a conditional sale contract prior to the amendment.⁵⁸ The supreme court had held in effect that a trustee in bankruptcy under an unrecorded contract of conditional sale was only vested with the title and interest of the bankrupt in the property acquired by him under such contract.⁵⁹

(4) **AMENDMENT TO BE CONSTRUED WITH § 70.**—Under § 70 of the act the trustee is vested by operation of law with the title of the bankrupt as to all property which belonged to him in his own right, and he takes the same, not as an innocent purchaser, but subject to all valid claims, liens and equities.⁶⁰ Under this statutory limitation, the trustee was held "to stand in the shoes of the bankrupt,"⁶¹ so that where a lien or security existed which was enforceable as against the bankrupt, it must be recognized by the trustee, and could not therefore be attacked by the trustee for the benefit of general creditors. It seems that the language of the amendment might have found a more appropriate place in section 70 of the act, but, however that may be, it is plain that the two sections must now be construed together and that the trustee can no longer be said to have the limited title of the bankrupt.⁶²

of claims, vote at a special meeting in favor of an offered compromise of a suit brought by the trustee, the court will not necessarily, upon the authority of section 56-a of the bankruptcy act, direct the trustee to accept the compromise, but in a proper case will order a bond of indemnity to be executed by the creditors opposing the compromise, saving the bankrupt estate from costs, expenses and counsel fees of such litigation. *In re Meadows, Williams & Co.* (D. C., N. Y.), 25 Am. B. R. 100, 181 Fed. 911.

^{54a.} *Barber v. Niemer* (Ia. Sup. Ct.), 40 Am. B. R. 752, 105 N. W. 440.

^{55.} See House Committee Report on Amendatory Act of 1910. See *Bank of North America v. Penn. Motor Co.* (Pa. Sup. Ct.), 31 Am. B. R. 395, 83 Atl. 622; *Sattler v. Slonimsky* (D. C., Pa.), 28 Am. B. R. 729, 199 Fed. 592; *In re Snelling* (D. C., Mass.), 29 Am. B. R. 818, 202 Fed. 269; *Border Nat. Bank v. Coupland* (C. C. A., 5th Cir.), 39 Am. B. R. 165, 240 Fed. 355; *Matter of Reynolds* (D. C., N. Y.), 40 Am. B. R. 141, 243 Fed. 268, 272; *Brown v. Crawford* (D. C., Ore.), 42 Am. B. R. 263, 262 Fed. 248; *American Bottle Co. v. Finney* (Ala. Sup. Ct.), 43 Am. B. R. 686, 82 So. 106; *Matter of A. B. Savage Baking Co.* (D. C., N. J.), 43 Am. B. R. 721, 259 Fed. 607.

A trustee has two rights as to property in his custody, i. e., that of the bankrupt and that of "a creditor holding a lien by legal or equitable proceedings thereon." *Matter of Seward Dredging Company* (C. C. A., 2d Cir.), 39 Am. B. R. 372, 242 Fed. 225.

^{56.} **Privileges of trustee prior to amendment of 1910.**—The trustee in bankruptcy of one who, prior to his insolvency, paid the consideration of a conveyance to another is not clothed with the privileges of a judgment creditor, and cannot attack the conveyance in that the bankrupt never had a fee or any legal or equitable interest in the lands. *London v. Epstein* (Sup. Ct., App. Div., N. Y.), 24 Am. B. R. 587, 38 N. Y. App. Div. 518.

^{57.} *Crucible Steel Co. v. Holt* (C. C. A., 6th Cir.), 23 Am. B. R. 302, 174 Fed. 127; *Matter of Schilling & Loller* (D. C., Ohio), 41 Am. B. R. 705, 251 Fed. 966.

^{58.} *Holt v. Henley* (Sup. Ct., U. S.), 232 U. S. 637, 32 Am. B. R. 161, 58 L. Ed. 707 (revg. 27 Am. B. R. 578), 193 Fed. 920.

^{59.} *York Manufacturing Co. v. Cassell*, 201 U. S. 844, 15 Am. B. R. 633, 50 L. Ed. 782; *Dunlop v. Mercer* (C. C. A., 8th Cir.), 19 Am. B. R. 361, 156 Fed. 545.

^{60.} See *Bankr. Act*, § 70-a, and discussion thereunder. *American Laundry Mach. Co. v. Everybody's Laundry* (Ia. Sup. Ct.), 43 Am. B. R. 294, 171 N. W. 161.

^{61.} *Security Warehousing Co. v. Hand*, 209 U. S. 415, 19 Am. B. R. 291; *In re Standard Telephone & Elec. Co.*, 216 U. S. 544, 24 Am. B. R. 761.

^{62.} *In re Hammond* (D. C., Ohio), 26 Am. B. R. 336, 188 Fed. 1020; *Davis v. Harlow* (Md. Ct. of App.), 39 Am. B. R. 300, 100 Atl. 102; *Matter of Reynolds* (D. C., N. Y.), 40 Am. B. R.

(5) **GENERAL PURPOSE AND EFFECT OF AMENDMENT.**—It was to obviate the prior limitation upon the right of a trustee to attack unrecorded conditional sale contracts and other like liens, that section 47, clause 2, subsection a, of the act was amended by inserting the words "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon."⁶³ The purpose of the amendment was to give to the trustee the lien of a judgment creditor, enabling him to protect general creditors from unrecorded liens, unlawful transfers, spurious claims and other dissipations of the assets of the estate, which a lien or judgment creditor might have prevented had bankruptcy not intervened.⁶⁴ Decisions holding that a trustee has no other right than belonged to the bankrupt are no longer controlling.⁶⁵ The amendment is not to be given any retroactive effect.⁶⁶ If none of the creditors of the bankrupt had a lien by judgment or otherwise against the property in question, the amendment does not increase the trustee's rights, but as to such property he stands in the shoes of the bankrupt.⁶⁷

(6) **STATUS OF TRUSTEE THAT OF CREDITOR HOLDING LIEN.**—The trustee no longer "stands in the shoes of the bankrupt."⁶⁸ Under the amendment the trustee may attack the validity of any lien, or other claim against the bankrupt's property which a creditor holding a lien by legal or equitable proceedings

141, 243 Fed. 268, 272; *Riggs v. Price* (Mo. Sup. Ct.), 43 Am. B. R. 413, 210 S. W. 420.

Effect of failure to amend section 70.—Although the amendment of 1910, to the bankruptcy act, increasing the rights of a trustee in bankruptcy to those of a lien creditor, should more properly have been made to section 70, which deals with property as to which the trustee acquires title, than to section 47, which relates more particularly to the duties of a trustee, it does not follow that it should necessarily have been so made, or that it is any the less effective because having been made to the latter section, the intention of Congress having been clearly expressed by the terms of the amendment. In *re Williamsburg Knitting Mill* (D. C., Va.), 27 Am. B. R. 178, 190 Fed. 871.

63. Statement of Representatives Shirley to the House of Representatives, Congressional Record, 61st Congress, 2d session, pp. 2276-7. It was for the purpose of avoiding the construction of the bankruptcy act by *York Manufacturing Co. v. Cassell*, 201 U. S. 844, 15 Am. B. R. 633, 50 L. Ed. 782, that the amendment was enacted. *Matter of Kruse* (D. C., Iowa), 37 Am. B. R. 687, 689, 234 Fed. 470.

64. *Matter of City Drug Store* (D. C., Ga.), 35 Am. B. R. 335, 224 Fed. 132; *Davis v. Harlow* (Md. Ct. of App.), 39 Am. B. R. 300, 100 Atl. 102.

65. In *re Gehris-Herbline Co.* (D. C., Pa.), 26 Am. B. R. 470, 188 Fed. 502.

66. *Arctic Ice Mach. Co. v. Armstrong County Trust Co.* (C. C. A., 3d Cir.), 27 Am. B. R. 562; In *re Schneider* (D. C., Pa.), 29 Am. B. R. 469, 208 Fed. 589.

As to the effect of amendment on rights accruing prior to its passage, see *Hinchman v. Consolidated Arizona Smelting Co.* (D. C., Me.), 29 Am. B. R. 393, 198 Fed. 907.

Rule of interpretation.—The amendment gives a rule of interpretation rather than a substantive right, and, therefore, such amendment is applicable to a contract of conditional sale made prior to its enactment, which, by State law in force at the time it was made, is invalid

because not recorded. In *re Farmers' Co-operative Co.* (D. C., N. Dak.), 30 Am. B. R. 190, 302 Fed. 1008.

67. In *re Flatland* (C. C. A., 9th Cir.), 28 Am. B. R. 476, 196 Fed. 310.

68. *Matter of Sterne & Levi* (Ref., Tex.), 26 Am. B. R. 535, 540.

Trustee no longer in position of bankrupt.—In the case of *In re Nelson* (D. C., S. Dak.), 27 Am. B. R. 272, 275, 91 Fed. 233, the court said: "Under section 47, subd. 'a,' 2 of the Bankruptcy Act, as amended in 1910, if property coming into the custody of the court be claimed by another, the trustee is vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon. Applying its plain interpretation to this section and amendment, it follows that an agreement which would have been binding upon and could have been enforced between the parties hereto prior to the amendment of 1910 no longer necessarily binds the trustee. His position is no longer the same as that of the bankrupt, but he is now in the position of a creditor holding a legal or equitable lien, and in this case the conditional sale of this property and the writing above set forth, termed a 'warehouse receipt,' are to be interpreted exactly as if the trustee were a creditor holding such lien. In *re Franklin Lumber Co.* (D. C., Pa.), 26 Am. B. R. 87, 187 Fed. 281."

69. *Pacific State Bank v. Coats* (C. C. A., 8th Cir.), 30 Am. B. R. 655, 205 Fed. 618 (quoting text); *Matter of Shute* (D. C., Wash.), 37 Am. B. R. 554, 233 Fed. 544; *Matter of City Drug Store* (D. C., Ga.), 35 Am. B. R. 335, 224 Fed. 132; *Gee v. Parks* (Tex. Civ. App.), 39 Am. B. R. 393, 198 S. W. 769; *National Bank of Bakersfield v. Moore* (C. C. A., 9th Cir.), 41 Am. B. R. 409, 247 Fed. 913; *Matter of Gay v. Sturgis*, 41 Am. B. R. 569, 251 Fed. 420; *Matter of Schilling and Loller* (D. C., Ohio), 41 Am. B. R. 705, 251 Fed. 906; *Fuller v. Atlanta National Bank* (C. C. A., 5th Cir.), 42 Am. B. R. 721, 254 Fed. 278; *Matter of Mutual Motors Co.* (D. C., Mich.), 44 Am. B. R. 337, 260 Fed. 341.

might have attacked.⁶⁶ Under this provision of the statute the trustee is not limited to such objections to a transaction between the bankrupt and a creditor as the bankrupt might have had, but he may make any objection that a creditor holding a lien might make.⁷⁰ The class of cases, unprovided for by the original act, and intended to be reached by the amendment, was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens.⁷¹ The language is readily susceptible of this construction. It recites that such trustee "shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." This language aptly refers to such rights, remedies and powers as a creditor holding such a lien is entitled to under the law, rather than to the rights, remedies and powers of a creditor who had actually fastened a lien on the property of the bankrupt estate.⁷² The

The word "creditor," as used in the amendment, means a creditor of the bankrupt. *Matter of Seward Dredging Company* (C. C. A., 2d Cir.), 39 Am. B. R. 372, 242 Fed. 226.

Right to maintain creditor's bill.—*Grand Rapids Trust Co. v. Nichols* (Mich. Sup. Ct.), 40 Am. B. R. 801, 105 N. W. 667.

The status of the general creditors was changed by the amendment, and by operation of law a lien was created and established in favor of the trustee for the general creditors. In *re Pacific Elect. Automobile Co.* (D. C., Wash.), 35 Am. B. R. 322, 224 Fed. 220.

Status of trustee.—The trustee, as representative of the general creditors now has the serviceable footing of a judgment creditor holding an execution duly returned unsatisfied or a creditor holding a lien by legal or equitable proceedings. *Matter of Shelly* (D. C., N. Y.), 37 Am. B. R. 514, 235 Fed. 311; *Matter of Fraser* (D. C., N. Y.), 41 Am. B. R. 839.

70. *Scandinavian American Bank v. Sabin* (C. C. A., 9th Cir.), 36 Am. B. R. 151, 227 Fed. 579; *Meier & Frank Co. v. Sabin* (C. C. A., 9th Cir.), 32 Am. B. R. 595, 214 Fed. 231; *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422; *Matter of Lane Lumber Co.* (C. C. A., 9th Cir.), 33 Am. B. R. 491, 217 Fed. 550; *Senft v. Lewis* (C. C. A., 2d Cir.), 39 Am. B. R. 240, 239 Fed. 116; *Baldwin v. Kingston* (D. C., N. J.), 40 Am. B. R. 641, 247 Fed. 163.

71. *First Nat. Bank v. Wegener* (Ore. Sup. Ct.), 44 Am. B. R. 587, 186 Pac. 41, quoting *Collier on Bankruptcy* (11th ed.) 729.

Potential rights of creditors.—In the case of *Pacific State Bank v. Coats* (C. C. A., 9th Cir.), 30 Am. B. R. 655, 205 Fed. 618, the court quotes the text and says: "The purpose of this amendment is to vest in the trustee for the interest of all creditors the potential rights of creditors possessing or holding liens upon the property coming into his custody by legal or equitable proceedings. The trustee no longer stands in the shoes merely of the bankrupt, with the limited rights of the bankrupt to attack unrecorded liens which may be valid and unimpeachable by the bankrupt; but the amendment by operation of law vests in him a lien equivalent to such as would be acquired by legal or equitable proceedings upon the property coming into custody by virtue of the bankruptcy proceedings." See *Matter of Thompson* (Ref., N. J.), 37 Am. B. R. 434 (quoting text); *Cooper Grocery Co. v. Park* (C. C. A., 5th Cir.), 33 Am. B. R. 262, 218 Fed. 42 (quoting text with approval).

Liability on note not enforceable by bank-

rupt.—Where a note signed by defendant as treasurer of the S. Co., could not be enforced against him personally by the payee, under *Mass. R. L., c. 73, § 37*, the payee's trustee in bankruptcy, who is vested by this section, as amended in 1910, with the rights of an attaching creditor, has no greater rights in respect to the note than the payee himself. *Jump v. Sparling* (Sup. Jud. Ct., Mass.), 33 Am. B. R. 91, 105 N. E. 878.

72. In *re Bazemore* (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236; In *re Calhoun Supply Co.* (C. C. Ala.), 26 Am. B. R. 528, 189 Fed. 537; *Sturdivant Bank v. Schade* (C. C. A., 8th Cir.), 27 Am. B. R. 673, 195 Fed. 188; *Matter of Stern* (D. C., Ohio), 30 Am. B. R. 694, 208 Fed. 488; *Matter of Lane Lumber Co.* (D. C., Idaho), 31 Am. B. R. 792, 210 Fed. 82; *Matter of Superior Drop Forge & Mfg. Co.* (D. C., Ohio), 31 Am. B. R. 455, 208 Fed. 813, quoting text; *Matter of Cooper* (D. C., Iowa), 35 Am. B. R. 321, 216 Fed. 309; *Lake View State Bank v. Jones* (C. C. A., 7th Cir.), 40 Am. B. R. 148, 242 Fed. 821; *National Bank of Bakersfield v. Moore* (C. C. A., 9th Cir.), 41 Am. B. R. 409, 247 Fed. 913; *American Laundry Machine Co. v. Everybody's Laundry* (Ia. Sup. Ct.), 43 Am. B. R. 294, 171 N. W. 161, quoting *Collier on Bankruptcy* (9th ed.), 659; *Riggs v. Price* (Mo. Sup. Ct.), 43 Am. B. R. 413, 210 S. W. 420.

The effect of the amendment of 1910 to section 47-a of the bankruptcy act is to collectively put the creditors of a bankrupt in the position of judgment or attaching creditors by representation and enables the trustee to avoid the lien of a chattel mortgage given, prior to the amendment, by the bankrupt on merchandise retained by him under circumstances which made such mortgage void as to creditors. In *re Hammond* (D. C., Ohio), 26 Am. B. R. 336, 188 Fed. 1020.

Petitioner delivered to bankrupt certain farm implements pursuant to agreements, contemplating a sale, wherein bankrupt agreed to hold the property in trust for the petitioner to secure it for the purchase price of same. Certain terms of credit were given, bankrupt, however, agreeing to turn over upon demand all notes, cash, checks, and book accounts received by him or arising out of the sale of the property, which when so surrendered were to be credited to bankrupt

amendment vests in the trustee, by operation of law, a lien equivalent in all respects to that acquired upon the property coming into the custody of the trustee, by virtue of legal or equitable proceedings instituted against the

as payment on account of the purchase price. It was provided that petitioner could terminate the contract at any time by notice in writing in case it became satisfied that bankruptcy was not entitled to the credit extended, and it was further stated that the written agreement contained all the "conditions of the sale." It was held that the agreements were contracts of sale; that the provision therein that title to the property should remain in the vendor until fully paid for was, under the law of Pennsylvania, void as against bankrupt's creditors and so void as against bankrupt's trustee under section 47a, (2) of the bankruptcy act, as amended in 1910. *In re Hartdagen* (D. C., Pa.), 26 Am. B. R. 532, 189 Fed. 646.

In the case of *Matter of Pittsburg-Big Muddy Coal Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 462, 215 Fed. 703, the court said: "Under the amendment the filing of a petition in bankruptcy constitutes an equitable levy and a caveat to the world, for the following reasons: 1. The plain and natural reading of the words gives the trustees the same right to attach or resist secret liens that judgment creditors would have had if bankruptcy had not intervened, no matter whether there are or are not any such creditors when the petition in bankruptcy is filed. 2. If the amendment were to be construed so as to limit the power of the trustee to cases in which there are lien creditors, virtually nothing would be added to the original Act, for under sections 67-c and f liens created within four months prior to the filing of the petition may be used by the trustee for the benefit of the estate. 3. Although extraneous matter cannot properly be looked to in aid of the interpretation of a clear and unambiguous statute (for such a statute carries its own means of interpretation), yet it may not be amiss, as against a contention that this amendment is not unambiguous, to note that it was the intention of the committee in charge of the measure that the rule announced in *York Mfg. Co. v. Cassell* (15 Am. B. R. 633, 201 U. S. 344), should be changed."

It is true that the case of *In re Lausman* (D. C., Ky.), 25 Am. B. R. 186, 183 Fed. 647, conflicts with the view stated in the text. In this case a computing scale had been sold to the bankrupt upon a contract, which was never recorded, that title should remain in the vendor until the agreed price was fully paid, a portion of which was still due at the time of adjudication. Under the settled law of Kentucky, this contract constituted a sale and a mortgage back to the vendor to secure the price, but was valid, whether recorded or not as between the parties and as against general creditors having no liens. It was

held that it was immaterial whether the other debts of the bankrupt were created before or after the mortgage in question was given, unless a lien on the computing scale in favor of some other creditor was otherwise acquired previous to the adjudication, that it was immaterial that the mortgage was not acknowledged or recorded and that no such lien having been otherwise acquired, the vendor had a preferred claim as against the scale or the proceeds of the sale thereof, under section 64-b (5) of the bankruptcy act.

Bankrupt executed and delivered a bill of sale for a motor truck to petitioner who had paid the full value thereof in cash, bankrupt agreeing to deliver the truck upon directions being given therefor. The truck, which bore bankrupt's name painted on it in large letters, was thus permitted to remain in its possession and use, being kept at a garage where, when bankruptcy intervened, it was being held under an attachment in a suit by the garage company for storage charges and supplies. Upon a petition to reclaim the property it appeared that the law of Massachusetts requires delivery in order to make a purchaser's title good against subsequent purchasers without notice or attaching creditors. *Held*, that the trustee in bankruptcy, being vested with the rights, remedies and powers of a lien creditor by virtue of the amendment of 1910 to section 74 of the Bankruptcy Act, was entitled to the property as against bankrupt's vendee. *In re Waite-Robbins Motor Co.* (D. C., Mass.), 27 Am. B. R. 541, 192 Fed. 47.

Land intended to be covered by mortgage but not described therein pass to the trustee. *Matter of Scruggs Brothers* (D. C., Ala.), 40 Am. B. R. 543, 252 Fed. 322.

Property procured by fraudulent representations.—Where vendors at the earliest opportunity rescind a sale of property to a bankrupt, procured by the latter's fraudulent representations, and under the State law the rights of the defrauded vendor prevail over the claims "of a creditor holding a lien by legal or equitable proceedings thereon," the trustee in bankruptcy acquires no title to such property under section 47-a (2). *Matter of Gold* (C. C. A., 7th Cir.), 31 Am. B. R. 18, 210 Fed. 410. See also *Matter of Collins* (D. C., Ala.), 39 Am. B. R. 510, 242 Fed. 975.

Warehouse receipts.—Upon the bankruptcy of a cotton factor who stored the cotton in a warehouse and pledged the receipts therefor, there were intervening petitions by consignors and receipt holding pledgees. *Held*, that by virtue of the amendment of 1910 to section 47-a(2) of the Bankruptcy Act the trustee represents creditors not secured by receipts with the same force and effect as if they had levied executions upon the cotton in the warehouse. This property came into the custody of the bankruptcy court, and titles or liens which, under the State law, would have prevailed against such levying creditors are superior to the title of

bankrupt by a creditor.⁷³ This provision of the bankruptcy act puts the trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor,⁷⁴ but does not necessarily give him the status of a purchaser without notice.⁷⁵ His rights in respect to the property against which the lien is asserted flow from the amendment and not from the creditors of the estate, for whose benefit such rights must be exercised.⁷⁶

(7) STATUS DETERMINED AS OF DATE OF FILING PETITION.—The statute does not indicate the time as of which the trustee is to be regarded as having acquired the status of a creditor holding a lien by legal or equitable proceedings. It frequently becomes important to determine the time when the status exists, as where for instance the lien of a creditor becomes effectual under a statute if perfected by execution, attachment or other process before the filing or recording of an instrument affecting or transferring the property in question.⁷⁷ If the instrument was duly recorded or filed prior to bankruptcy the lien of a creditor did not attach at that time and the trustee upon his appointment acquires no right to attack the validity of the instrument. In analogy to the rulings in respect generally to the effect of filing a petition in bankruptcy, it has been authoritatively determined that the status of the trustee as a creditor holding a lien exists as of the date of the filing of such petition.⁷⁸

(8) UNRECORDED LIENS.—One principal object of the statute is to vest

the trustee. *Interstate Banking & Trust Co. v. Brown* (C. C. A., 6th Cir.), 37 Am. B. R. 771, 235 Fed. 32.

73. *Sanborn-Cutting Co. v. Paine* (C. C. A., 9th Cir.), 40 Am. B. R. 525, 244 Fed. 672; *Matter of Thompson* (Ref. N. J.), 37 Am. B. R. 434, quoting text; *Pacific State Bank v. Coats* (C. C. A., 9th Cir.), 30 Am. B. R. 655, 205 Fed. 618. But see *Sparks v. Weatherly* (Sup. Ct. Ala.), 32 Am. B. R. 835, 58 So. 280, wherein the court said: "We are of the opinion that the clause of the amendment in question was intended to provide that as to property adversely held the trustee should be entitled to proceed in such cases and in such manner as an individual creditor might have proceeded in subjecting the assets of the bankrupt, had the bankruptcy not intervened to prevent; and that no enlargement of the rights of the trustee representing creditors was intended over and above the rights conferred upon the creditors themselves by the statutes of the State; that as to substantive rights the trustee is in no better position than the bankrupt or his creditors would have been, except that he may come into equity without being required to first exhaust his remedy at law, a matter of advantage to the trustee in some jurisdictions."

State law to control.—The rights of a trustee under section 47a (2) of the bankruptcy Act to property coming "into the custody of the bankruptcy court," being the "rights . . . of a creditor holding a lien by legal or equitable proceedings" are essentially a matter of State law. *Matter of Floyd-Scott Co.* (D. C. Mass.), 35 Am. B. R. 463, 224 Fed. 987; *Hoyt v. Zibell* (C. C. A., 7th Cir.), 43 Am. B. R. 538, 237 Fed. 186.

Equitable estoppel.—The trustee in bankruptcy, when there are creditors entitled to invoke an equitable estoppel, may maintain an action to appropriate the property affected by the estoppel to the extent of the claims of such creditors. *Bergin v. Blackwood* (Minn. Sup. Ct.), 42 Am. B. R. 746, 170 N. W. 508.

74. *In re Hartdagen* (D. C. Pa.), 26 Am. B. R. 532, 150 Fed. 546; *Matter of O'Brien, Jr.* (D. C. N. J.), 32 Am. B. R. 347, 215 Fed. 129.

75. *Matter of Superior Drop Forge and Mfg. Co.* (D. C., Ohio), 31 Am. B. R. 455, 203 Fed.

813; *Matter of Remson Mfg. Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 799; *Matter of Seward Dredging Company* (C. C. A., 2d Cir.), 39 Am. B. R. 372, 242 Fed. 225; *American Laundry Mach. Co. v. Everybody's Laundry* (1a. Sup. Ct.), 43 Am. B. R. 294, 171 N. W. 161.

76. *In re Farmers Co-operative Co.* (D. C., N. Dak.), 30 Am. B. R. 190, 202 Fed. 1008; *In re O'Callaghan* (Ref. Mass.), 30 Am. B. R. 97.

77. *Martin v. Commercial National Bank* (C. C. A., 5th Cir.), 36 Am. B. R. 25, 228 Fed. 651, in which case it was held that where no creditor of a bankrupt acquired a lien on property covered by a mortgage which was executed before the four months' period antedating the bankruptcy but was recorded within that period, the trustee did not acquire the status of a creditor holding a lien superior to that of the mortgage.

78. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275, in which it was stated that the view which accords with other provisions of the act is that the trustee takes the status of a creditor having a lien as of the time when the petition in bankruptcy is filed; *Fairbanks Steam Shovel Co. v. Willis*, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, affg. 32 Am. B. R. 381; *Matter of Anson Mercantile Co.* (D. C., Tex.), 35 Am. B. R. 952; *Mergenthaler Linotype Co. v. Hull* (C. C. A., 1st Cir.), 39 Am. B. R. 187, 239 Fed. 26; *Lake View State Bank v. Jones* (C. C. A., 7th Cir.), 40 Am. B. R. 148, 242 Fed. 821; *Matter of Terrell* (C. C. A., 8th Cir.), 40 Am. B. R. 713, 246 Fed. 743; *Park v. South Bend Chilled Plow Co.* (Tex. Civ. App.), 41 Am. B. R. 23, 190 S. W. 843; *Bonner v. First National Bank* (C. C. A., 5th Cir.), 41 Am. B. R. 60, 248 Fed. 692; *National Bank of Bakersfield v. Moore* (C. C. A., 9th Cir.), 41 Am. B. R. 409, 247 Fed. 913; *Matter of Capital City Cap Co.* (D. C., N. J.), 41 Am. B. R. 604, 251 Fed. 664; *Matter of Schilling and Loller* (D. C., Ohio), 41 Am. B. R. 688, 251 Fed. 972; *Matter of Schilling and Loller* (D. C., Ohio), 41 Am. B. R. 705, 251 Fed. 986; *Otto v. England* (Wash. Sup. Ct.), 41 Am. B. R. 808, 160 Pac. 964; *Jones v. Bank of Excelsior Springs* (Mo. Ct. of App.), 44 Am. B. R. 99, 213 S. W. 892; *Seales v. Holje* (Cal. Ct. of App.), 44 Am. B. R. 127, 180 Pac. 308; *First Nat. Bank v. Wegener* (Ore. Sup.

in the trustee the same right to attack secret unrecorded liens, where record was required by the State law, as was given to judgment creditors and others under that law.⁷⁹ It was not the purpose of the amendment to enlarge the rights of a trustee as against a lien or under a state statute, but the main purpose was to enable the trustee to avoid secret and unrecorded liens created by the act of the bankrupt.⁸⁰ So that where an instrument conveying real property was not recorded prior to bankruptcy, it has been held that the trustee takes title to the land, under a statute which provides that a purchaser of land who records his deed before a prior purchaser has a superior title.⁸¹ The trustee of a bankrupt chattel mortgagor has all the rights and remedies of a lien or judgment creditor as against an unrecorded chattel mortgage, and the mortgagee may not after the filing of a petition in bankruptcy against the mortgagor take possession of the property under the mortgage.⁸² The recording to be effectual must be such as complies with the requirements of the recording acts, and in case of a failure, as where the instrument was not properly acknowledged, the trustee may avail himself of the defects, in the same manner and to the same effect as a lien or judgment creditor.⁸³ A contract of conditional sale, void under the State law as against judgment creditors of the purchaser unless recorded, is likewise void as against the trustee in bankruptcy of the purchaser in possession of the property.⁸⁴ But in some states a conditional sale contract is valid against the trustee in bankruptcy if recorded at any time before the petition is filed.^{84a}

(9) PROPERTY AFFECTED.—It has been held that the liens thus acquired by the amendment reaches generally all the property which comes into the possession of the court and is not limited specially to property which is subject to unrecorded chattel mortgages or contracts of conditional sale.⁸⁵ The trustee has no right as to property in the possession of the bankrupt which did not belong to him,⁸⁶ nor is the general rule that the trustee takes the

Ct.), 44 Am. B. R. 587, 186 Pac. 41; *Kettenbach v. Walker* (Idaho Sup. Ct.), 44 Am. B. R. 619, 186 Pac. 912.

Equity of redemption.—A trustee in bankruptcy does not occupy the position of lien creditor as to property purchased at execution sale of the bankrupt's realty more than two years prior to adjudication, and hence has no right to redeem from the mortgage. *Brown v. Crawford* (D. C., Ore.), 42 Am. B. R. 263, 263 Fed. 248.

The status of a lien or judgment creditor, conferred upon a trustee in bankruptcy by the amendment of 1910 to this section, dates from the filing of the petition in bankruptcy, and is not retroactive as regards the prior four months' period. *Bunch v. Maloney* (C. C. A., 8th Cir.), 37 Am. B. R. 369, 233 Fed. 967.

79. In *re Smith* (D. C., Wis.), 29 Am. B. R. 527, 198 Fed. 876, as to effect of failure to refile chattel mortgage. *Davis v. Harlow* (Md. Ct. of App.), 39 Am. B. R. 300, 100 Atl. 102; *Fuller v. Atlanta National Bank* (C. C. A., 5th Cir.), 42 Am. B. R. 721, 254 Fed. 278.

Unrecorded transfer of bond for title.—Under this section, in connection with the Georgia statute, the trustee in bankruptcy of the holder of a bond for title, has no lien as against the holder of an unrecorded transfer of the bond for title as security. *Matter of Phoenix Planing Mill* (D. C., Ga.), 42 Am. B. R. 145, 250 Fed. 899.

Unrecorded liens.—It was clearly the intention of Congress in adopting the amendment of 1910 to section 47a (2) of the bankruptcy act that thereafter the trustee should not stand in the shoes of the bankrupt with regard to unrecorded liens depending for their validity upon

registration; and that as to the general creditors, such liens should be void. *Matter of Collins* (D. C., Ia.), 37 Am. B. R. 692, 236 Fed. 937.

Unrecorded mortgage.—Under the provisions of this section as amended in 1910, a trustee in bankruptcy has the right to property in the possession of the bankrupt which is superior to the claim of a mortgagee under a mortgage, not recorded as required by law, but which is valid between the parties. *Matter of Social Circle Cotton Mills* (D. C., Ga.), 32 Am. B. R. 567, 213 Fed. 994.

Under the Bankruptcy Act and the Code of Iowa, a mortgage unrecorded, whether written or oral, is of no validity as against the rights of the trustee in bankruptcy of the mortgagor. *Matter of Cooper* (D. C., Ia.), 35 Am. B. R. 321, 216 Fed. 809.

80. *Gates & Co. v. Stevens Construction Co.* (N. Y. Ct. of App.), 38 Am. B. R. 693, 220 N. Y. 38, 115 N. E. 22.

The proceeds of property on which there is a lien invalid for failure to record must be distributed among all of the creditors of the bankrupt without distinction. *Matter of Rosenthal* (D. C., Ga.), 39 Am. B. R. 30, 238 Fed. 597.

81. Title of trustee as against unrecorded instruments.—The effect of the amendment of 1910 to section 47a of the Bankruptcy Act has been to put trustees in bankruptcy on the same basis as creditors and purchasers for value as against unrecorded instruments. *Lynch v. Johnson* (N. C., Sup. Ct.), 35 Am. B. R. 881, 96 S. E. 995. *Contra: Robertson v. Schlotschauer* (C. C. A., 7th Cir.), 40 Am. B. R. 237, 243 Fed. 324.

82. *Fairbanks Steam Shovel Co. v. Wills*, 240

property subject to such liens as may be enforced against it, affected by the amendment.⁸⁷ If the property sold under a contract of conditional sale, not filed as required by a State law, is at the time of bankruptcy in the possession of the vendor, it does not pass to the trustee.⁸⁸

(10) **PRIORITY OF DEBTS.**—The amendment does not conflict with section 64-b (5) relating to priority of debts.⁸⁹ It has been held that a trustee may object to the priority of a claim based upon a mortgage given as security and recorded within the four months' period, and the referee may determine the question of preference in a proper case.⁹⁰ For the purpose of fixing priority as between a trustee in bankruptcy and adversely claiming lien holders, the time of filing the petition is the vital date, and a lien invalid on that date cannot be perfected before adjudication so as to make it valid against the trustee.⁹¹

(11) **CREDITORS HOLDING LIENS; CONDITIONAL SALE CONTRACTS AND CHATTEL MORTGAGES.**—The words "creditor holding a lien by legal or equitable proceedings" include a judgment creditor, holding an execution lien. The purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings favored by the varying registration laws of each of the States. The registration laws of some States include but one of many classes of such creditors. In that case the purpose of Congress is not to be frustrated as to the included class because other classes included in the amendment were not included also in the registration act of that particular State. The breadth of language was used for the purpose of gathering in all classes protected by local registration acts.⁹² If property coming into the custody of the court be claimed by another, the trustee is vested with all the rights, remedies, and powers of a creditor holding a lien

U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, affg. 32 Am. B. R. 381; *Matter of P. J. Sullivan Co., Inc.* (D. C., N. Y.), 41 Am. B. R. 189, 247 Fed. 139, affd. 42 Am. B. R. 530, 254 Fed. 660.

83. *Matter of Caslon Press* (C. C. A., 7th Cir.), 36 Am. B. R. 127, 129, 229 Fed. 133; *Matter of Empress Pharmacy* (D. C., Iowa), 38 Am. B. R. 145, in which case there was a failure to index properly a mortgage executed by the bankrupt. *Matter of Rosenthal* (D. C., Ga.), 39 Am. B. R. 30, 238 Fed. 597.

84. *Matter of O'Brien, Jr.* (D. C., N. J.), 32 Am. B. R. 347, 215 Fed. 129; *Matter of Bettman-Johnson Co.* (C. C. A., 6th Cir.), 42 Am. B. R. 123, 250 Fed. 657.

84a. *De Laval Separator Co. v. Jones* (Me. Sup. Ct.), 41 Am. B. R. 440, 102 Atl. 968.

85. *In re Whitley Bros.* (D. C., Ga.), 29 Am. B. R. 64, 109 Fed. 326.

86. **Property subject to valid liens.**—A creditor holding an unsatisfied execution cannot attach the property of a third person accidentally in the possession of a bankrupt, hence, the trustee in bankruptcy is not given a superior lien by this section, as amended in 1910, upon money paid to the bankrupt by mistake and upon which a bank had a lien. *Brown Bros. Co. v. Smith Bros. Co.* (D. C., La.), 37 Am. B. R. 30, 231 Fed. 475.

87. See discussion under § 70, *post*; *Gates Co. v. Stevens Construction Co.* (N. Y. Ct. of App.), 38 Am. B. R. 396, 220 N. Y. 38, 115 N. E. 22; *Matter of Creech Bros. Lumber Co.* (C. C. A., 9th Cir.), 39 Am. B. R. 487, 240 Fed. 8.

88. *Matter of Remson Mfg. Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 799.

89. **Construction with section 64-b (5).**—*In re Calhoun Supply Co.* (C. C., Ala.), 26 Am. B. R. 528, 189 Fed. 537, and *In re Bazemore* (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236, the court said: "The construction, necessary to effectuate the intention of Congress, does not seem to me to make the amended section conflict with sec-

tion 64-b, clause 5. Under the State law the conditional vendor has no priority over judgment creditors without notice, and the amendment to the Bankruptcy Act places the trustee in that category. As against his right as conferred by the amended section of the Act, the conditional vendor has no priority and the order of payment provided for by section 64 is not therefore interfered with by not allowing the conditional vendor priority of payment." But in *In re Lausman* (D. C., Ky.), 25 Am. B. R. 186, 183 Fed. 647, it has been held that the questions involved do not depend upon what sort of title the trustee may take to the property coming into his custody as provided by the amendment of 1910 to section 47-a (2) of the bankruptcy act, but upon how that property is required to be distributed under section 64-b (5) thereof.

90. *In re Lorch & Co.* (D. C., Ky.), 28 Am. B. R. 784, 199 Fed. 944.

In respect to real property which is in the possession of a person other than the bankrupt under an oral purchase thereof, the trustee holds no better title than the bankrupt, and is not entitled to the property, since under the amendment he has merely the rights of "a creditor holding an execution." *In re Snelling* (D. C., Mass.), 29 Am. B. R. 818, 202 Fed. 259, affd. *Clark & Snelling*, 30 Am. B. R. 50, 205 Fed. 240.

91. *Massachusetts Bonding & Ins. Co. v. Kemper* (C. C. A., 6th Cir.), 34 Am. B. R. 80, 220 Fed. 847.

92. *In re Calhoun Supply Co.* (C. C., Ala.), 26 Am. B. R. 528, 189 Fed. 537.

If a contract of sale is one of conditional sale, so that the title does not pass out of the vendor and such a contract is not required or permitted by the laws of the State to be recorded, the reservation of title is good as against the trustee; however, if it be an absolute sale, whereby the title passes accompanied by a lien

by legal or equitable proceedings thereon. An agreement therefore which would previously have been valid between the parties—such, for example, as a contract of conditional sale⁹³—is no longer necessarily void against the trustee. He is in the position of a creditor holding a legal or equitable lien, and the agreement is to be scrutinized from that point of view. Such an agreement, purporting on its face to be a contract for a lease, may now be shown by the trustee to be a contract of conditional sale, although the bankrupt himself, under the contract, might be estopped from making such assertion.⁹⁴ A trustee may assert his title against the vendor under an unrecorded conditional sale contract.⁹⁵ The section as amended covers the rights of creditors under a chattel mortgage which is void as to such creditors under the laws of the State where made, and the trustee may enforce such rights as against the

given back to the seller to secure the purchase price, the contract amounts to a chattel mortgage, and if not filed, is invalid against the trustee. *Deere Plow Co. v. Mowry* (C. C. A., 8th Cir.), 34 Am. B. R. 384, 222 Fed. 1.

93. *Davis v. Crompton* (C. C. A., 3d Cir.), 20 Am. B. R. 53, 158 Fed. 735. See *In re Kreuger* (D. C., Ky.), 27 Am. B. R. 623, 199 Fed. 367.

Validity of unrecorded conditional sale as against trustee; amendment of 1910; constitutionality.—A contract of conditional sale, reserving title in the conditional vendor until the property sold is paid for, which by State law is invalid unless recorded, as against creditors and lienors of the conditional vendee for value and without notice, is, by virtue of the amendment of 1910 to section 47-a (2), void as against the conditional vendee's trustee in bankruptcy. Such amendment is not unconstitutional as depriving the conditional vendor of his property without due process of law, as it does not violate one's constitutional rights to require him to conform to the recording acts of the State in which he has his property. *In re Williamsburg Knitting Mill* (D. C., Va.), 27 Am. B. R. 178, 191 Fed. 871; *Hart v. Emmerson-Brantingham Co.* (D. C., Mo.), 30 Am. B. R. 218, 203 Fed. 60. But see *Big Four Implement Co. v. Wright* (C. C. A., 8th Cir.), 31 Am. B. R. 125, 207 Fed. 535; *In re East End Mantel & Tile Co.* (D. C., Pa.), 29 Am. B. R. 793, 202 Fed. 215; *In re Nuckols* (D. C., Tenn.), 29 Am. B. R. 867, 201 Fed. 437.

Power to avoid unrecorded contract of conditional sale.—A trustee in bankruptcy, in respect to an unrecorded contract of conditional sale whereby goods have been delivered to the bankrupt and the title retained by the conditional vendor, has the same rights as a creditor holding a lien by legal proceedings; and it is not necessary to his rights that there should, in fact, have been such lien creditors where the petition in bankruptcy is filed. *In re Dancy Hardware & Furniture Co.* (D. C., Ala.), 28 Am. B. R. 444, 198 Fed. 336.

Validity of unrecorded contracts as against trustee.—By virtue of the amendment of 1910 to this section a trustee in bankruptcy, as respects property held by a bankrupt under an unrecorded contract of conditional sale, is vested with all the "rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings," and where property was delivered to bankrupt under a contract of conditional sale, not recorded as required by the Georgia statute, the trustee's rights, as to such property and the proceeds thereof, are superior to those of the conditional vendor. *In re Farmer's Supply Co.* (D. C., Ga.), 28 Am. B. R. 535, 196 Fed. 990.

Bill of sale.—Provisions of a bill of sale to a bankrupt examined and held not to create or reserve a lien superior to the rights of the trustee in bankruptcy. *Matter of Cooper* (D. C., Ia.), 35 Am. B. R. 321, 216 Fed. 309.

94. *In re Franklin Lumber Co.* (D. C., Pa.), 26 Am. B. R. 37, 187 Fed. 281 (revd. on other grounds, 28 Am. B. R. 699, 199 Fed. 1), holding that whenever a judgment creditor may attack a contract, in form a bailment, on the ground that it is really a conditional sale, and may support the attack by competent and relevant evidence that throws light on the true meaning of the contract—the trustee has the same right. The mere form of the agreement does not bind him, as it might bind the bankrupt; see also *In re Gaglione & Son* (D. C., Pa.), 22 Am. B. R. 694, 200 Fed. 81.

The trustee may retain chattels sold to the bankrupt under a conditional sale in a jurisdiction where, if he has really sold it and has also parted with the possession, the conditional vendor cannot enforce against execution creditors a condition that he is to retain the title until the price is paid, and this, even though the transaction has been declared by the parties to be a bailment, if the court is satisfied that a sale with condition as to title annexed was really intended. *In re Gehris-Herbine Co.* (D. C., Pa.), 26 Am. B. R. 470, 188 Fed. 502; *In re Harrington* (Ref., Mass.), 29 Am. B. R. 690, in which case Referee Olmstead discusses with characteristic clearness the circumstances which lead to the enactment of this amendment, and the rights of trustees in respect to chattels sold on condition, or by bill of sale, the possession remaining in the bankrupt.

95. *Potter Mfg. Co. v. Arthur* (C. C. A., 6th Cir.), 34 Am. B. R. 75, 220 Fed. 843; *Matter of Capital City Cap Co.* (D. C., N. J.), 41 Am. B. R. 604, 251 Fed. 664.

mortgagee to the same extent as the creditors might have done.⁹⁶ So too, the trustee may attack a contract, in form a bailment, and show that it is contract for a conditional sale and therefore invalid as to lien creditors.⁹⁷

(12) FRAUDULENT TRANSFERS.—Under the section as so amended the trustee becomes vested with all the rights of a judgment creditor as to real property transferred in fraud of creditors more than four months prior to the filing of the petition.⁹⁸ A conveyance or transfer which is invalid because in fraud of creditors may be attacked by a trustee in the same manner and with like effect as could a judgment creditor had bankruptcy not intervened.⁹⁹ The trustee is not required to allege in an action under this clause, to recover property fraudulently transferred, that a deficiency of assets exists.¹⁰⁰

g. Sales by trustees.—The duty of trustees concerning, and the practice on, sales of assets of the estate is considered under section seventy. In the appointment of an auctioneer the trustee is to be guided by the court; the court may disapprove the selection of an auctioneer made by the trustee, and direct him to select another designated by the court.¹⁰¹

h. Employment of attorneys.—This, too, is considered elsewhere.¹⁰² An attorney may be needed to aid the trustee in the collection of the property of the estate. It would be the trustee's duty in such a case to employ such attorney.

i. Rapidity in administration.—This is required not only by subdivision 2 of this subsection, but by other provisions found in the law and the General orders.¹⁰³

j. Accounting for interest.—Subdivision 1 seems unnecessary. The former statute permitted a temporary investment of the funds where it appeared that distribution might be delayed by litigation.¹⁰⁴ The court or referee could doubtless order this now. Thus, there might be some interest earned. The frequency with which dividends must be paid,¹⁰⁵ however, makes any accumulation of interest unlikely. The trustee should, if possible, arrange with the official depository for interest. In any event, all interest received by a trustee must be accounted for. The interest accruing on interest-bearing assets must be collected and accounted for by the trustee.¹⁰⁶

k. Deposits.—Subdivision 3 of this section makes it the duty of the trustee to deposit all the money received by him in one of the designated depositories and General Order XXIX prescribes the method of withdrawal. These

96. *In re Gelver* (D. C., So. Dak.), 28 Am. B. R. 413, 193 Fed. 128; *Massachusetts Bonding & Ins. Co. v. Kemper* (C. C. A., 6th Cir.), 34 Am. B. R. 80, 220 Fed. 847. See also *Senft v. Lewis* (C. C. A., 2d Cir.), 39 Am. B. R. 240, 239 Fed. 116.

97. *In re Gaglione & Son* (D. C., Pa.), 28 Am. B. R. 604, 200 Fed. 81.

98. *In re Downing* (D. C., N. Y.), 27 Am. B. R. 309, 192 Fed. 683, *affd.* 29 Am. B. R. 228, 201 Fed. 93.

Sale of real estate free from claim for dower; law of Pennsylvania.—Since by the amendment of 1910 to section 47a(2) of the Bankruptcy Act, a trustee in bankruptcy, in so far as the assets of the estate are concerned, is in the position of a lien creditor, and since under the law of Pennsylvania, a lien creditor can issue execution and by a sale thereunder divest the wife of a debtor of her dower interest in real estate, the trustee of a bankrupt may, by a sale in bank-

ruptcy, divest the bankrupt's wife of her interest in her husband's real estate, without her consent. *In re Freedman* (Ref., Pa.), 29 Am. B. R. 135.

99. *Bean v. Parker* (Vt. Sup. Ct.), 38 Am. B. R. 895, 96 Atl. 17; *Riggs v. Price* (Mo. Sup. Ct.), 43 Am. B. R. 413, 210 S. W. 420.

100. *Kraver v. Abrahams* (D. C., Pa.), 29 Am. B. R. 365, 203 Fed. 782.

101. *In re Benjamin* (C. C. A., 2d Cir.), 14 Am. B. R. 481, 136 Fed. 175.

102. See under Sixty-two of this work.

103. Compare Bankr. Act, §§ 47-a (10), 57-n, 65-b.

104. R. S., § 5060.

105. Bankr. Act, § 65-b, as amended, seems a partial reversal of this policy of the original law.

106. *Johnson v. Norris* (C. C. A., 5th Cir.), 27 Am. B. R. 107, 100 Fed. 459.

provisions of the act and the General Order are mandatory in form and were designed to insure the safety of the funds, rather than an increment by way of interest while they were idle. But it seems that the consent of all the parties interested may justify a departure from the prescribed rules.¹⁰⁷ However, referees in bankruptcy should take the utmost care to see that receivers and trustees comply with the law in reference to the depositing of funds, and that they deposit all funds received by them in a regularly designated depository.¹⁰⁸ A trustee may not deposit funds of the estate in interest-bearing savings accounts instead of a general checking account, without the consent of the creditors.¹⁰⁹

III. ACCOUNTS AND REPORTS.

a. In general.—Subdivisions 6, 7, 8 and 10 relate to accounts and reports which the trustee is required to keep and submit. The subdivisions seem redundant. If a trustee follows them literally, he will spend much of his time in keeping accounts and making reports. Stripped of surplusage and read in with General Order XVII, the trustee is required (1) generally, to keep regular accounts of receipts and disbursements, and, specially, (2) to prepare and file an inventory of the estate "immediately upon entering upon his duties," (3) to report the condition of the estate within the first month after his appointment, and every two months thereafter, unless excused by the referee, and (4) to make and file a final report and account at least fifteen days before the final meeting. All this in addition to the twenty-day report on exemptions.¹¹⁰ But, in effect, the "inventory" may be but a summary of the appraisers' report;¹¹¹ and the bi-monthly reports required by subdivision (10) are rarely made. The purpose—that the trustee shall be always under the eye of the creditors and the referee—is apparent. So long as this is recognized, a trustee will, it is thought, perform his duty satisfactorily, even though he does not always have an accountant at his elbow. A trustee, who fails to obey an order to file his final account, may be committed for contempt.¹¹² Payments to a referee of unauthorized charges rendered by the referee, without an order therefor, should not be allowed in the trustee's account;¹¹³ although if payments made to a referee without formal order may not be considered illegal or improper the court may ratify them.¹¹⁴

107. See Bankr. Act, § 63; Huttig Mfg. Co. v. Edwards (C. C. A., 8th Cir.), 20 Am. B. R. 349, 354, 160 Fed. 619.

108. Matter of Barnett (D. C., Ga.), 32 Am. B. R. 585, 214 Fed. 263.

109. Matter of Dayton Coal & Iron Co. (D. C., Tenn.), 38 Am. B. R. 657.

110. General Order XVII.

111. Bankr. Act, see § 70-b, Form No. 13.

112. Failure to obey order to file account; contempt.—The trustee of a bankrupt, in the face of orders requiring him to file his final account, having held up the final settlement of the bankrupt's estate for more than a year, the district court on October 27, 1910, made an order requiring the trustee to file his account by November 15, 1910, or in the alternative to be committed to jail for contempt. On November 14, 1910, a petition to revise such order was allowed. It was held that, it being necessary to consider the peti-

tion as of the date it was granted, it could not be presumed that the court intended to issue a commitment for contempt before judgment of conviction should have been pronounced; that no such judgment being disclosed by the record, and the order, so far as it required the account to be filed, being proper, the petition to revise the order must be dismissed. O'Connor v. Sunseri (C. C. A., 3d Cir.), 26 Am. B. R. 1, 184 Fed. 712.

113. Matter of Borger (Dist. Col. Sup. Ct.), 35 Am. B. R. 238, 43 Wash. L. Rep. 436.

Duty to consult records.—A trustee in bankruptcy has no right to assume that the referee has obtained an order for the allowance of certain charges to himself. It is his duty to consult the records of the court. Matter of Borger (Dist. Col. Sup. Ct.), 35 Am. B. R. 238, 43 Wash. L. Rep. 436.

114. Matter of Schreiber (D. C., Sup. Ct.), 35 Am. B. R. 241, 43 Wash. L. Rep. 500.

b. Practice.—The difference between an account and a report should be noted; an account should deal only in dollars and cents;¹¹⁵ a report should be a running summary of the details of administration. The trustee's report that there are no assets seems also to be called a "return."¹¹⁶ The word "statement" is also used of a report where there are no assets. Whatever these papers be called, they should conform as far as possible to the official forms, should always be verified by the trustee, and, if reciting disbursements, usually be accompanied by vouchers. They should be filed with the referee, if the case has been referred. They should also be audited by the referee.¹¹⁷ This seems, however, a precautionary provision, rather than a requirement. Accounts are usually submitted to creditors at meetings called for that purpose,¹¹⁸ and, if passed by them, are approved.

IV. DISTRIBUTION.

a. In general.—Disbursements must be made by check or draft as directed in subdivision 4. Dividends are to be paid within ten days after they are declared as directed in subdivision 9. Some authority must be shown for all disbursements, whether in dividends or otherwise.¹¹⁹

b. Expenses of administration.—What a trustee may be allowed for expenses of administration is considered elsewhere.¹²⁰

c. Payment of priorities.—So also of his duty as to those persons entitled by the law to priority of payment.¹²¹

d. Dividends.—Likewise of dividends to creditors who have proved their claims.¹²² The only provision here is that dividends must be paid within ten days after they are declared.^{122a}

e. Method of payment.—Subdivision 4 and General Order XXIX should be read together. No moneys can be properly disbursed by a trustee save

Ratification by general creditors of improper allowances by trustee to referee.—Where the general creditors of a bankrupt, after being advised by a special master that payment by the trustee to the referee of certain sums allowed by the latter to himself, is improper, approve the act of the trustee, the trustee should be allowed for such payments, although they were made without an order of the referee which might have been reviewed, and also contrary to a subsequent decision of this court. *Matter of Lacey & Co.* (Dist. Col. Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434; *Matter of Smith* (Dist. Col. Sup. Ct.), 35 Am. B. R. 237, 43 Wash. L. Rep. 436.

Audit of accounts.—It is the duty of a special master to whom a trustee's account has been referred, on the resignation of the referee, to audit the same and credit him with only such items as were authorized by law. He is not justified in allowing unlawful payments merely because no creditors objected to them. *Matter of Borger* (Dist. Col. Sup. Ct.), 35 Am. B. R. 238, 43 Wash. L. Rep. 436.

115. Forms Nos. 49 and 50.

116. Form No. 48.

117. General Order XVII; In re *Baginsky* (Ref., La.), 2 Am. B. R. 243.

118. See Bankr. Act, § 58-a (6).

119. See under Section Sixty-two of this work.

In "Supplementary Forms," *post*, will be found a final order of distribution, including a dividend sheet, the use of which, instead of Form No. 51, is suggested. See also *Hagar and Alexander's Bankruptcy Forms* (2d Ed.); In re *Rude* (C. C., Ky.), 4 Am. B. R. 319, 101 Fed. 805; In re *Hoyt & Mitchell* (D. C., N. Car.), 11 Am. B. R. 784, 127 Fed. 968.

The district court for the Eastern District of North Carolina has adopted and distributed rule 10 as follows: "All funds belonging to bankrupt estates must be deposited in the designated depository (section 47, cl. 3, Bankr. Act), and disbursed only by check or draft drawn on such depository in accordance with dividend sheet prepared by referee and approved by the judge (section 47, cl. 4). Such checks or drafts must be countersigned as provided by general order 29 of the Supreme Court. Depositories and trustees not observing this rule make themselves liable on their bond and to attachment for contempt."

120. See under Section Sixty-two of this work.

121. See under Section Sixty-four of this work.

122. See under Section Sixty-five of this work.

122a. After ten days have elapsed from the time a dividend is declared by the referee, and no party has attempted to have the order for the payment of the dividend set aside, the trustee may be directed to proceed regardless of the correctness of the dividend sheet. *Matter of Stringer* (D. C., N. Y.), 40 Am. B. R. 474, 244 Fed. 629.

"by check or draft on the depository." The provisions of the statute and General Order should be strictly followed,¹²³ and where payments have been made without compliance therewith they have been disallowed.¹²⁴ Thus, if deposited in the district court, money can be withdrawn only by a check or warrant, signed by the clerk and countersigned by the judge, or by "a referee designated for that purpose."¹²⁵ The quoted words are usually availed of in composition cases.¹²⁶ While, if the money is deposited by the trustee, the referee must countersign each check. Payments should not be made upon orders drawn by the referee.¹²⁷ The requirements of the General Order as to stub entries, numbering and the like, should be observed. Checks should always run to and be by the trustee mailed or delivered to the creditors, unless the power of attorney specifically authorizes the attorneys to receive and receipt therefor.¹²⁸ In disbursing dividends, a combination check and receipt, the latter attached to the check but marked off from it by a perforated line, and containing a statement that the check will not be paid on presentation unless the receipt is filled out and signed, has been found convenient.¹²⁹ Trustees will also find it time saving to recite on the face of the check the name and number of the estate, whether it is a first, second, or final dividend, and the rate per cent.¹³⁰ To this end, dividend checks, if numerous, should be specially printed; if not, the use of rubber stamps containing the suggested information will be found inexpensive and effective. But checks should not be signed or countersigned by such a stamp.

f. Trustee's supplemental report.—Though not required, safety seems to suggest that the trustee file a supplemental report after the distribution is complete. This should show every allowance or expense paid and every individual disbursement; and vouchers, signed by the creditors and others and numbered, if possible, to correspond to the check numbers, or attached to the returned checks, should be filed at the same time. Not until such report is filed should the trustee be discharged.¹³¹

V. MISCELLANEOUS DUTIES.

a. Setting apart exemptions.—While exemption rights depend upon State statutes, the manner of claiming such exemptions and of setting apart and awarding them is regulated by the bankruptcy act.¹³² Subdivision 11 of this section requires the trustee to set apart and report the value of the bankrupt's exemptions. In this connection section six should also be consulted. Preliminary to this, the trustee must "set apart the bankrupt's exemptions and report on the items and estimated value thereof." He should thereupon surrender possession of such property to the bankrupt.¹³³ This should be done

^{123.} In re Cobb (D. C., N. Car.), 7 Am. B. R. 202, 112 Fed. 655.

^{124.} In re Hoyt & Mitchell (D. C., N. Car.), 11 Am. B. R. 784, 127 Fed. 968. And see In re Hoyt (D. C., N. Car.), 9 Am. B. R. 574, 119 Fed. 987.

^{125.} General Order XXIX.

^{126.} Compare under Section Twelve of this work.

^{127.} In re Cobb (D. C., N. Car.), 7 Am. B. R. 202, 112 Fed. 655.

^{128.} See Form No. 20; Form No. 21 is not enough.

^{129.} See "Supplementary Forms," post;

Hagar and Alexander's Bankruptcy Forms (2d Ed.).

^{130.} See Rule 14(10) in the district of Western New York, 1 N. B. N. 115.

^{131.} Compare, however, to the contrary, Form No. 51.

^{132.} Bankr. Act, § 2(11); In re Gerber (C. C. A., 9th Cir.), 26 Am. B. R. 608, 186 Fed. 693.

^{133.} In re Soper (D. C., Nebr.), 22 Am. B. R. 868, 173 Fed. 116. The trustee takes no title to exempt property and it is his duty to set the same apart as soon as practicable. In re Goodman (C. C. A., 5th Cir.),

within twenty days after the trustee receives notice of his appointment.¹³⁴ Thus, the trustee acts in a quasi-judicial capacity in the first instance, and, if there is no exception taken, the referee usually approves. But any creditor may take exception to the trustee's action.¹³⁵ If exception is taken, the practice is defined in General Order XVII, which requires it to be taken within twenty days after filing the report and the referee may not extend such time.¹³⁶ This whole subject was also regulated by a general order under the former law.¹³⁷

b. Furnishing information.—The trustee's duty here is similar to the referee's.¹³⁸ He is also liable to the same penalties.¹³⁹ This duty is akin to that of frequent accountings, the latter seeming for the whole body of creditors, the former for any individual who may request. Any person interested in the bankrupt estate has a right to an inspection of the accounts and papers of the trustee,¹⁴⁰ and to any information in respect to the estate which the trustee can impart.¹⁴¹ It is not thought, however, that, in answering inquiries by mail, the trustee can use the "official business" envelope, as can the referee. Cases under the former law are still in point.¹⁴²

c. Other duties.—The trustee also has other miscellaneous duties, as, for instance, the examination and correction of proofs of debt,¹⁴³ attendance on examinations of the bankrupt, and to assist the creditors and the referee generally in the realization and distribution of assets.

VI. CONCURRENCE OF TWO OF THREE TRUSTEES NECESSARY.

Three trustees are rarely appointed. If they are, a majority must always concur. This seems a variance from the rule that a trust to two or more

23 Am. B. R. 504, 174 Fed. 644; *Matter of Vonkee* (D. C., Wash.), 38 Am. B. R. 799; *Matter of Shrimer* (D. C., N. Car.), 36 Am. B. R. 404, 228 Fed. 794.

Duty of trustee to set apart exemptions.—In the case of *In re Andrews & Simonds* (D. C., Mich.), 27 Am. B. R. 116, 120, 193 Fed. 776, the court said: "There is nothing in the bankruptcy law except the above caption to the official form of schedule, which either requires or even suggests that the bankrupt must specify the articles in a stock of goods which he claims as his exemption. On the contrary, the law expressly lays upon the trustee the duty to select and set apart the exemption. In other words, if the bankrupt has clearly indicated his intention not to waive his exemption and has also specified the particular class of property owned by him from which he claims his exemption, it then becomes the duty of the trustee to select and sever the exemption from the mass of property belonging to the estate of the character and in the class indicated. This view is supported by authority."

In the case of *In re Finkelstein* (D. C., Pa.), 27 Am. B. R. 229, 231, 192 Fed. 738, the court said: "The bankrupt is presumed to be entitled to the exemption which the law allows, until it is otherwise judicially determined, and in this he has a right to be heard. A trustee is not a judicial officer, his functions and duties are merely administrative, and when requested the law com-

mands him accordingly to set aside the exemption schedules, and in this he has no alternative."

Order of state court to turn over exemptions of officers of that court; contempt.—A trustee, who, prior to an order made in a state court directing him to turn over a bankrupt's exemption to a receiver in the state court, has turned the exemption over to the bankrupt, is not guilty of contempt. *Garlington v. Coker* (Sup. Ct., Ga.), 32 Am. B. R. 416, 141 Ga. 678, 81 S. E. 1107.

134. General Order XVII, Form No. 47.

135. For forms, see "Supplementary Forms," *post*. As to the right of a trustee to except to his own formal administrative act setting apart an exemption claimed by the bankrupt, see *In re Rice* (D. C., Pa.), 21 Am. B. R. 202, 164 Fed. 514. As to right of bankrupt to except to the trustee's action, see discussion under Section Six of this work.

136. *Matter of Krecun* (C. C. A., 7th Cir.), 36 Am. B. R. 172, 229 Fed. 711.

137. Act of 1867, General Order XIX.

138. Bankr. Act, § 39-a(3).

139. Bankr. Act, § 29-c(3). See also § 29c.

140. Bankr. Act, § 49, *post*.

141. *Matter of Petersen* (Ref., Minn.), 10 Am. B. R. 355. See also *Petition of Moulthrop* (C. C. A., 6th Cir.), 41 Am. B. R. 654, 249 Fed. 468.

142. *In re Perkins*, Fed. Cas. 10,982; *In re Blaisdell*, Fed. Cas. 1,488.

143. Compare under Section Fifty-seven of this work.

is vested in all and that all must, therefore, join in exercising it. The law being mandatory in requiring either one or three trustees,¹⁴⁴ it seems doubtful whether, on the death of one, the survivors can do anything until the vacancy is filled in the regular way.¹⁴⁵

VII. TRUSTEE TO RECORD CERTIFIED COPY OF ADJUDICATION.

The subsection was added in 1903. Section 21-e seems to have been overlooked. There can be no doubt, however, as to the meaning of the new subsection. The trustee is bound within the time limited to file, which doubtless means also to record, in all counties where the bankrupt has real estate, a certified copy of the decree of adjudication. It is unfortunate that this filing is not in words given the effect of actual notice. Thus the recording of the certified copy of the order approving the trustee's bond is still essential.¹⁴⁶ Careful trustees will see that both these copies are recorded. This new duty is put only on trustees in proceedings begun after February 5, 1903.¹⁴⁷

144. Bankr. Act, § 44.

145. Id. But see Bankr. Act, § 46.

146. See under Section Twenty-one of this work.

147. See "Supplementary Section to Amendatory Act," *post*; Hagar and Alexander's Bankruptcy Forms.

SECTION FORTY-EIGHT.

COMPENSATION OF TRUSTEES, RECEIVERS AND MARSHALS.

§ 48. **Compensation of Trustees.**— *a* Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lienholders,* by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred* dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

d *Receivers or marshals appointed pursuant to section two, subdivision three, of this act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided,*

* Amendment of 1910 in italics.

That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.

e Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.

Analogous provisions: In U. S.: Act of 1867, §§ 28, 47, R. S., §§ 5099, 5124, 5127, 5127A; Act of 1841, § 6; Act of 1800, § 29.

In Eng.: Act of 1883, § 72; Act of 1890, § 15; General Rules, 125, 305, 306.

In Can.: Act of 1919, § 40.

Cross-references: To the law: Jurisdiction of court of bankruptcy to authorize business of bankrupt to be conducted, and allow compensation therefor, § 2(5).

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 - (6) *ALLOWANCE BY COURT*, 748.

II. Apportioning Compensation Between Several Trustees, 748.**III. Withholding Compensation When Trustee Removed, 748.****I. COMPENSATION OF TRUSTEES.¹**

a. *Comparative legislation*.—In England, the fees of trustees are fixed by resolution of the creditors, subject to a review, under certain conditions, by the board of trade.² In Canada the trustee receives such remuneration as shall be voted to him by the creditors, but in no event more than five per cent of the cash receipts.^{2a} Prior to the present law, assignees' fees in this country have been "in the discretion of the court."³ The amendatory act of 1874 reduced the customary fees then paid by one-half.⁴ The present method is doubtless an adaptation of the State systems for compensating executors, administrators, receivers, and the like. The changes made by the amendatory acts of 1903 and 1910 are thought to strike a fair mean between the loose methods of the old law and the niggardly rigidity of the present statute as originally passed.⁵

b. *Amount of compensation*.—Three general considerations as to trustees' compensation should be noted: (1) that fixed by this section is "full compensation for their services," [save that which may be allowed under § 2 (5) as now amended];⁶ (2) the exact percentage, not greater than the prescribed upward limit, is fixed by the court, there being in this a difference between the fees of referees and those of trustees,⁷ and (3) no compensation

1. See also Am. B. R. Dig., §§ 328-331.

2. English Act of 1883, § 72; General Rules 305, 306.

2a. Can. Bankr. Act of 1919, § 40.

3. See "Analogous Provisions," *ante*.

4. R. S., § 5127-a.

5. Compare pp. 23-25, Report of Ex. Com. of Nat. Assn. of Referees in Bankruptcy, March, 1900.

6. See General Order XXXV(3).

7. See Bankr. Act, § 40a.

is payable until after the services are rendered, i. e., when the administration is closed. The compensation is of two kinds, a filing fee and certain commissions, fixed and determined by the amounts which pass through the hands of the trustee.

c. Amount under original act.—Before the amendatory act of 1903 the commissions to be paid to trustees could only be reckoned on "sums to be paid as dividends and commissions,"⁸ and the rate was but about half that customarily allowed corresponding officers even fifty years ago.⁹ The result was that few competent men would serve as trustee the second time, thus crippling the administration of the law. Efforts were made to meet the difficulty in various ways, as by appointing attorneys to be trustees and allowing them compensation for legal services as an expense of administration,¹⁰ by appointing attorneys for trustees in asset cases, with a tacit understanding that the attorney's allowance should be shared with the trustee, or by allowing trustees extra compensation as agents of the creditors when they did more than perform the regular duties required by the law.¹¹ Each of these methods was of doubtful legality and subject to abuse. Since § 72, added by the amendatory act, they are no longer possible.

d. Pauper cases.—In certain cases, the trustee may serve without pay.¹² It has been thought, however, that, unlike the referee, a trustee cannot be compelled to serve in a pauper case, but, if the creditors desire him to do so, they must furnish his fee.¹³

e. Effect of amendatory acts of 1903 and 1910.—(1) IN GENERAL.—The amendatory act of 1903 has modified the original law as to trustees' fees in four particulars, all intended to make them more adequate.¹⁴

(2) COMMISSIONS ON DISBURSEMENTS.—(I) *In general*.—Commissions are to be computed on "all moneys disbursed or turned over to any person, including lien-holders¹⁵ by them as may be allowed by the courts," and cannot be otherwise fixed by agreement with the creditors.¹⁶ This presupposes that the

8. In re Utt (C. C. A., 7th Cir.), 5 Am. B. R. 383, 105 Fed. 754; In re Smith (D. C., N. Car.), 5 Am. B. R. 559, 108 Fed. 39; In re Kaiser (D. C., Mont.), 8 Am. B. R. 108, 112 Fed. 955; In re Mammoth Pine Lumber Co. (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731; In re Goldville Mfg. Co. (D. C., S. C.), 10 Am. B. R. 552, 123 Fed. 579. *Contra*: In re Barber (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547. Under the act prior to the amendment it was held that trustees were entitled to commissions on funds arising from sales of mortgaged property and distributable to mortgage creditors. In re Muhlhäuser (Ref., Ohio), 9 Am. B. R. 80.

9. Compare Rule 59, So. District of New York, under law of 1841, Owen on Bankruptcy, Appendix, p. 13.

10. In re Mitchell (Ref., Pa.), 1 Am. B. R. 687. *Contra*: In re Mukdau, Fed. Cas. 9,905.

11. In re Plummer (Ref., N. Y.), 3 Am. B. R. 320; In re Dinam & Co. (D. C., Pa.), 17 Am. B. R. 110, 146 Fed. 731, permitting an allowance for the trustee's personal services rendered in connection with sales of the goods belonging to the estate. *Contra*: In re Epstein (D. C., Ark.), 6 Am. B. R.

121, 109 Fed. 578. See also In re Mammoth Pine Lumber Co. (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731.

12. See Bankr. Act, § 51-a(2).

13. In re Levy (D. C., Wis.), 4 Am. B. R. 108, 101 Fed. 247.

14. See Bankr. Act, § 51-a(2) (4). Gugel v. New Orleans Bank (C. C. A., 5th Cir.), 39 Am. B. R. 160, 239 Fed. 676.

Congress intended by the amendments to sections 40-a and 48-a to provide what it considered ample compensation for services to be rendered by trustees, and by section 72 to relieve the courts of the necessity of determining what constitutes legal compensation for such officers. American Surety Co. v. Freed & Hoffman (C. C. A., 3d Cir.), 35 Am. B. R. 103, 224 Fed. 333.

15. Amendatory Act of 1910, § 9.

16. Agreement with creditors.—The commissions legally payable to trustee are controlled and measured by the "money distributed" or "moneys disbursed or turned over," within the meaning of sections 40-a and 48-a of the Bankruptcy Act, and cannot be otherwise fixed by agreement with the creditors. American Surety Co. v. Freed (C. C. A., 3d Cir.), 35 Am. B. R. 103, 224 Fed. 333. The fact that a trustee in good faith agrees prior to a sale to accept a less amount

money disbursed belonged to the estate of the bankrupt and was rightfully in the hands of the trustee for disbursement. Such funds may come into the possession of the court for this purpose in two ways: (1) By operation of law, and (2) by the consent or acquiescence of those interested therein.¹⁷

(II) *Property not lawfully in hands of trustee.*—Property which comes to the possession of a trustee in bankruptcy through the fraud of the bankrupt, and is adjudged to be returned to the victim of the fraud, is not a part of the estate of the bankrupt, and the referee and trustee may not be allowed their statutory percentages out of it.¹⁸

(III) *"On all moneys disbursed."*—The words "on all moneys disbursed" are substantially the same as "received and paid out," which are found in the New York Code of Civil Procedure,¹⁹ fixing the commissions of executors and administrators, and cases construing that section and its predecessors before the code will be found in point.²⁰ There is a distinction between the basis of the compensation of the referee and the trustee in this respect; that of the former is reckoned only on "moneys disbursed to creditors." The trustee is entitled to commissions on all moneys disbursed by him, whether to creditors, secured or unsecured, or having priority, or to other persons.²¹

(IV) *Secured and priority claims.*—The amendment accords to trustees' commissions on all claims whether secured or entitled to priority under the laws of a State.²² If a secured creditor chooses to realize through the bankruptcy court, and the trustee thereby receives and pays out money, the equities are strongly against the secured creditor, and he should pay the commissions.²³

(V) *Property not converted into money.*—Prior to the amendment of 1910 it was questioned whether, if in such a case property, but not money, is received and turned over by the trustee, the latter was entitled to commissions.²⁴ It is probable that the language of the former statute did not entitle the trustee to commissions on property not converted into moneys,²⁵ but turned over at an

as commissions than he is actually entitled to, is not a bar to his claim for the amount so stated. *Matter of Breakwater Co.* (D. C., Pa.), 33 Am. B. R. 721, 220 Fed. 228.

17. *In re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 29, 145 Fed. 966.

18. *Gillespie v. J. C. Piles & Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 502, 512, 178 Fed. 886.

Stockbrokerage case.—Upon the bankruptcy of a stockbroker, the commissions of the trustee are calculated on funds which do not include either securities or their proceeds which claimants have successfully reclaimed. *Matter of Wilson & Co.* (D. C., N. Y.), 42 Am. B. R. 350, 252 Fed. 631.

19. N. Y. Code Civ. Proc., § 2730.

20. For instance *Hosack v. Rogers*, 9 Paige, 461; *Rundle v. Allison*, 34 N. Y. 180; *Betts v. Betts*, 4 Abb. N. C. 317, 437; *Cox v. Schermerhorn*, 18 Hun (N. Y.) 16.

21. *In re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966; *Gugel v. New Orleans Bank* (C. C. A., 5th Cir.), 39 Am. B. R. 160, 239 Fed. 676. But see *In re Meadows* (D. C., N. Y.), 29 Am. B. R. 165, 199 Fed. 304, holding that such fees are not allowable where the disbursements when made from the proceeds of the sale of stock which had never been in the possession of the court, although the sale was conducted by the trustee under an order of the referee.

Commissions on profits of sale.—Where the volume of business transacted by a trustee amounted to about \$900,000, resulting in a profit of \$50,000, his award should be limited to the statutory percentages on the profits, as it cannot be said that trustee disbursed the moneys received except as to the profits. *Mat-*

ter of New York Commercial Co., (C. C. A., 2d Cir.), 36 Am. B. R. 496, 231 Fed. 445.

22. *In re Muhlihauser Co.* (Ref., Ohio), 9 Am. B. R. 80; *In re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 30, 145 Fed. 966; *In re Erie Lumber Co.* (D. C., Ga.), 17 Am. B. R. 689, 701, 150 Fed. 817.

23. *In re Sanford Mfg. Co.* (D. C., N. Car.), 11 Am. B. R. 414, 126 Fed. 888. The reasoning in *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547, is in point. See also *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 222.

24. The distinction between "money" and "property" made by the statute would not here be applicable. The secured creditor makes use of the system because it is apparently less expensive. Whether what he receives is money or land, he should pay the officers through whom it comes for their services, provided he has himself asked the relief. By analogy only, it seems, need these be the commissions fixed by the law.

25. Compare *Burtis v. Dodge*, 1 Barb. Ch. (N. Y.) 77. But see also *Thompson v. Pritchard*, 12 Week. Dig. (N. Y.) 80. Compensation to a receiver may be computed by including as "disbursements" the value of the property delivered by him. *In re Cambridge* (D. C., Mass.), 14 Am. B. R. 168, 134 Fed. 983.

agreed value to a creditor, or any other person. The amendatory act of 1910 inserted the words "or turned over to any person, including lien-holders," and has thus disposed of this question in favor of the allowance of commissions to trustees on account of property turned over to the bankrupt or a person holding a superior lien against the property.²⁶

(VI) *Property or money on which commission allowed.*—A trustee is entitled to commissions on all sums which, but for an outside agreement between the parties and their attorneys, would have been paid through the trustee.²⁷ Thus, he is entitled to commissions on the proceeds of the sale of exempt property, where the bankrupt does not object.²⁸ Likewise, where a corporation is organized for the purpose of taking over the bankrupt's business, the creditors agreeing to take stock in the new corporation in payment of their claims, the trustee is entitled to commission on the amount disbursed through the corporation by means of shares of its stock.²⁹ Commissions are payable on sums disbursed to lienors from the funds in the hands of the trustee which were subject to the liens.³⁰ And where a mortgagor did not prove his claim, but purchased the mortgaged premises on a sale by the trustee subject to the mortgage, the trustee is only entitled to commissions on the sale price of the equity of redemption.³¹ But the trustee is not entitled to compensation for his services from the lienors, where the proceeds of a sale of a bankrupt's assets, after distribution to the lienors, leave no surplus for the bankrupt estate.³² Such commissions should be paid out of the estate upon the assumption that the trustee would not have administered incumbered property unless for the interest of the estate.³³

(VII) *Partnership and individual bankruptcy estate.*—Where a partnership and the individuals comprising it join in a single involuntary petition and are

26. As in a subsequent clause of subsection. See also §§ 1(25), 60-d. Compare *American Surety Co. v. Freed & Hoffman* (C. C. A., 3d Cir.), 35 Am. B. R. 103, 224 Fed. 333.

27. In re *Sanford Mfg. Co.* (D. C., N. Car.), 11 Am. B. R. 414, 126 Fed. 888.

28. In re *Castleberry* (D. C., Ga.), 16 Am. B. R. 430, 143 Fed. 1018.

29. *Matter of Breakwater Co.* (D. C., Pa.), 33 Am. B. R. 721, 220 Fed. 226, revd. 224 Fed. 333.

30. In re *Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966.

31. *Matter of Old Oregon Mfg. Co.* (D. C., Wash.), 38 Am. B. R. 409.

32. *Smith v. Township of Au Gres* (C. C. A., 6th Cir.), 17 Am. B. R. 745, 150 Fed. 257. This case was decided before the amendment of 1910, but *Matter of Meadows* (C. C. A., 2d Cir.), 33 Am. B. R. 649, 211 Fed. 948, decided since 1910, is to the same effect. See also *Gugel v. New Orleans Bank* (C. C. A., 5th Cir.), 39 Am. B. R. 100, 230 Fed. 676.

33. *Payment out of estate.*—*Matter of Huggins* (C. C. A., 8th Cir.), 24 Am. B. R. 715, 179 Fed. 490, in which the court said: "A court of bankruptcy should not assume charge of incumbered property and liquidate the liens on it, unless there are reasonable grounds for believing some advantage will accrue to the bankrupt's estate. If the validity of the liens is unquestioned, and their amount is such that there is probably no excess of value in the property, it should

be surrendered to the lienholders or others entitled, unless some other reason appears for retaining control. A court of bankruptcy is not a court of general jurisdiction for the adjudication of controversies or the administration of assets in which the bankrupt's estate is in no wise interested. If, however, cognizance is taken, it should be assumed some benefit or advantage was expected to accrue to the general creditors, and if it results otherwise it is equitable to make the general estate bear the cost of the proceeding. Here the proceeds of sale did not equal the admitted incumbrance, and the deficiency should not be further increased by deducting the commissions of the officers, if there is a general estate against which they can be charged. This is in analogy to the general practice in equity in foreclosure cases, where, if possible, the judgment lien creditors are paid in full, and if a deficiency results from deducting the costs from the proceeds it goes as a judgment against the debtor. It appears here that there was a general estate of the bankrupt out of which the commissions might be paid. Therefore we need not determine what should be done in case of a sale by a trustee in bankruptcy at the instance or with the concurrence of a lien creditor, a deficit of proceeds, and no general estate."

adjudged bankrupt, there is only one case for the purpose of computing the trustee's fees and commissions, and he should not be given an allowance on both the partnership estate and the individual estate separately computed.³⁴

(3) **RATE OF COMMISSION.**—The rate per cent. of commissions was considerably increased by the amendment of 1903, but only in small or medium-sized cases. On estates of over ten thousand dollars it remains unchanged. The purpose clearly is, on the one hand, an additional incentive to the discovery of assets in estates where the schedules show little or nothing, and a moderate increase in compensation in larger estates which, being spread over a goodly total, will not be felt. Thus, the rate on the first five hundred dollars is now six per cent. instead of three per cent., on the next one thousand dollars four per cent. instead of three per cent., on the next eight thousand five hundred dollars two per cent. instead of about two and two-fifths per cent.,³⁵ and, on the balance, one per cent., as now. That these fees are reckoned on "moneys disbursed," will also add materially to a trustee's emoluments in small cases.

(4) **COMMISSION IN CASE OF COMPOSITION.**—When a trustee has been appointed and qualified in a case resulting in a composition, he may be allowed "not to exceed one-half of one per centum of the amount to be paid to creditors." A trustee is rarely appointed in such cases,³⁶ but may be. As the law stood before the amendatory act of 1903, he could be allowed nothing. This is now corrected, and he is paid the same rate as is the referee.

(5) **ADDITIONAL COMPENSATION FOR CONDUCT OF BUSINESS.**³⁷—Prior to the amendment of this section in 1910 by the addition of subsection *e* a trustee in bankruptcy was not entitled to an allowance of extra compensation,³⁸ but since the addition of that subsection, where the business of a bankrupt is ordered continued by a trustee, the court may allow additional compensation to him.³⁹ The maximum amount is fixed by the amendment. General Order XXXV (3) is, however, in no wise changed by the amendments. Under it, the compensation of trustees cannot be other or more than that fixed by § 48. This is emphasized by § 72, added by the amendatory act of 1903. A contract for extra compensation, made with a creditor owning more than ninety per cent. of the unsecured claims against the bankrupt, is void as against

34. *Matter of Rider* (D. C., Mont.), 34 Am. B. R. 280, 220 Fed. 193.

35. This apparent decrease is not actual because of the changed basis of computation, and the larger rates on the first \$500 and \$1,500.

36. See *In re Rung* (Ref., N. Y.), 2 Am. B. R. 620.

Commissions on deductions.—Where, under the terms of an order for the sale of assets requiring ten per cent. to be paid in cash at the time of the sale, it was provided that in case the property was purchased by a creditor there might be deducted from the balance of the purchase price the amount of the distributive share thereof to which he might be entitled, the trustee is entitled to commissions upon the amount deducted. *In re Morse Iron Works & Dry Dock Co.* (D. C., N. Y.), 19 Am. B. R. 846, 154 Fed. 214.

37. See also Am. B. R. Dig. § 330.

38. *In re Epstein* (D. C., Ark.), 6 Am. B. R. 191, 109 Fed. 879; *In re Carolina Cooper-*

age Co. (D. C., N. Car.), 3 Am. B. R. 154, 96 Fed. 950; *Matter of Shiebler & Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 162, 174 Fed. 336; *In re Coventry Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 623, 166 Fed. 516. Compare *In re Plummer* (Ref., N. Y.), 3 Am. B. R. 320.

39. *Matter of Pequot Brewing Co.* (Ref., N. Y.), 18 Am. B. R. 352.

The "additional compensation" for conducting the bankrupt business as a going concern is realized by the allowance of commissions on the disbursements made in such conduct of the bankrupt business as well as on other disbursements. *Matter of Hart & Co.* (D. C., Hawaii), 17 Am. B. R. 480. The trustee may be allowed compensation for his services and expenses in attending and conducting a sale of the assets. *In re Dimm & Co.* (D. C., Pa.), 17 Am. B. R. 119, 146 Fed. 402. See *In re Knocher & Co.* (C. C. A., 9th Cir.), 28 Am. B. R. 747, 197 Fed. 136.

public policy.⁴⁰ A trustee who is also an attorney may not receive, in addition to the trustee's fees, compensation for legal services performed.⁴¹ And where the volume of business transacted by a trustee amounted to a large sum, resulting in considerable profits, his commission must be computed on the profits and not on the business transacted.⁴² The amendment does not affect the compensation of a trustee appointed before it took effect.⁴³

(6) ALLOWANCE BY COURT.—The amount allowed as commissions may be less than those fixed by this section. It should always be borne in mind that no commissions can be paid or withheld until allowed by the court,⁴⁴ and in any event, only in such amount "as may be allowed by the court." The allowance rests in the sound discretion of the court and is not reviewable except where it appears from the record that such discretion has been abused.⁴⁵

II. APPORTIONING COMPENSATION BETWEEN SEVERAL TRUSTEES.

Whether there be three trustees or one, the compensation to all cannot be more than to one. But the court must apportion the amount between the trustees "according to the services actually rendered." This is contrary to the usual rule.⁴⁶

III. WITHHOLDING COMPENSATION WHEN TRUSTEE REMOVED.

The rule stated in subsection *c* needs no comment.⁴⁷ Within the limits fixed by law the amount to be allowed as commissions is subject to the sound judicial discretion of the court. Where a trustee has been negligent in the performance of his duty, the court may, in a proper case, without the filing of any exceptions, deny him any commissions.⁴⁸ A mere resignation or a vacancy because of disqualification discovered after appointment would not bar the trustee from compensation. Where a trustee is permitted to resign to avoid the odium of removal, the court may reduce his claim for compensation.⁴⁹ In all such cases, the proportion should be fixed in accordance with subsection *b*.⁵⁰

40. *Devries v. Orem*, 17 Am. B. R. 876, 104 Md. 648, 65 Atl. 430.

41. *In re Felson* (D. C., N. Y.), 15 Am. B. R. 185, 139 Fed. 281; *In re McKenna*, (D. C., N. Y.), 15 Am. B. R. 4, 137 Fed. 611; *Matter of Van Denberg* (D. C., Ohio), 34 Am. B. R. 521, 221 Fed. 449.

42. *Matter of New York Commercial Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 406, 231 Fed. 445.

43. *In re Screws* (D. C., Ga.), 17 Am. B. R. 269, 147 Fed. 989.

44. *In re Hughes*, Fed. Cas. 6,841; *In re Noyes*, Fed. Cas. 10,371; *In re Dean*, Fed. Cas. 3,699.

45. *Matter of Cash-Papworth* (C. C. A., 2d Cir.), 31 Am. B. R. 709, 210 Fed. 24.

46. Compare *White v. Bullock*, 15 How. Pr. (N. Y.) 102. For similar rules as to the referee, see § 40-b.

47. See generally under § 46.

Personal expenses and commissions will be denied a trustee removed by the court for due cause. *In re Leverton* (D. C., Pa.), 19 Am. B. 434, 155 Fed. 925, 931.

48. *In re Schoenfeld* (C. C. A., 2d Cir.), 25 Am. B. R. 748, 183 Fed. 219.

49. *In re Fidler & Son* (D. C., Pa.), 23 Am. B. R. 16, 172 Fed. 632.

50. A similar rule is applied to the referee, Bankr. Act, § 40-a.

SECTION FORTY-NINE.

ACCOUNTS AND PAPERS OF TRUSTEES.

§ 49. **Accounts and Papers of Trustees.**—*a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

Analogous provisions: In U. S.: R. S., § 5062B.

In Eng.: Generally to the General Rules, as Rules 217, 225, 226, 244, 273 (10), 290.

In Can.: None.

Cross-references: To the law: Punishment of trustee for secreting or destroying papers, § 29-a.

Trustee to keep accounts of receipts and disbursements, § 47-a(6); to lay before creditors detailed statements of administration of estate, § 47-a(7); to make final reports and file final accounts, § 47-a(8); to report to court as to condition of estate, § 47-a(10).

To the General Orders: Report as to exemptions, XVII.

Failure of trustee to file report or statement required by the act; order to show cause, XVII.

1. ACCOUNTS AND PAPERS OF TRUSTEES.

That the accounts and papers of trustees shall always be open to the inspection of officers and all parties in interest, seems to follow from § 47-a.¹ This section is, therefore, of little importance. "Accounts and papers" includes the books of the bankrupt in the possession of the trustee; in fact, any documents whether originated by him or received by him from the bankrupt. The penalties for secreting documents and for refusing to permit inspection are discussed elsewhere.²

1. See pp. 663, 664, *ante*.

2. See under § 29.

SECTION FIFTY.

BONDS OF REFEREES AND TRUSTEES.

§ 50. **Bonds of Referees and Trustees.**—*a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d The court shall require evidence as to the actual value of the property of sureties.

e *There shall be at least two sureties upon each bond.*

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.

j Joint trustees may give joint or several bonds.

k If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Analogous provisions: In U. S.: As to registers bonds Act of 1867, § 3, R. S., § 4995;

As to assignees' bonds, Act of 1867, § 13, R. S., § 5036; Act of 1841, § 9.

In Eng.: As to trustees, § 21 (2); General Rule 342.

In Can.: As to trustees, Act of 1919, § 14.

Cross-references: To the law: Certified copy of order approving bond evidence of vesting title in trustee, § 21-e.

Bond not required on appeals or writs of error by trustee, § 25-c.

To the General Order: Notice to trustee of his appointment to state penal sum of bond, XVI.

To Official Forms: Bond of referee, No. 17; bond of trustee, No. 25; order approving trustee's bond, No. 26.

SYNOPSIS OF SECTION.

I. Bonds of Referees and Trustees, 751.

- a. *Of referees*, 751.
- b. *Of trustees*, 751.
- c. *Sureties on bonds; forms*, 752.
- d. *Where filed*, 752.
- e. *Suits on bonds*, 752.
- f. *Effect of failure to give bond*, 753.

I. BONDS OF REFEREES AND TRUSTEES.

a. *Of referees.*—The referee, though a judicial officer, is required to give a bond. So was the assignee under the former law.¹ The amount, the sufficiency of the sureties, and the time within which the bond must be filed are usually fixed in the order of appointment. The condition is "the faithful performance of their official duties." The amount cannot be larger than five thousand dollars. A referee cannot act as such until he has filed his bond. Form No. 17 should be used.^{1a}

b. *Of trustees.*²—A trustee, too, must give a bond. This was not necessarily so under the former law; the judge might order the assignee to give a bond and, on the request in writing of a creditor, was required so to order.³ Trus-

1. Act of 1867, § 3, R. S., § 4495.

1a. The purpose of a referee's bond, though made to the United States as obligee, is to protect private individuals as well as the United States. *United States v. Ward* (C. C. A., 8th Cir.), 43 Am. B. R. 711, 257 Fed. 352.

Taking illegal fees.—A bond conditioned for the faithful performance of the duties of the

office of referee covers moneys collected in the form of illegal fees and the sureties are liable therefor. *United States v. Ward* (C. C. A., 8th Cir.), 43 Am. B. R. 711, 257 Fed. 372.

2. See also Am. B. R. Dig., § 321.

3. Act of 1867, § 13, R. S., § 5036. Compare *In re Sands*, Fed. Cas. 12,301.

tees' bonds must be given within ten days after appointment, or within five days additional if permitted by the court. This seems mandatory, but the practice of extending the time still further when no objection is made is quite general. Where the question of the trustee's failure to give a bond is raised in a State court, the presumption is that the trustee duly qualified by complying with the provisions of the statute relating to a bond.⁴ The condition is the same as that in the referee's bond. But the creditors, not the court, fix the amount of a trustee's bond. This should be done at the first meeting, immediately after the appointment of the trustee. If the creditors fail so to do, the judge or referee fixes it. The amount is specified in the notice of appointment.⁵ Upon the approval of the bond by the referee the trustee takes title to the bankrupt's property, and the order of approval when duly certified and recorded is conclusive evidence of the vesting of the title.⁶

c. Sureties on bonds; forms.—Where bonds are given by individuals, there must be two sureties; if by a bonding company, there need be but one.⁷ The sureties, if individuals, must be worth "above their liabilities and exemptions," the penal sum mentioned in the bond. As to this, the "court shall require evidence." In actual practice, this is often done by adding affidavits of justification to the bond.⁸ This is, of course, not required of bonding companies in good standing. Joint trustees should give joint and several bonds. The form of the bond is prescribed.⁹ But, as has been suggested elsewhere, Form No. 26, the order approving the bond, should usually be modified by inserting certain dates, that when a certified copy is recorded in a local registry office parties interested in titles passing from a bankrupt to his trustee may have the same information that would be given had the bankrupt actually executed a deed.¹⁰ The practice of giving surety company bonds is now quite general. They are sufficient if the company is within the terms of subsection *g*. The liability of a surety extends to the expenditure of such funds of the bankrupt estate as becomes necessary as the immediate result of embezzlement by the trustee, but not including the premium of the bond of the new trustee.¹¹

d. Where filed.—Referees' and trustees' bonds must be filed and recorded in the office of the clerk. A trustee's bond is usually approved by the referee, whose duty it is forthwith to transmit the bond and the order of approval to the clerk.

e. Suits on bonds.—Though the bond runs to the United States, a suit may be brought thereon "in the name of the United States for the use of any person injured." Leave of court is not necessary for the bringing of such an action in the name of the United States.¹² Nor is it necessary that all the parties injured be named in the complaint.^{12a} No order need be made directing an absconding trustee to account, prior to bringing suit on his bond.¹³ Such

4. *Breckons v. Snyder* (Pa. Sup. Ct.), 15 Am. B. R. 112, 311 Pa. St. 176.

5. See General Order XVI and Form No. 24.

6. *Anderson v. Stayton State Bank* (Ore. Sup. Ct.), 38 Am. B. R. 4, 159 Pac. 1033, citing text.

7. *In re Kalter* (Ref., Pa.), 2 Am. B. R. 590. Compare Act of August 13, 1894.

8. See form in "Supplementary Forms," *post*.

9. Form No. 25.

10. See § 21, *ante*. See also requirement of § 47-c which was added by the amendatory act of 1903.

11. *Matter of Kajita* (D. C., Hawaii), 13 Am. B. R. 19, 2 U. S. D. C., Hawaii, 194.

12. *Alexander v. Union Surety & Guar. Co.* (N. Y. Sup. Ct.), 11 Am. B. R. 32, 89 N. Y. App. Div. 3; *United States v. Ward* (C. C. A., 8th Cir.), 43 Am. B. R. 711, 257 Fed. 353.

12a. *United States v. Ward* (C. C. A., 8th Cir.), 43 Am. B. R. 711, 257 Fed. 352.

an action may be brought in a district court of the United States;¹⁴ such action is not, however, a proceeding in bankruptcy, but a plenary suit, and therefore an order dismissing it is not reviewable by a petition to revise under § 24-b.¹⁵ The limitation on such suits is short: as to referees, two years after the alleged breach; as to trustees, two years after the estate has been closed. The closing of an estate here is probably the date of the order discharging the trustee. Subsection i provides, however, that trustees shall not be liable, personally or on their bonds, for any penalties or forfeitures incurred by bankrupts under the act. The bond continues in force notwithstanding a recovery thereon for two years after the estate is closed.¹⁶ The action of a District Court in allowing improper compensation to a referee is not a bar to an action on his bond to recover the same.^{16a}

c. Effect of failure to give bonds.— Failure to give a bond within the time limited amounts to a declination of office and creates a vacancy. As above suggested, this requirement has not been very strictly construed. The time would probably run from the date of the receipt of the notice, rather than from the date of the order fixing the amount.

13. An order directing an absconding trustee to account is said to be an indispensable prerequisite to an action on his bond. It might, and probably would, be proper in conditions where practicable. But an order upon a person lurking in an unknown place, and purposely keeping out of the reach of any legal notice of an order, if one should be made, would be of no avail. *Scofield v. United States ex rel. Bond* (C. C. A., 6th Cir.), 23 Am. B. R. 259, 174 Fed. 1.

14. *United States ex rel. Schaffner v. Union Surety & Guar. Co.* (D. C., N. Y.), 9 Am. B. R. 114, 118 Fed. 482, containing form of complaint.

15. *United States v. Ruggles* (C. C. A., 6th Cir.), 34 Am. B. R. 91, 221 Fed. 256.

16. *Matter of Kajita* (D. C., Hawaii), 13 Am. B. R. 19, 2 U. S. D. C., Hawaii, 194.

16a. *United States v. Ward* (C. C. A., 8th Cir.), 43 Am. B. R. 711, 257 Fed. 353.

SECTION FIFTY-ONE.

DUTIES OF CLERKS.

§ 51. **Duties of Clerks.**—*a* Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

Analogous provisions: In U. S.: None.

In Eng.: Nope.

In Can.: None.

Cross-references: To the law: Clerk to refer case to referee in case of absence or disability of judge, § 18-f, g.

Duty of referee when case is referred to him by clerk, § 38(3).

Referee to transmit papers to clerk, when required in proceeding in court, § 39-a(8); to call upon and receive papers from clerks, § 39-a(10).

Fees of referee, § 40; of trustees, § 48.

Compensation of clerks and marshals, § 52.

Petitions in bankruptcy to be in duplicate, one copy for clerk and one for service, § 59-c.

Fees for filing petitions to have priority, § 64-b(2).

Indexes to be prepared and searches to be made by clerks, § 71.

To the General Orders: Clerk to keep docket of cases, I.

Clerk to indorse each paper filed with time of filing and statement of character, II.

Process, summons and subpoenas to be tested by clerk, III.

Clerk may require indemnity for expenses, X.

Proofs of claims and other papers filed with clerk, XX.

List of proved claims to be transmitted to clerk, XXIV.

Checks or warrants for payment of money may be countersigned by clerk, XXIX.

Fees allowed to clerk are in full compensation for services, XXXV(1); judge may order paid out of estate in certain cases, XXXV(3).

To Official Forms: Adjudication of bankruptcy to be signed by clerk, No. 12.

Order of reference by clerk, No. 14; in case of absence or disability of judge, No. 15.

SYNOPSIS OF SECTION.

I. Duties of Clerks, 755.

- a. *Under general orders and forms, 755.*
- b. *Account for fees; collection of fees, 755.*
- c. *Payment of fees to referee and trustee, 756.*
- d. *Pauper affidavits, 756.*
- e. *Additional duties, 757.*

I. DUTIES OF CLERKS.¹

a. **Under general orders and forms.**—In addition to the duties prescribed by this section the clerk is required to keep a docket in the form specified in General Order I. He is required by General Order II to indorse on each paper filed the day and hour of filing. Under General Order III he is required to attest each process, summons and subpoena issued out of the court. Besides these specific duties the clerk has his usual duties as to the keeping of a docket of bankruptcy cases, the filing of papers,² and the issue of process.³ In the absence of the judge, he refers cases to the referee for adjudication,⁴ and the deputy clerk has like authority.⁵ It seems also he should give notice to creditors of the order to show cause on discharge,⁶ though, as has been indicated,⁷ this is often done by the referee. For any disbursements he may be called on to make, he, like the referee, can demand indemnity.⁸ It is not the duty of the clerk to furnish referees with blank forms.⁹

b. **Account for fees; collection of fees.**—The duty enjoined by subdivision 1 to account for fees received by him is similar to that required of him as to all other fees, and indicates that fees in bankruptcy are not in addition to his salary as fixed by law.¹⁰ By subdivision 2 the clerk is also required "to collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition," except in pauper cases. The amounts of these fees are fixed in other sections.¹⁰ Unless the fees are paid, no pauper affidavit being filed, the petition need not be received. Early in the history of the law, it was a question whether partners who had no assets, and sought bankruptcy merely to secure a discharge, should not be required to deposit separate fees for the individual estates and that of the copartnership.¹¹ The better opinion is that they need not;¹² such a petition is but one proceeding. There is a recorded

1. See also Am. B. R. Dig. § 115.

2. Compare Bankr. Act, §§ 39 (5), (7), (8), (10), 59-c.

3. See Forms Nos. 5, 30. See also § 71 of this work.

4. Bankr. Act, § 18-f-g. See also § 38-a (3).

5. *Gilbertson v. United States* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672, holding that a deputy district court clerk under § 558 of the U. S. Revised Statutes, is authorized to make an order of reference, a mere ministerial act, upon the filing of a petition for adjudication. Compare *Bray v. Cobb* (D. C., N. C.), 1 Am. B. R. 153, 91 Fed. 102.

6. Form No. 57; *Matter of Longhney* (D. C. Wash.), 24 Am. B. R. 203, 218 Fed. 980.

7. See p. 349, *ante*.

8. See General Order X.

9. *United States v. Mason* (C. C. A., 1st Cir.), 129 Fed. 742.

10a. **Fees for mailing notices.**—The moneys which a district clerk receives out of a bankrupt estate on the order of the court for mailing notices, are not received *ex virtute officii* and he is not obliged to account therefor. *United States v. U. S. Fidelity, etc., Co.* (D. C., Tex.), 45 Am. B. R. 295, 203 Fed. 442.

10. For the referee's, see Bankr. Act, § 40-a; for the trustee's, § 48-a; for the clerk's, § 52-a.

11. Compare *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 553. See also *Mahoney v. Ward* (D. C., N. C.), 3 Am. B. R. 770, 100 Fed. 278.

12. *In re Langslow* (D. C., N. Y.), 1 Am. B. R. 258, 98 Fed. 800; *In re Gay* (D. C., N. H.), 3 Am. B. R. 529, 98 Fed. 870. Contra, however, is the case of *In re Farley* (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 359, which follows *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 553.

instance of husband and wife filing a petition together and being permitted to proceed on the deposit of one fee; but they were to an extent partners in business as well. The rule is indicated in the words "in each case." If a single adjudication can be made affecting all petitions, one fee is sufficient; but not otherwise.¹³

c. **Payment of fees to referee and trustee.**—The clerk's fee seems to be earned on the filing of the petition; the referee's and the trustee's when the case is closed. As to trustees, an estate is closed when the trustee is discharged; as to the referee, when he has transmitted his records. These restrictions on payment, however, are not always strictly observed.¹⁴ Payments are made by check or order in accordance with General Order XXIX. In the larger districts, the referees often certify each week or month for fees due the trustees and themselves. Provision is elsewhere made for the return out of the estate of fees deposited by petitioning creditors in involuntary cases.¹⁵ There is, however, no provision for the repayment of the trustee's fee when no trustee is appointed. This is usually done by a check to the bankrupt or his attorney, after the case is closed.

d. **Pauper affidavits.**¹⁶—A "poor person" may avail himself of the bankruptcy law, by filing with his petition a pauper affidavit. Contrary to the usual practice, he may get into court and become entitled to adjudication and, it seems, protection, without the usual preliminary inquiry as to his alleged property. The fees referred to are the statutory fees to be paid to the clerk, referee and trustee as compensation for their services, and do not include or refer to the expenses incurred by the officers of the court in the bankruptcy proceeding.¹⁷ Before the adoption of the General Orders, this provision was much abused.¹⁸ Various means were devised to check the practice of filing pauper affidavits in unworthy cases. It is not thought, however, that a refusal to discharge until the fees are paid is any more defensible than would be a refusal to file for the same reason.¹⁹ Under General Order X the clerk, referee or marshal may require indemnity before incurring any expense in publishing or mailing notices, traveling, procuring the attendance of witnesses or perpetuating testimony and may refuse to proceed without such indemnity, notwithstanding the so-called pauper affidavit; the money advanced for this purpose by the bankrupt or other person may be repaid to him as a part of the cost of administration.²⁰ The clerk is not given any option as to filing such petition, and where it appears from the schedules offered therewith that the petitioner has either in his hands or otherwise subject to his order money with which to pay the fees, his petition should be filed, and such money subjected to an order for the payment of such fees.²¹ Ample power is now given

13. In re Langlow (D. C., N. Y.), 1 Am. B. R. 258, 98 Fed. 869.

14. In the Western District of N. Y., the word "closed" is liberally interpreted by rule. See 1 N. B. N. 110.

15. Bankr. Act, § 64-b(2). See also In re Matthews (D. C., Iowa), 3 Am. B. R. 265, 97 Fed. 772; In re Silverman (D. C., N. Y.), 3 Am. B. R. 227, 97 Fed. 525.

16. See also Am. B. R. Dig. § 285.

17. Matter of Crisp (D. C., Tenn.), 38 Am. B. R. 557.

18. Of one of the districts in Alabama, it was, early in 1900, stated: "It (the pauper

petition clause) has induced much perjury in this district. One lawyer has been disbarred because of it, and several others have been led into unprofessional conduct."

19. In re Mason (D. C., Ala.), 25 Am. B. R. 73, 181 Fed. 899. See rule in District of Washington, 1 N. B. N. 376, 95 Fed. 120. And compare In re Langlow (D. C., N. Y.), 1 Am. B. R. 258, 98 Fed. 869; In re Plimpton (D. C., Vt.), 4 Am. B. R. 614, 103 Fed. 775.

20. Matter of Crisp (D. C., Tenn.), 38 Am. B. R. 557.

21. In re Mason (D. C., Ala.), 25 Am. B. R. 73, 181 Fed. 899.

to investigate the truth of the pauper affidavit,²² and to report that it is not true, if it appears that a fraud on the court has been attempted.²³ It is suggested also that through an examination had to test the truth of the affidavit, the bankrupt will often be found able to make the deposit. The affidavit must state that "the petitioner is without, and cannot obtain, the money with which to pay such fees." On examination as to its truth, it will usually be held false if it appears that he has exempt property,²⁴ or has paid an attorney for services in preparing the petition and schedules, or, it has been held, if the bankrupt is at the time earning fair wages.²⁵ A proposed voluntary bankrupt, who has not money enough to pay the filing fees, is not required to solicit loans from his friends for that purpose.²⁶ The necessity of, in some way, securing the fee of the trustee when one is appointed has already been considered.²⁷

c. **Additional duties.**—The amendatory act of 1903 has added § 71 to the original law. It prescribes other duties for the clerk.²⁸ It might well have been subdivision b of this section. It should be read with it.

22. General Order XXXV(4).

23. The practice suggested by the following rule adopted by Judge Coxe of the Northern District of New York, has proven effective:

"V. In case a petition is filed by a proposed voluntary bankrupt which is accompanied by an affidavit under subdivision 2 of § 51 of the act, it shall be the duty of the clerk to file said petition without the payment of the fees provided for by law. If the clerk, or the referee to whom said petition is referred, has reason to believe such affidavit is false, he may file a certificate to that effect and cause the bankrupt to be examined. If upon such examination the referee reports in writing that the statements contained in such affidavit are false, and that the bankrupt has or can obtain money with which to pay said fees, such report shall be sufficient proof upon which to base proceedings under subdivision 4 of general order No. XXXV." See also "Supplementary Forms," *post*.

24. Exemptions allowed by the statute were not intended to cover exonerations from the payment of such filing fees. In *re* Mason (D. C., Ala.), 25 Am. B. R. 73, 181 Fed. 899; In *re* Hines (D. C., W. Va.), 9 Am. B. R. 27, 117 Fed. 790; In *re* Bean (D. C., Vt.), 4 Am. B. R. 53, 100 Fed. 262.

25. In *re* Collier (D. C., Tenn.), 1 Am. B. R. 182, 93 Fed. 191, holding that the court has the right to demand some evidence which shows that it is reasonable to conclude that the petitioner cannot really obtain the money, and where it appeared that one had filed a petition without paying fees and had filed the statutory affidavit, but it also appeared that he was earning \$30 per month, this was held to be conclusive evidence of his

ability to obtain his \$25 for government fees, notwithstanding that he had a family to support out of his earnings. Compare also In *re* Williams, 2 N. B. N. Rep. 206.

26. *Sellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 94 Fed. 801, 36 C. C. A. 502.

Borrowing money to pay costs.—In the case of In *re* Hines (D. C., W. Va.), 9 Am. B. R. 27, 117 Fed. 790, the court said: "If the bankrupt . . . was able to borrow from his friends money with which to pay the court costs, he could not properly make the affidavit required in this case, and it would be his duty to pay the fees." In *re* Mason (D. C., Ala.), 25 Am. B. R. 73, 181 Fed. 899, the court in commenting on these cases said: "I concur in the views of the courts expressed in the foregoing quotations from the cases cited, except that in *Re Hines, supra*, where the court in effect declares that, if the bankrupt was able to borrow from his friends money with which to pay the court costs, he could not properly make the affidavit required, and it would be his duty to pay the fees. I think the rule announced by Judge McCormick in *Sellers v. Bell, supra*, which in substance is that a proposed voluntary bankrupt, who has not money enough to pay the filing fees, is not required to solicit loans from his friends for that purpose, is more reasonable and just. He says that such a requirement would inflict a humiliation on any citizen to require that he solicit or accept alms of his kindred or friends. Moreover, it would raise an issue not contemplated by the bankruptcy act, and which would be embarrassing and difficult to determine."

27. See p. 744, *ante*.

28. See under § 71 of this work.

SECTION FIFTY-TWO.

COMPENSATION OF CLERKS AND MARSHALS.

§ 52. **Compensation of Clerks and Marshals.**—*a* Clerks shall respectively receive as full compensation for their services to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their service in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with the laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Analogous provisions: In U. S.: Act of 1867, § 47. R. S., §§ 5124, 5125, 5127, 5127A; Act of 1841, § 13; Act of 1800, §§ 46, 47.

In Can.: None.

Cross-references: To the law: Marshals may be appointed to take charge of bankrupt's property, § 2(3).

Compensation of marshals for services rendered in taking charge of property, § 48-d.
Clerks to collect fees, and account for same, § 51(2).

Fees of clerks for certificates of searches, § 71.

To the General Orders: Clerk or marshal may require indemnity before incurring expense, X.

Accounts of marshal as to expenses, XIX.

Fees of clerk in full compensation for services, XXV(1).

SYNOPSIS OF SECTION.

COMPENSATION OF CLERKS AND MARSHALS.

I. Compensation of Clerks, 759.

a. The filing fee, 759.

b. Other fees, 759.

II. Compensation of Marshals, 759.

a. Fixed by general law, 759.

b. While acting as receiver, 760.

c. Accounts of marshals, 760.

I. COMPENSATION OF CLERKS.¹

a. **The filing fee.**—By subsection *a* the filing fee of the clerk is fixed at ten dollars, and must be paid before a petition is filed,² and such charge may be collected for him by the referee in bankruptcy.^{2a} It is in "full compensation" for the services of the clerk to each estate. General Order XXXV (1) interprets the quoted words by providing that the fees allowed to clerks "shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money."

b. **Other fees.**—But clerks may charge the fees allowed them by law for copies of papers in bankruptcy proceedings furnished to persons other than the referees or other officers, or expenses necessarily incurred in publishing or mailing notices or other papers. In some districts, it is even prescribed by rule that clerks may charge a fee for copying and mailing the petition for discharge and order thereon known as Form No. 57.³ The validity of such a rule is doubted, and in fact it has been held in some districts that clerks are not entitled to a fee for mailing notices of an application for a discharge.⁴ It is a severe stretch of meaning to declare such mandates "copies furnished to other persons." Money so collected is not for "expenses," but for fees pure and simple. The clerk is also entitled to disbursements for postage, stationery and clerical work.⁵ It is thought that General Order XXXV (1) is not in accord with § 52-a; if not, the latter must control. What has been said elsewhere as to pauper cases⁶ and the right to demand indemnity applies⁷ to clerks as well. The clerks are now salaried officers.⁸ Any surplus of fees collected must be turned into the treasury.⁹ Section 71, added by the amendatory act of 1903, also authorizes the clerks to charge fees for bankruptcy searches. The clerk is not entitled to charge a commission in composition proceedings when he acts as distributing agent.^{9a}

II. COMPENSATION OF MARSHALS.¹⁰

a. **Fixed by general law.**—The marshals and their field deputies are now also salaried officers.¹¹ They play small parts in the administration of the

1. See also Am. B. R. Dig., § 116.

2. Bankr. Act, § 51 (2).

Partnership case.—Where under a partnership petition the partners seek and obtain discharges both as against the firm creditors and as against their respective individual creditors, the several estates must be administered and in each the clerk's fees are allowable. In re Farley & Co. (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 859.

2a. Matter of McNeill Corp. (D. C., Mass.), 41 Am. B. R. 162, 249 Fed. 765.

3. See In re Durham, 2 N. B. N. Rep. 1104. See also under § 39, *ante*.

4. In re Dunn Hardware & Furniture Co. (D. C., N. C.), 14 Am. B. R. 186, 134 Fed. 977; Matter of Longhney (D. C., Wash.), 34 Am. B. R. 206, 218 Fed. 960, holding that clerks should prepare, or cause to be prepared, copies of petitions and notices of application for discharge, and mail them to creditors as directed by the court, the expense to be paid by the bankrupt, and that a charge of forty cents for such notices based upon §§ 823, 840 of the U. S. Rev. St., is unauthorized.

Special or extra compensation is not allow-

able to the clerks under General Order No. XXXV, sec. 1, for mailing notices to creditors; his clerical services in such matters—so far at least as no extraordinary expense is involved—being covered by the filing fee of ten dollars provided by section 52, subd. a. Matter of Iwanaga (D. C., Hawai), 38 Am. B. R. 285.

5. In re Dunn Hardware & Furniture Co. (D. C., N. C.), 14 Am. B. R. 186, 134 Fed. 977; Matter of McNeill Corp. (D. C., Mass.), 41 Am. B. R. 162, 249 Fed. 765.

6. See under § 51.

7. General Order X.

8. Under the former statute, their fees were limited to those fixed by the general law. See "Analogous Provisions," *ante*.

Per diem compensation allowed by statute for services under U. S. R. S., §§ 574, 638, 823, see United States v. Marvin (U. S. Sup. Ct.), 212 U. S. 275, 22 Am. B. R. 717.

9. Act of May 23, 1896; U. S. Compiled Laws.

9a. Matter of Newbold (D. C., Utah), 40 Am. B. R. 298, 244 Fed. 888.

10. See also Am. B. R. Dig., § 120.

11. This only since act of May 23, 1896.

present bankruptcy law. Under the former law, they acted as messengers as well as custodians, and their fees were fixed by the statute.¹² Under the present statute, the only duties they are usually called upon to perform are the service of subpoenas and writs of injunction,¹³ and the taking possession of and caring for property.¹⁴ Their fees in either case are those fixed by the general law.¹⁵ They also may demand indemnity.¹⁶ When a petition accompanies an order, the statutory fee, it seems, can be charged for each paper, though they are bound together.¹⁷

b. While acting as receiver.—The compensation of a marshal while performing the duties of a receiver is considered elsewhere.¹⁸ His fees by way of commissions upon moneys disbursed or turned over to any person, including a lienholder, and upon moneys realized by the trustees from property turned over in kind to such trustees are fixed by § 48-d. It seems that a marshal cannot act as a receiver in bankruptcy.¹⁹

c. Accounts of marshals.—Marshals are required to account for their fees in bankruptcy cases. This is regulated by General Order XIX which requires no comment.²⁰

12. See "Analogous Provisions," *ante*.

13. Compare Bankr. Act, §§ 11-a, 18-a; Equity Rules XIII, XV.

14. See Bankr. Act, §§ 2(3), 3-a, and 69.

15. U. S. R., § 829.

16. General Order X.

17. In re Damon (D. C., N. Y.), 5 Am. B. R. 133, 104 Fed. 775.

18. See under § 2 and § 48-d. See also

In re Woodard (D. C., N. Car.), 2 Am. B. R. 692, 95 Fed. 955; In re Scott (D. C., N. Car.), 3 Am. B. R. 625, 99 Fed. 404; In re Adams, etc. (D. C., Col.), 4 Am. B. R. 107, 101 Fed. 215.

19. Act of May 23, 1896, § 20.

20. The referee has a similar duty. General Order XXVI.

SECTION FIFTY-THREE.

DUTIES OF ATTORNEY-GENERAL.

§ 53. Duties of Attorney-General.—*a* The Attorney-General shall annually lay before congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

Analogous provisions: None.
Cross-references: None.

1. ATTORNEY-GENERAL'S REPORTS.

The statistical tables required by this section will be found in the annual reports of the attorney-general beginning with that of 1898. The statistics required will be furnished by the proper officers on demand by the attorney-general.

SECTION FIFTY-FOUR.

STATISTICS OF BANKRUPTCY PROCEEDINGS.

§ 54. **Statistics of Bankruptcy Proceedings.**—*a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the attorney-general, for statistical purposes, within ten days after being requested by him to do so.

Analogous provisions: In U. S.: R. S., § 5127B.

In Can.: None.

Cross-references: To the law: None.

I. STATISTICS.

These reports are called for by the clerks at the request of the attorney-general, and are made on blanks furnished by the Department of Justice. From them the attorney-general's annual report, required by section 53, is compiled. He can also ask for other or special reports from all the districts or a single district. There are no recorded cases construing this section.

SECTION FIFTY-FIVE.

MEETINGS OF CREDITORS.

§ 55. **Meetings of Creditors.**—*a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Analogous provisions: In U. S.: As to time and place of first meeting, Act of 1867, § 11, R. S., §§ 5019, 5032; Act of 1841, § 7; Act of 1800, § 6; As to presiding officer at first meeting, Act of 1867, § 12, R. S., § 5033; As to allowance of claims at first meeting, see Analogous Provisions under Section Fifty-seven, *post*; As to other meetings, Act of 1867, §§ 27, 28 R. S., §§ 5002, 5093, 5098; As to the final meeting, Act of 1867, § 28, R. S., §§ 5093, 5096.

In Eng.: As to first meeting, Act of 1883, Schedule I, Rules 1-4; As to subsequent meetings, Act of 1883, § 89 (2); Act of 1890, § 18; Act of 1883, Schedule I, Rules 5-7; and, generally, as to meetings of creditors, General Rules 249-257.

In Can.: Act of 1919, § 42.

Cross-references: To the law: Adjudication of bankruptcy, when to be made, § 18-a; order of reference to referees when judge is absent, § 18-f, g.

Notice of meetings of creditors to be given, § 58.

Proof and allowance of claims, § 57.

Who entitled to vote at meetings of creditors, § 56.

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MEETINGS OF CREDITORS.

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I. SCOPE OF SECTION.

Scope of section.—The cross-references, *supra*, indicate the limited scope of the section. It has to do only with the time and place of holding the first meeting of creditors, who shall preside, and what in general may be done thereat, the calling of special meetings by creditors, and when final meetings shall be held. It is clearly a section on practice, not law, a distinction recognized in the English system by putting the corresponding rules of practice at the end of the section as a "schedule."¹ The procedure under § 55 is so different from that under the law of 1867² as to make the cases and sug-

1. See Eng. Act of 1883; Schedule I.

2. Act of 1867, §§ 11, 12, R. S., §§ 5019, 5032, 5033.

gestions under that law of little value. It will be observed, however, that then the place and time of meeting could be arbitrarily fixed, and there were usually three stated meetings,³ while, save for meetings called specially, there can now be but two.

II. FIRST MEETING.

a. **In general.**—Subsection *a* makes it the duty of the court to cause the first meeting of the creditors to be held as therein provided. It is the practice for the referee to call the first meeting upon the order of reference having been submitted to him after an adjudication.⁴ On receipt from the clerk of an order of reference,⁵ the referee forthwith calls a first meeting,⁶ setting the time, "not less than ten nor more than thirty days after the adjudication," and the place "at the county seat of the county in which the bankrupt has had his principal place of business, resided or has his domicile." These provisions are, in effect, directory; for, by subsequent clauses, the time may be somewhat indefinitely lengthened, and, if, as is often the case, the county seat is "manifestly inconvenient as a place of meeting for the parties in interest," another place may be selected. The first meeting of creditors cannot be had until after adjudication.⁷ The practice of keeping first meetings alive by successive continuances is general, and to be recommended;⁸ it saves delay and expense in calling creditors together to consider special matters. Indeed, through the use of short notices, addressed to and served on the creditors or attorneys who have appeared, it often alone makes prompt action possible. That all meetings should be held in court-rooms and on regular days and at regular hours,⁹ and be conducted with dispatch, dignity and impartiality on the part of the presiding officer, in short, as a court of justice, seems to be the purpose of the statute.¹⁰

b. **Order of business; procedure.**—Subsection *b* provides that the referee, or, if there has been no reference, the judge, must preside at all first meetings. The following order of business is suggested:¹¹

1. Call for and noting of appearances in person or by powers of attorney.
2. Application for *ex parte* amendments.
3. Allowance or disallowance of claims.
4. Election of trustee, and fixing of amount of bond.
5. Examination of the bankrupt.
6. Miscellaneous motions, orders and instruction.
7. Continuance to a place, day and hour certain.

This order will often be changed, as, where there has been a receiver,¹² who should report as soon as the creditors entitled to vote are ascertained or where

3. Act of 1867, §§ 27, 28.

4. Official Form, No. 18, prescribes the form of the notice to be given to creditors of the first meeting and is to be signed by the referee. See also Am. B. R. Dig., §§ 313-315, 571.

5. Bankr. Act, § 18-f-g. See also where the referee makes the adjudication, § 38(1).

6. This is usually done by the entry of the fact in his record book, though a formal order may be drawn and signed. As to the method of giving notice, see Bankr. Act, § 58.

7. In re Back Bay Automobile Co. (D. C.,

Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33.

8. Compare In re Norton, Fed. Cas. 10,348; In re Phelps, Fed. Cas. 11,071.

9. In re Eagles (D. C., N. Car.), 3 Am. B. R. 733, 99 Fed. 695.

10. Compare In re Merchants' Ins. Co., Fed. Cas. 9,442.

11. See also 1 N. B. N. 112, 113; Rules 1, 5, 6, 8, 9.

Opening and conducting meeting.—See In re Eagles and Crisp (D. C., N. Car.), 3 Am. B. R. 733, 99 Fed. 695.

12. Consult Section Two of this work.

the appointment of appraisers¹³ is necessary, an order of business which should follow the appointment of a trustee. Appearances may be either in person or by attorney; if the latter, by an attorney or counselor authorized to practice in the circuit or district court.¹⁴ Subsection *b* also provides that the judge or referee shall, before proceeding with the other business, allow or disallow claims and conduct an examination of the bankrupt. This is evidently for the purpose of determining the right of creditors to vote. The bankrupt may be required to attend the first meeting and submit to an examination for the purpose of aiding the court in ascertaining who are creditors.¹⁵ The proof and allowance of claims is especially provided for under § 57, to which reference should be made in this connection. A creditor included in the schedules, whose identity is established satisfactorily to the referee, is entitled to an opportunity to examine the bankrupt before he decides to become a party to the proceeding.¹⁶ Where claims are objected to, they should, as far as possible, be heard summarily on an oral motion to reject—the mere filing usually amounts to an allowance¹⁷—and their right to vote determined. Only when clearly fictitious or preferential, should this right be denied them.¹⁸ The determination of a referee as to the allowance or disallowance of a claim presented at such a meeting is a judicial act which cannot be reviewed, revised or reversed by a State court.¹⁹ Other general regulations as to papers and practice will be found in General Order IV. The cross-references, *ante*, to other sections and general orders, should be read in anticipation of a first meeting of creditors. The very broad range that business at meetings of creditors may take is indicated by subsection *c*.

III. SPECIAL MEETINGS.

a. In general.—While this section provides only for first and final meetings in each case, special meetings can be called and held for a variety of purposes.²⁰

13. See discussion under Section Seventy of this work.

14. General Order IV.

15. Bankr. Act, § 7 (1) (3), and discussion thereunder.

16. Examination of bankrupt by creditor before proving claim.—A creditor who has not filed a claim is privileged to examine the bankrupt, in order to see if it is worth while so to do. In *re Walker* (D. C., N. Dak.), 3 Am. B. R. 35, 96 Fed. 550; In *re Jehu* (D. C., Iowa), 2 Am. B. R. 498, 94 Fed. 638, the court said: "The creditors may properly decline to incur the expense of proving their claims until it appears that some good will result from so doing. The referee should be satisfied that the party applying for the order is in fact a creditor of the bankrupt; but, if this fact be shown, no good reason exists why the examination should not be had, even though the creditor may not have proved his claim in set form."

Examination at adjourned meeting.—Where a bankrupt, in his schedules, claims the bar of the statute of limitations as a defense to a particular provable debt, the creditor, who had not filed proof of claim, is entitled to examine the bankrupt, at an adjourned meeting of the creditors, in order to determine whether he will take an affirmative part in the bankruptcy proceedings,

although a rule of court requires a creditor to file a formal claim with the referee before any examination. In *re Kniffer* (D. C., N. Y.), 18 Am. B. R. 587, 155 Fed. 1018.

17. In *re Summer* (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224. Claims so filed may, however, be objected to and allowance thus postponed. See Bankr. Act, § 57-d.

18. See Bankr. Act, § 56.

19. *Glendening v. Red River Valley Nat. Bank* (Sup. Ct., N. Dak.), 11 Am. B. R. 246, 94 N. W. 901.

When the referee acts instead of the judge, his duties are judicial in their nature and he is to pass upon such questions as may arise in carrying forward the objects and purposes of the meeting. In *re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57.

20. Bankr. Act, § 44; General Order XXV.

Subsections *d* and *e* provide the method of calling such meetings. When all the creditors whose claims have been allowed agree in writing that such a meeting shall be held, it may be held at any time or place agreed upon. The court is required to call such a meeting when one-fourth or more in number of those "who have proven their claims" shall file a written request to that effect.

The phrase "special meeting" occurs only in General Order XXV. Special meetings are usually called to consider proposed sales of property, or the compromises of controversies, or for the declaration and payment of dividends.²¹ "Proven" does not necessarily mean "obtained the allowance" of their claims.²² It seems that "whenever" in subdivision *e* means "whenever after the first meeting" previously provided for in subdivision *a*.²³ The creditors can only take such steps at the special meeting as will tend to the promotion of the best interests of the estate.²⁴ Almost invariably the referee presides over such meetings, though this is not necessary, as at first meetings.²⁵

b. On call of creditors.—Creditors' meetings, after the first, while always called by the referee, are usually the result of a report or a petition filed, or motion made, by the trustee. Subdivisions *d* and *e* provide a means to call the creditors together, if the trustee will not act, or the referee refuses to order the meeting. The former of these subsections seems, however, in conflict with § 58-a, and its value or validity has not yet been determined. The policy of the law seems to be to give all creditors the absolute right to ten days' notice of all important steps, nay, even of all "meetings of creditors."²⁶ The practice on the call of a creditors' meeting by written request of a majority in number and amount of claims proven is sufficiently explained in the statute.²⁷

IV. FINAL MEETINGS.

a. In general.—Final meetings must be ordered when "the affairs of the estate" are ready to be closed.²⁸ This seems to imply that there need be no final meeting unless there is an estate. Where there are dividends for creditors a final meeting, as distinguished from a first meeting, must, since the proviso clauses added to § 65-b, be held.²⁹ The safer practice is to hold such a final meeting even in no-asset cases. It should be called as soon as the trustee's final report is filed.³⁰ Creditors must also have the usual notice of the filing of a trustee's final account.³¹

21. *Matter of Cutler & John* (D. C., N. Car.), 36 Am. B. R. 420, 228 Fed. 771, holding that where it appears that the bankrupt owns property subject to valid liens, the referee may, if in his judgment it is advisable, call a meeting of the creditors in order that they may be heard before action is taken subjecting the estate to possible cost and expense in the administration of such property. *In re Meadows, Williams & Co.* (D. C., N. Y.), 25 Am. B. R. 100, 181 Fed. 911 (meeting to consider proposed compromise of action by trustee). For a suggested practice, resulting in combining three or four special meetings in one, see under § 58 of this work, *post*.

22. *In re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, *revd.* 19 Am. B. R. 33.

23. *In re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, *revd.* 19 Am. B. R. 33.

24. *In re Meadows, Williams & Co.* (D. C., N. Y.), 25 Am. B. R. 100, 181 Fed. 911.

25. Frequently, however, the trustee pre-

sides over meetings to consider the sale of property.

26. See Bankr. Act, § 58-a(3). Compare *In re Stoever* (D. C., Pa.), 5 Am. B. R. 250, 105 Fed. 355; *Matter of Cutler & John* (D. C., N. Car.), 36 Am. B. R. 420, 228 Fed. 771, citing text.

27. See subsection *e* of this section.

28. *In re Sarah Michel* (D. C., Wis.), 1 Am. B. R. 665, 95 Fed. 803.

Notice.—An order closing an estate without giving ten days notice of the final meeting of the creditors for that purpose is a nullity. *Matter of Levy* (D. C., Pa.), 44 Am. B. R. 248, 261 Fed. 432.

29. A meeting for the declaration of a dividend should be combined with that for the payment of the dividend so declared, and, if there is to be but one dividend, the final meeting can and should, in proper cases, be combined with such dividend meetings. *In re Marshall N. Smith* (Ref., N. Y.), 2 Am. B. R. 648.

30. Bankr. Act, § 47-a(8). See also for the necessity of a supplemental report of distribution by the trustee, discussion under Section Forty-seven of this work, sub-title, "Trustee's Supplemental Report."

31. Bankr. Act, § 58-a(6).

SECTION FIFTY-SIX.

VOTERS AT MEETINGS OF CREDITORS.

§ 56. **Voters at Meetings of Creditors.**—*a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

Analogous provisions: In U. S.: As to voters, generally, Act of 1867, § 13, R. S., § 5034; As to preferred creditors, Act of 1867, § 18, R. S., § 3035.

In Eng.: As to voters, generally, Act of 1883, Schedule I, Rules 8-10, 14; As to voting by proxy, Act of 1883, Schedule I, Rules 15, 17, 19, 21; Act of 1890, § 22, General Rules 245-248.

In Can.: Act of 1919, § 42.

Cross-references: To the law: Creditors, term defined, § 1(9); secured creditors, term defined, § 1(23).

Meeting of creditors; first meeting; other meetings, how called, § 55.

Proof and allowance of claims, § 57; provable debts, § 63.

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To the Official Forms: List of debts proved at first meeting, No. 19.

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Appointment of trustee by creditors, No. 22; by referee, No. 23.

See also Supplementary Forms, *post*; Hagar and Alexander's *Bankruptcy Forms*, 2d Ed.

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I. IN GENERAL.

a. *Comparative legislation.*—The English statute regulates voting at creditors' meetings with great particularity,¹ and proxy voting at such meetings is so restricted as to make impossible many of the evils complained of under previous statutes. Valuable suggestions as to their orderly conduct will, therefore, be found in the English law and general rules. Our law of 1867 was not, in this particular, essentially different from that of 1898. Creditors then took action by a majority in number and amount, though all claims proven were counted, whether present or represented or not;² the voting of secured creditors was prohibited, not by statute, but by the courts. The Canadian statute, like the English statute, deals with meetings of creditors in considerable detail.^{2a}

b. *Scope of section.*—The present law, in effect, gives voting power only to creditors holding claims neither preferred nor secured nor entitled to priority, which have been allowed and are present; and declares that a majority shall consist in the concurrence of the larger amount as to dollars and the larger number as to individuals.

c. *Election of trustees.*³—(1) *IN GENERAL.*—In general, the election of trustee should take place at the time and place fixed in the notice, and objections, technical in their nature, or motions manifestly for the purpose of delay, will usually be denied. It is to be regretted that the prevailing tendency is to construe the law and general orders technically.⁴ A broad, perhaps, rather, a shrewd discretion, seems a rule more in harmony with the purpose of the statute—that “the creditors of a bankrupt estate shall . . . appoint” the trustee. In the nature of things, all creditors who entitle themselves to vote before the result is announced, should be counted; conversely, no others should.⁵ It has been held that provisional allowances or disallowances may be made in proper cases to permit the prompt selection of a trustee,⁶ and this may be permissible where the only other possible course would be to postpone the election of a trustee until intricate questions of law and fact pertaining to the claim were determined.⁷

(2) *POSTPONEMENT OF ELECTION.*—If possible, there should be no postponement of an election of trustee,⁸ but a referee may, in his discretion,

1. See “Analogous Provisions,” *ante*.

2. Act of 1867, § 13, R. S., § 5034.

2a. Can. Bankr. Act, 1910, § 42.

3. See Am. B. R. Dig., §§ 312-315, and discussion under § 44, which should always be construed with this section.

4. See footnotes 47 and 48, *post*. Compare, however, *In re Henschel* (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 443; *In re Eugenheimer* (D. C., N. Y.), 1 Am. B. R. 425, 91 Fed. 744.

5. *In re Lake Superior, etc., Co.*, Fed. Cas. 7,907.

6. *In re Malino* (D. C., N. Y.), 8 Am. B. R. 205, 118 Fed. 368. But compare *In re Columbia Iron Works* (D. C., Mich.), 14 Am. B. R. 520, 142 Fed. 242.

7. *Postponement until determination of question of preference.*—Where the referee, after twice adjourning the election of trustee and affording an opportunity to creditors to examine the bankrupt in support of their objection that a certain creditor was not entitled to vote for trustee unless it surrendered a preference alleged to have been received by it, finds from the evidence adduced that the alleged preference had not been established, no error is committed in refusing to postpone the election of trustee until the final determination of

the question of preference and permitting the creditor to vote. *In re Milne* (D. C., N. Y.), 20 Am. B. R. 248, 159 Fed. 280.

8. *In re Richards* (D. C., N. Y.), 4 Am. B. R. 631, 103 Fed. 849. See also *In re Henschel* (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 433.

Postponement to bring in other creditors.—Where, at the time stated for the election of a trustee, a majority in number of the creditors are ready and opposed to delay, but a minority requested a postponement of an hour in order that others favorable to their candidate might be present, the referee was justified in denying the postponement, no good reason therefor being shown. *Matter of Grat* (D. C., Mass.), 36 Am. B. R. 524, 228 Fed. 925.

An adjournment on the ground of surprise will not be granted where the surprise relied upon is not as to a fact, but arises from

adjourn a first meeting of creditors for a few hours in order that claims may be presented and allowed,⁹ or that the creditors may compose their differences in the case of a no-choice vote.¹⁰ If there is a postponement, all claims proven in the interval have the same rights as those previously allowed. When, after the first meeting, proper amendments are granted bringing in new creditors, such creditors, it seems, may, if it appears that their votes would have changed the result, petition for a new election and, if successful thereat, oust the elected trustee.¹¹ The referee's power to approve or disapprove has already been considered.¹²

II. VOTES BY CREDITORS.

a. **Majority in number and amount.**—Subsection *a* provides that creditors shall pass upon all matters submitted to them by a majority vote "in number and amount of claims of all creditors whose claims have been allowed and are present." All questions duly submitted at a meeting must depend upon such a majority vote for their determination.¹³ Nor is it necessary that there be any definite quorum, as in England; one creditors present or duly represented and entitled to vote may choose a trustee.¹⁴ The meaning of "present" has been somewhat discussed. The better opinion is that, if excluded from voting for any reason, a creditor, though actually present, is not present for the purpose of ascertaining the total of claims.¹⁵ A partnership creditor can be counted only as a single individual.¹⁶

b. **Who entitled to vote.**—(1) **IN GENERAL.**—Creditors only are entitled to vote.¹⁷ Creditors may appear and vote personally, or by attorney or proxy as

oversight of a provision of law as to the correct execution of a letter of attorney. In re Finlay (D. C., N. Y.), 3 Am. B. R. 738, 104 Fed. 675.

9. Matter of Rosenfeld-Goldman Co., (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921.

10. When postponement permitted.—But where the vote for trustee results in no choice, the unanimous request of the creditors for an adjournment of the meeting for twenty-four hours to enable them to compose their differences, if possible, should be granted, and the appointment of a trustee by the referee after denying such request will be set aside and an election ordered. In re Nice and Schreiber (D. C., Pa.), 10 Am. B. R. 639, 123 Fed. 987.

11. In re Perry, Fed. Cas. 10,998; In re Ratcliffe, Fed. Cas. 11,578; In re Morgenthal, Fed. Cas. 9,813.

12. See pp. 704-708, *ante*. Compare also generally, §§ 44 and 55.

13. Majority in number and amount controls, Bollman v. Tobin (C. C. A., 8th Cir.), 38 Am. B. R. 504. In this case the court said: "At these meetings a majority of the general creditors in number and amount controls. See sections 55 and 58 of the Bankruptcy Act, and General Order No. 13. In re Lewensohn (D. C., N. Y.), 3 Am. B. R. 299, 98 Fed. 576; In re McGill (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57. The courts have uniformly enforced these distinctive features of the law. It is true that the administration of the estate is by the court and not by creditors, but on questions of general business policy, the wishes of a

majority of the creditors ought not to be disregarded except for good cause arising out of some special feature affecting the particular estate. If the majority seeks a fractional advantage to the injury of the minority, it is the duty of the court to interfere and protect the rights of all. But so long as the majority seeks no advantage except such as will accrue to the benefit of all creditors, their judgment should prevail, unless the circumstances are quite exceptional."

Appointment of trustee.—This section does not operate to prevent a referee from appointing as a trustee a person who failed of election by the creditors because he did not receive the votes of a majority in number of creditors and amount of claims. Matter of F. & D. Co. (C. C. A., 2d Cir.), 39 Am. B. R. 378, 242 Fed. 69.

14. In re Mackellar (D. C., Pa.), 8 Am. B. R. 609, 116 Fed. 547; In re Haynes, Fed. Cas. 6,209. Compare Matter of Continental Building and Loan Assoc. (D. C., Cal.), 36 Am. B. R. 412.

15. Creditors; when "present."—Creditors whose claims have been allowed are not present at a meeting within the meaning of section 56-a of the bankrupt act, when they are not permitted to participate in its proceedings. . . . The meaning of the clause is to vest the power of creditors in those who are present, and not allow the proceedings to be delayed by the absence of those creditors who do not take sufficient interest to participate; but it is not its meaning to treat those as present who are excluded from voting by the referee. In re Henschel (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 443, *revg.* s. c. (Ref., N. Y.), 6 Am. B. R. 25, and (D. C., N. Y.), 6 Am. B. R. 305, 109 Fed. 861.

16. In re Purvis, Fed. Cas. 11,476.

17. Bankr. Act, § 1(9), defines the term "creditor." See also Am. B. R. Dig., § 314.

will hereafter appear.¹⁸ Relatives and friends of the bankrupt who are legitimate creditors must be permitted to vote like other creditors.¹⁹ A member of a partnership or an officer of a corporation, presenting a proof of debt, should be allowed to vote,²⁰ though if represented by an attorney, the former must show the attorney's authority to act,²¹ and the mere fact that a claimant is a director and stockholder of a bankrupt corporation does not, in the absence of collusion or improper influence, disqualify him from voting for a trustee.²² The shareholders in a building and loan association are creditors entitled to vote for trustee upon the bankruptcy of the association.²³ A receiver in a State court appointed in an action by a corporation against a delinquent stockholder may be deemed a "creditor" of such stockholder within the meaning of this section.²⁴ Creditors sometimes appear specially, so as to assert title to goods sold on consignment, or to save their rights by having objections to the jurisdiction noted; but these are not creditors in the sense used in this section. That the creditors of a partnership, as distinguished from the creditors of an individual, are the only voters on matters involving the administration of partnership estates, seems to follow by analogy from § 5-b.²⁵

(2) PROOF AND ALLOWANCE OF CLAIM.—A creditor cannot vote until his claim has not only been "proved,"²⁶ which means the mere verification of it in accordance with the law and one of the forms prescribed by the Supreme Court, but also "allowed,"²⁷ which means the filing of such proved claim, without objection, with the proper referee. Even if filed, it seems that the referee has the right to determine its voting power, if the same is called in question.²⁸ The mere filing of objection will not, however, be sufficient to

18. General Order IV. See Bankr. Act, § 1(9).

19. Matter of Rothleder (D. C., N. Y.), 37 Am. B. R. 116, 232 Fed. 398.

20. The managing officers of a bankrupt corporation may vote, if they are *bona fide* creditors. In re Northern Iron Co., Fed. Cas. 10,322, 14 N. B. R. 356.

An officer of a bankrupt corporation and its attorney are entitled to vote for trustee on any allowed claims of their own and may not be summarily deprived of that right on the ground of interference of bankrupt's officers with appointment of trustee. In re Day & Co. (C. C. A., 2d Cir.), 24 Am. B. R. 252, 178 Fed. 545, affg. 23 Am. B. R. 56, 174 Fed. 164.

21. Compare In re Finlay (D. C., N. Y.), 3 Am. B. R. 738, 104 Fed. 675.

22. In re Stradley & Co. (D. C., Ala.), 26 Am. B. R. 149, 187 Fed. 285.

23. Merchants' National Bank v. Continental Bldg. & Loan Association (C. C. A., 9th Cir.), 37 Am. B. R. 439, 232 Fed. 828.

24. Dight v. Chapman, 12 Am. B. R. 743, 44 Oreg. 265, 75 P. 585, citing Collier on Bankruptcy (3d ed.), p. 304.

25. In re Beck (D. C., Mass.), 6 Am. B. R. 554, 110 Fed. 140, holding that in case of the separate bankruptcy of one member of a partnership, his individual creditors are entitled to vote for trustee, though all the assets belong to the partnership, and there is but one joint creditor; In re Purvis, Fed.

Cas. 11,476, 1 N. B. R. 163, holding that one of several joint creditors, who are not partners, cannot vote without the consent of the others.

26. Compare Bankr. Act, § 57-a; In re Walker (D. C., N. Dak.), 3 Am. B. R. 35, 96 Fed. 550.

27. See Bankr. Act, § 57-b; In re Eagles (D. C., N. Car.), 3 Am. B. R. 733, 99 Fed. 606; Clendenen v. National Bank (Sup. Ct., N. Dak.), 11 Am. B. R. 245, 94 N. W. 901; In re Henschel (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 443; Matter of Pan-American Match Co. (D. C., Mass.), 39 Am. B. R. 806, 242 Fed. 905.

28. Determination of validity of claims.—If, at a meeting for the election of a trustee, objections are made to a claim, the referee has either to disfranchise the claim or go forward and ascertain in a summary manner whether or not the claim ought to be voted upon, and his decision ought not to be set aside, unless so plainly unjust as to amount to an abuse of discretion. Matter of Rosenfeld-Goldman Co. (D. C., Mass.), 36 Am. B. R. 520, 229 Fed. 921; Matter of Grat (D. C., Mass.), 36 Am. B. R. 524, 228 Fed. 925.

Referee must entertain objections.—Where the referee in proceedings which resulted in the election of trustee overrules objections of certain claims, preferred upon the ground that the claimants were preferred creditors and not entitled to have their claims allowed until the preferences were surrendered, and accepts the proofs of such claims as presented and a trustee is elected thereupon, the pro-

exclude a claim which, on an examination—often mere oral statements of counsel—seems to be *bona fide*.²⁹ If objection is made and a *prima facie* case is presented, and it appears that the vote of the claim objected to will be decisive of any matter submitted to the creditors, the referee should postpone the vote until the validity of the claim can be determined.³⁰ In such a case it may even be necessary to appoint a receiver *ad interim*.³¹

(3) COMBINATIONS AND ASSIGNMENTS.—Combinations of creditors to control judicial proceedings in their own interests will not be favored.³² A single interest should vote as a single interest, and not otherwise.³³ Where a number of claims have been assigned to one person, all of which are allowed, he is entitled only to one vote.³⁴

c. Creditors not entitled to vote.—(1) SECURED CREDITORS.—Subsection b provides that creditors holding claims which are secured may not vote. Secured claims are defined in section 1 (23).³⁵ In this connection §§ 57-e-h should be consulted. Such claims are not to be counted, only as to the excess of the claim over the value of the security. The voting power of a secured debt depends on the value of the security.³⁶ This is often ascertained summarily; indeed, is sometimes stipulated. Again, technicalities should be avoided. At the same time, the burden clearly rests on the secured creditor to show that the security is not sufficient to pay his debt.^{36a} Such a creditor cannot be counted or allowed to vote, unless it appears that there will

ceedings are erroneous and the election must be set aside. In re Malino (D. C., N. Y.), 8 Am. B. R. 206, 118 Fed. 308.

Claims not affecting result.—The referee, at a meeting for the election of a trustee, is not bound to pass upon objections to a claim presented, where it would have been so voted as not to affect the result. Matter of Rosenfeld-Goldman Co. (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921. Where no harm has been done to a creditor by denying it the right to vote for trustee, it has no cause for complaint. Merchants' National Bank v. Continental Building & Loan Association (C. C. A., 9th Cir.), 37 Am. B. R. 439, 232 Fed. 828.

29. In re Kelly Dry Goods Co. (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

30. Postponement of vote.—Consult In re Lake Superior, etc., Co., Fed. Cas. 7907; In re Harrman, Fed. Cas. 6425; In re Frank, Fed. Cas. 5,050; Matter of Rosenfeld-Goldman Co. (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921; Matter of Snow (D. C., Mass.), 41 Am. B. R. 461, 248 Fed. 295. Postponement of proof was required under the former law (R. S., § 5063), but this is not so under the present statute. Compare also In re Jackson, Fed. Cas. 7,123; In re Milne (D. C., N. Y.), 20 Am. B. R. 248, 250, 159 Fed. 280, citing Collier on Bankruptcy (6th ed.), p. 424.

Review of referee's findings.—Where upon a petition to review the election of a trustee upon the ground that certain claims were not entitled to be voted, there is no evidence presented as to the disputed claims, the referee's findings of fact as to all claims must be confirmed. Matter of Snow (D. C., Mass.), 41 Am. B. R. 462, 248 Fed. 296.

31. Bankr. Act, § 2 (3) (15).

32. A combination of creditors for the control of judicial proceedings in their own interests, as distinguished from the interests of the general creditors, is clearly against public policy; as where certain creditors of several allied corporations, prior to bankruptcy proceedings, assigned, for value, their claims against these corporations, in trust, to a so-called committee, and especially where it was a part of the undertaking and purpose of the committee to purchase in the

interest of these particular creditors, as a single interest, from the trustee who represents all the creditors, the property of the bankrupt, and the committee should not be allowed to cast more than one vote for trustee instead of a vote for each claim represented by them. In re Kenney Co. (D. C., Ind.), 14 Am. B. R. 611, 136 Fed. 451.

33. In re Kenney & Co. (D. C., Ind.) 14 Am. B. R. 611, 136 Fed. 451.

34. In re Messengill (D. C., N. Car.), 7 Am. B. R. 669, 113 Fed. 366; In re Frank, Fed. Cas. 5,050.

35. In re Coe (Ref., Ohio), 1 Am. B. R. 275.

36. Bankr. Act, § 57-e. Compare also In re Cram, Fed. Cas. 3,343; In re Davis, Fed. Cas. 3,614; In re Hanna, Fed. Cas. 6,027. And see In re Hunt, Fed. Cas. 6,884; Emerine v. Tarault (C. C. A., 6th Cir.), 34 Am. B. R. 55, 219 Fed. 68.

The right of a secured or priority creditor to vote for trustee upon the excess of his claim over his security or priority should be correctly determined and limited to the proper amount, and where no petition for re-examination of such a claim or the determination of its value has been filed and it is claimed that the value of the security greatly exceeds that placed upon it by the referee, exceptions to his ruling will be overruled without prejudice to the right of the trustee or creditors to the appointed method under General Order 21. subd. 6, to review the ruling. Matter of Columbia Iron Works (D. C., Mich.), 14 Am. B. R. 526, 143 Fed. 234.

36a. Matter of Ferrand (D. C., La.), 46 Am. B. R. 36, 263 Fed. 908.

be a deficiency, and then only to the amount of the deficit.^{36b} Secured creditors often consider their security of so little value that they surrender it, or offer so to do, in their proof of debt. If so, they vote on the entire amount.³⁷ Even if the security is upon exempt property, the creditor is only allowed to vote on the unsecured balance.³⁸

(2) CREDITORS ENTITLED TO PRIORITY.—The preceding paragraph is equally applicable here. Sections 64-a-b should also be read. As priority creditors may reasonably expect to be paid in full, instances where they may participate in votes at creditors' meetings will be rare.

(3) PREFERRED CREDITORS.—A preferred creditor cannot vote without surrendering his preference.³⁹ It is necessary for a creditor in order to prove a claim and take part in a creditors' meeting to waive any lien or preference or security in his favor.⁴⁰ He is not even a creditor in the sense here used until he surrenders his advantage. When he does so voluntarily,⁴¹ he is entitled to vote the full amount of his claim. In this connection, the changes in the definition of "preference" made by the amendatory act of 1903 should be observed.⁴² Whether the obtaining of a lien through legal proceedings,⁴³ within four months of the bankruptcy, constitutes the creditor obtaining it a "preferred creditor" may be doubted.⁴⁴ It has been held that it does not because the lien is avoided by section 67-f.⁴⁵ It is not, however, important in this connection; the claims of such creditors can be objected to and postponed.

d. Votes by attorneys in fact.—The law permits proxy voting, provided the agent, attorney or proxy is duly authorized.⁴⁶ The meaning of these last words seems to be indicated by General Order XXI (5), supplemented by Forms Nos. 20 and 21.⁴⁷ Attorneys at law representing creditors of a bank-

36b. Secured claim.—Where a secured creditor's proof of claim is entirely formal and contains no prayer for the enforcement of the petitioner's security and does not allege any insufficiency in its security or take any step to have the value of its security determined it is not entitled to have its secured claim allowed to any amount in order that it might participate in a creditor's meeting. *Matter of North Star Ice & Coal Co.* (D. C., Tenn.), 42 Am. B. R. 76, 252 Fed. 301.

37. See *In re Parks*, Fed. Cas. 10,754; *In re High*, Fed. Cas. 6,473.

38. *In re Lantzenheimer* (D. C., Iowa), 10 Am. B. R. 720, 124 Fed. 710.

39. Bankr. Act, § 57-g. *Stevens v. Nave-McCord Mercantile Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71. For a case where a preferred creditor was improperly allowed to vote, see *In re Malino* (D. C., Iowa), 8 Am. B. R. 205, 118 Fed. 368.

40. Waiver of lien by proving claim and voting at creditor's meeting to elect trustee.—One who claims a mechanic's lien but waives it on proving a claim in bankruptcy against the contractor, having voted upon the claim and transacted other business as a creditor at a meeting of creditors for the election of a trustee, may not thereafter assert that through the mistake made by a clerk of the lawyer who drew the proof of claim the waiver therein was broader than he intended, where the lien sought to be preserved must have been collected out of the proceeds of a contract which were the property of bankrupt. *Brown v. City National Bank* (Sup. Ct., N. Y.), 26 Am. B. R. 638, 72 N. Y. Misc. 201.

41. See under Section Fifty-seven of this work.

42. See under Section Sixty of this work.

43. See under Section Sixty-seven of this work.

44. Bankr. Act, § 57-d.

45. *In re Scully* (D. C., Pa.), 5 Am. B. R. 716, 108 Fed. 372.

46. Bankr. Act, § 1 (9). See also Am. B. R. Dig., § 315.

Revenue stamp.—Letters or power of attorney giving authority to vote for a trustee must bear a revenue stamp under the Emergency Revenue Law of October 22, 1914. *Matter of Capital Trading Co.* (D. C., N. Y.), 36 Am. B. R. 339, 229 Fed. 806.

Power of referee to pass upon validity of powers of attorney.—The referee, presiding at the first meeting of creditors for the election of a trustee, must determine who are to make up its constituent members, and he has the right to refuse to allow one offering to qualify, who acts under a power of attorney nominally executed by the creditors, but in fact procured by the bankrupt in order to vote for his choice of trustee. *In re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57, affg. *Falter v. Reinhard* (D. C., Ohio), 4 Am. B. R. 782, 104 Fed. 292. See also *In re Rekersdres* (D. C., N. Y.), 5 Am. B. R. 811, 108 Fed. 206; *In re Dayville Woolen Co.* (D. C., Ct.), 8 Am. B. R. 85, 114 Fed. 674; *In re Pfromm*, Fed. Cas. 11,061.

47. Powers must be executed as indicated in the forms. *In re Henschel* (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 443. A commissioner of deeds should not be permitted to

rupt, although in good standing and duly admitted to practice in the United States courts, must, before being entitled to vote for a trustee, present a duly executed power of attorney in the form prescribed,⁴⁸ also, where the attorney represents a partnership or corporation, the power must be accompanied by the oath called for by General Order XXI (5).⁴⁹ The cases under the former law are to the same effect.⁵⁰ Perhaps caution requires this, and it is quite apparent that recognized practice and the weight of authority requires attorneys at law to obtain letters or other instruments showing authority to represent their client creditors. It is suggested that these cases have not given proper force to the words "when a creditor is not represented by attorney-at-law,"⁵¹ in the caption of Form No. 20, or the second sentence of General Order IV. Unless there is strong reason—and, save in the large cities where perhaps disbarment means little, there seems to be none—it is submitted that the ancient practice of recognizing for all purposes an attorney who appears for a party might well be followed. Written appearances should, however, be required.⁵² An attorney, who prepared the bankrupt's petition, his services then terminating, may vote upon claims sent to him without his solicitation or the procurement of the bankrupt.⁵³ An attorney, who holds a power of attorney from a creditor, jointly with the bankrupt's attorney, should not be permitted to vote.⁵⁴ Such powers of attorney to be effectual as a grant of right to vote must be secured in good faith without collusion with the bank-

cast votes for a trustee under a power of attorney acknowledged before himself. *Matter of Grossman* (D. C., N. Y.), 34 Am. B. R. 32, 225 Fed. 1020. Compare, for rulings, under former law, *In re Christley*, Fed. Cas. 2,702; *In re Barrett*, Fed. Cas. 1,043.

48. *In re Blankfein* (D. C., N. Y.), 3 Am. B. R. 165, 97 Fed. 191; *In re Richards* (D. C., N. Y.), 4 Am. B. R. 631, 103 Fed. 849; *In re Scully* (D. C., Pa.), 5 Am. B. R. 716, 108 Fed. 372; *In re Lazoris* (D. C., Wis.), 10 Am. B. R. 31, 120 Fed. 716. *In re Eagles & Crisp* (D. C., N. Car.), 3 Am. B. R. 733, 99 Fed. 496; *In re Henschel* (D. C., N. Y.), 6 Am. B. R. 305, 109 Fed. 861; *Matter of Capital Trading Co.* (D. C., N. Y.), 36 Am. B. R. 339, 229 Fed. 806. See also *In re Hawley* (D. C., N. Y.), 220 Fed. 372; *In re Henschel* (C. C. A., 2d Cir.), 7 Am. B. R. 762, 113 Fed. 443. *Contra*: *In re Crooker Co.* (Ref., Mass.), 27 Am. B. R. 241; *In re Brown*, 2 N. B. N. Rep. 590; *In re Pauly* (Ref., N. Y.), 2 Am. B. R. 333, holding that an attorney in good standing need not present a passport, in the nature of a power of attorney, every time he, in his professional capacity, approaches the domain of bankruptcy. His authority to make a reasonable request or motion will ordinarily be presumed. See Am. Bankr. Dig. § 315.

Representation by attorney.—The fact that a relative of the bankrupt sought to have the attorney for the bankrupt vote his claim and the claims of other relatives but

the attorney stated it was inconsistent and suggested that another attorney in the same office represent him and that the present receiver would be a proper man for trustee. does not warrant the rejection of the votes of such creditors, especially where it appears that the bankrupt neither openly nor secretly endeavored to control or influence the selection of a trustee. *Matter of Rothleder* (D. C., N. Y.), 37 Am. B. R. 116, 232 Fed. 398.

Authority of managing attorney.—A power of attorney to vote a claim at a meeting of creditors, running to a law firm or "their representative" authorizes their managing attorney to vote the claim. *Matter of Eisenberg* (D. C., N. Y.), 40 Am. B. R. 864, 251 Fed. 427.

49. *In re Finlay* (D. C., N. Y.), 3 Am. B. R. 738, 104 Fed. 675; *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619, holding that the General Order is sufficiently complied with where the oath is contained in the proof of debt.

50. *In re Purvis*, Fed. Cas. 11,476; *In re Kneopfel*, Fed. Cas. 7,891; *Martin v. Walker*, Fed. Cas. 9,170.

51. Form No. 26, under the former law, was not so captioned. Consult *In re Gasser* (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537.

52. Compare, for practice in accordance with these views, 1 N. B. N. 113 (rule 6), and p. 114. Form A. See also *In re Gasser* (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537, and *In re Northern Iron Co.*, Fed. Cas. 10,322.

53. *In re Cooper* (D. C., Pa.), 14 Am. B. R. 320, 135 Fed. 196.

54. *Matter of Columbia Iron Works* (D. C., Mich.), 14 Am. B. R. 536, 142 Fed. 234.

rupt or his attorney.⁵⁵ A power of attorney must be produced before the close of the meeting.⁵⁶

e. Practice.—The practice in voting at creditors' meetings is indicated in what goes before. Claims are called for allowance at the first meeting, and should be at every continuance day. At the same time, appearances, either in person, by attorneys, or by agents or proxies, should be noted. If any power of attorney or proof of debt is objected to, the referee will often determine the question summarily. Sometimes such matters are postponed until all other claims are called, to determine whether the objections will affect the result. Votes are usually taken *viva voce*,⁵⁷ and, at the conclusion, the result announced by the referee, he at the same time noting in his minute-book the vote taken and the subject decided.⁵⁸ After this is done, other votes cannot be received, nor should a creditor be allowed to change his vote.⁵⁹ Referees usually have filing and approval stamps, which, when imprinted on the proofs or powers, indicate the action taken. There are, of course, slight variances in practice in every referee district. Any method which will permit an expression of the wishes of all creditors entitled to vote, without suggestion from or interference by the presiding referee, is all that is required. The effect of a disagreement of creditors on an election of trustee is considered elsewhere.⁶⁰

55. Good faith in securing powers of attorney.—Powers of attorney obtained through the influence of the attorneys for creditors who have received alleged preferences may not be used in the selection of a trustee, especially in a case where the unsecured creditors have no possible way of realizing on their claims unless the trustee is able to recover the illegal preference. *Matter of Law* (Ref., Ill.), 13 Am. B. R. 650, *affd.* by district court. No attorney should be permitted to vote any claim that has come to him through the instrumentality of the bankrupt, in furnishing him with a list of the creditors before the schedules are filed. *In re Lloyd* (D. C., Wis.), 17 Am. B. R. 96, 148 Fed. 92.

Proxies secured by creditors.—An election of a trustee, approved by the referee in bankruptcy and the District Court, should not be

disturbed because 36 claims were voted by proxies, where it does not appear that they were procured to be voted or were voted in the interest of the bankrupt, but on the contrary that they were solicited by a creditor and voted by attorneys in no way subject to the control or direction of the bankrupt. *Matter of Wilson* (C. C. A., 1st Cir.), 39 Am. B. R. 419, 242 Fed. 479.

56. *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619, holding that the production of a missing power of attorney after the election of a trustee and the close of the meeting comes too late.

57. Compare *In re Pearson*, Fed. Cas. 10,878.

58. The use of Form No. 22 is not general.

59. *In re Schieffer*, Fed. Cas. 12,445; *In re Lake Superior, etc. Co.*, Fed. Cas. 7,997.

60. See Bankr. Act, § 44.

SECTION FIFTY-SEVEN.

PROOF AND ALLOWANCE OF CLAIMS.

§ 57. **Proof and allowance of claims.**—*a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so, what securities are held therefor, and whether any, and, if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimant will permit.

g The claims of creditors who have received preferences, *voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given,** shall not be allowed unless such creditor shall surrender *such preferences, conveyances, transfers, assignments, or incumbrances.**

*Amendments of 1903 in italics.

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, and then within sixty days after the rendition of such judgment: *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

Analogous provisions: In U. S.: As to who may make proof, Act of 1867, § 22, R. S., § 5078; Act of 1841, § 5; and take proof, Act of 1867, § 22, R. S., § 5079; Act of 1841, § 5; As to manner of proof, Act of 1867, § 22, R. S., § 5077; Act of 1841, §§ 5, 7; As to inspection and allowance of claims, Act of 1867, § 22, R. S., §§ 5080, 5081; Act of 1841, §§ 5, 7; Act of 1800, §§ 16, 37, 39; As to postponing allowance of claims objected to, Act of 1867, § 23, R. S., § 5083; As to proof of preference claims, Act of 1867, § 23, R. S., § 5084.

In Eng.: Act of 1883, Schedule II, General Rules 219-231.

In Can.: Act of 1919. §§ 45, 46, 47, 48, 49, 52, 53.

Cross-references: To the law: Definitions of creditor, § 1(9); of debt, § 1(11); of secured creditor, § 1(23).

Jurisdiction to allow, disallow and reconsider claims, § 2(2).

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See forms in Hagar & Alexander's Bankruptcy Forms, (2d Ed.).

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I. PROOF AND ALLOWANCE IN GENERAL.

a. *Scope of section.*—This section is the guide to the practice upon the proof and allowance of claims against the bankrupt. It prescribes with some definiteness what is to be done by the creditor to secure an allowance of his claim. It determines what those creditors, who have security or priority in part for their claims, may do to secure an allowance of their unprotected balances. It states the duty to be performed by those creditors who have received void or voidable preferences in order that their claims may be allowed. In case of a contest on claims, it sets out the practice in hearing objections, and provides for a rejection of a claim presented, and the reconsideration of a claim allowed. It will be noticed by references hereafter

noted that the practice herein prescribed is largely supplemented by the general orders,¹ and the official forms also indicate the essential requirements for a due presentation and allowance of claims against the bankrupt's estate.² The section does not attempt to declare what are and what are not provable debts; this is left for a subsequent section and will be hereafter considered.³

b. *Comparative legislation.*—Both the English and Canadian bankruptcy laws go into great detail on the subject of the proof of claims.⁴ Their practice on proving debts is not essentially different from our own, and will, therefore, be found suggestive. So also of our law of 1867. The facts necessarily shown in a proof of debt were more numerous⁵ and, early, in its administration, the taking of proofs was limited to certain Federal officers;⁶ but then, as now, proof was made by an affidavit in the nature of a deposition,⁷ the general orders⁸ and forms⁹ and were practically identical with those now in use. Precedents under that law are still valuable.

c. *Distinction between proof and allowance of claims.*—The language of the act in relation to the distinction between the allowance of claims and the proof of claims is carefully observed throughout §§ 55, 57 and elsewhere. The proof of a claim is one thing, its allowance by the court is quite a different step. When the act refers to a proof of a claim it means the deposition or statement of the creditor. When it refers to its acceptance by the courts, it uses the word allowed or allowance.¹⁰ The distinction between

1. See General Orders, XX, XXI, XXIV and XXVIII.

2. See Official Forms, Nos. 19-21, 31-39.

3. Bankr. Act, § 63, and discussion thereunder. It should be noticed, however, that subsection *g* prevents the allowance of claims of creditors who have received void or voidable preferences, except when the preferences are surrendered; that subsection *f* limits the allowance of claims for penalties and forfeitures; that subsection *m* permits the proof of a claim of one bankrupt estate against another, and that subsection *n* places a time limitation upon the provability of debts. These subsections are closely related to the subject of the provability of debts.

4. See "Analogous Provisions," *supra*.

5. Act of 1867, § 22, R. S., § 5077.

6. Act of 1867, § 22, R. S., §§ 5076, 5079. See also R. S., §§ 5076-A, 5076-B.

7. Compare *In re Strauss*, Fed. Cas. 13,532; *In re Elder*, Fed. Cas. 4,326; *In re Port Huron Dry Dock Co.*, Fed. Cas. 11,293; *Dutton v. Freeman*, Fed. Cas. 4,210.

8. Act of 1867, General Order XXXIV.

9. Act of 1867, Forms Nos. 21, 22, 23, 24, 25.

10. *Matter of Back Bay Automobile Co.* (Ref., Mass.), 19 Am. B. R. 33.

Proof and allowance of claims are separate and distinct steps.—In the case of *In re Mertens* (C. C. A., 2d Cir.), 16 Am. B. R. 825, 147 Fed. 177, 77 C. C. A. 473, the court considered the various subsections of section 57 and concludes: "From these various sections we deduce the following propositions: that proof and allowance of claims are two separate and distinct steps; that a clear statement of a claim in writing, duly

verified and filed with a referee, if made within a year, is sufficient to take the claim out of the statutory limitation, even though it may be allowed or liquidated and allowed afterward. We think that section 63-b must be interpreted in the light of the other sections of the law and that to construe it as meaning that no proof of unliquidated claims can be filed until the precise amount due thereon is established will, in practical operation, make an allowance of such claims impossible for the reason that a hostile trustee or creditor can easily delay the liquidation until after the expiration of the year. The more reasonable and sensible construction is, that the filing of the proof, like the filing of a declaration at common law, if made within the time, takes the claim out of the statute of limitations, and that after such proof is made, the claim is before the court to be dealt with as the interests of the bankrupt and the creditor may require." See also *In re Standard Telephone & Electric Co.* (D. C., Wis.), 26 Am. B. R. 601, 186 Fed. 586; *In re Fairlamb Co.* (D. C., Pa.), 23 Am. B. R. 515, 199 Fed. 278.

This distinction has been lucidly maintained by Judge Ray, in *In re Horstein* (D. C., N. Y.), 10 Am. B. R. 308, 122 Fed. 266, where he says: "It will be noted that the proof of a claim is one thing, and the allowance of such claim is quite another thing. Claims may be proved, but not allowed. They may be provable, not allowable. They may be provable, and then allowed in part only, or on conditions only. The statute does not say that the claims of creditors who have received preferences shall not be proved; but it does say that such claim shall not be

proof and allowance is much the same as that between evidence and judgment.¹¹ Before a claim can be regarded as proven the written proof called for by § 57-n must at least have been filed or lodged with the court or some officer thereof. That such written proof has been completed is not enough so long as the proof remains in the hands of the creditor or his attorney.¹²

II. PROOF OF CLAIMS.

a. General requirements.—Claims in bankruptcy must be proven in the manner prescribed in the bankruptcy law as supplemented by the general orders and official forms.¹³ Affidavits used in insolvency or general assignment proceedings under State laws are not enough; though, where the facts and amounts tally with the schedule and include those called for by § 57-a, they will, provided there is no objection, usually be accepted and filed. Proofs of

allowed unless or until the creditor surrenders his preference. By plain implication, the proof of the claim is permitted. The claim of a creditor who has received a preference may be proved; but it cannot be allowed, unless he shall surrender the preference. Strange, indeed, is that construction of this law, in the face of those provisions, which will prevent a creditor from coming into court and proving his claim, having the amount of the preference received by him, if any (and that may be a serious and necessary question for determination, both to the fact of preference and its amount), determined by the court, and then having his proved claim allowed on surrendering the preference. Any creditor has the right to come into court for that very purpose. To hold otherwise will logically prevent a creditor who has in fact received a preference, by way of lien or otherwise, for only a small part of his claim, coming into court and proving his claim, and then having it allowed on surrendering the preference—a mode of procedure the statute expressly permits.”

“Debts are not the less provable, within the meaning of the Bankrupt Act, because the statute of limitations may be successfully pleaded against their allowance. As well say that a debt was not suable because the statute of limitations might be pleaded to an action upon it.” *Hargardine-McKittrick Dry Goods Co. v. Hudson* (C. C. A., 8th Cir.), 10 Am. B. R. 225, 122 Fed. 232, aff. 6 Am. B. R. 657. See also *In re Scruggs* (D. C., Ala.), 31 Am. B. R. 94, 97, 205 Fed. 673, citing text.

Right to prove a secured claim.—There is apparently a distinction between the proving of a claim under § 57a and its allowance under § 57c, resulting in the right to prove a secured claim when the ultimate necessity for its allowance appears reasonably possible, even though it may turn out to be unnecessary because the security proves adequate to pay the debt in full. *Emerine v. Tarault* (C. C. A. 6th Cir.), 34 Am. B. R. 55, 219 Fed. 68.

A proved claim does not become “allowed” by the filing thereof, since the allowance of a claim, different from the party’s

act of proving and the ministerial act of filing, is a judicial act; and until a direct or indirect order of allowance is made, objections to a claim may properly be filed, it being unnecessary, until such order is made, to proceed under section 57k or l for a reconsideration of the claim and a recovery of dividends already paid. *In re Two Rivers Woodenware Co.* (C. C. A., 7th Cir.), 29 Am. B. R. 518, 199 Fed. 877.

A disallowed claim and a nonprovable debt are not identical things; and where a debt is disallowed because without foundation the claimant does not have a nonprovable debt. *Leaser v. Gray*, 236 U. S. 70, 34 Am. B. R. 8.

11. Compare *In re Wise*, 2 N. B. R. Rep. 151. See *In re Merrick*, Fed. Cas. 9,463.

12. *In re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, rev. 19 Am. B. R. 33.

13. *In re Dunn Hardware & Furniture Co.* (D. C., N. Car.), 13 Am. B. R. 147, 133 Fed. 719; *In re Coventry-Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 272, 106 Fed. 516. The practice covering the presentation of claims of creditors to the referee in bankruptcy is outlined in *In re Sumner* (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224.

Verified proofs of claim.—A wife who, in her verified proofs of claims against the bankrupt estate of her husband, makes no reference to any payment on account of loans which were the subject-matter of her claims, but expressly states that “no part of said debt has been paid,” and scratches out from the blank form the word “except,” violates the express requirements of this section. *In re Girvin* (D. C., N. Y.), 20 Am. B. R. 490, 160 Fed. 197, 206.

Necessity that forms be followed with exactness.—Bankrupt forms have been provided to expedite proper and prompt administrations according to the very right of parties and by no means for the purpose of creating purely technical defenses, hence the court is not bound by any hard and fast rule to these forms, but on the contrary any form of proof used, if sufficient to show the nature of the claim and the bankrupt’s liabil-

debt must show at least (1) the claim; (2) the consideration therefor;¹⁴ (3) whether any, and, if so, what, securities are held therefor; (4) whether any, and if so, what, payments have been made thereon; and (5) that the sum claimed is justly owing from the bankrupt to the creditor.¹⁵ Proofs must be (a) in writing, (b) under oath, and (c) signed by the creditors.¹⁶ There must be a sufficient verification, otherwise there is a failure of proof.¹⁷ As will be noticed hereafter, a defective proof of a claim, or an informal presentation of a claim may be corrected by amendment even if after the expiration of the time limit,¹⁸ provided there enough is presented to show that a demand is made against the estate, and that it is the creditor's intention to hold the estate liable.¹⁹

b. Proof as evidence; prima facie case.—A claim proven as required by the act should be received and filed by a referee receiving it, and amounts to a *prima facie* case;²⁰ thus proving the debt for all purposes in the proceeding, unless objected to or continued for consideration. If objections are made to the allowance of a claim, the formal proof of it raises a presumption as to its validity which must be rebutted by affirmative proof.²¹ Even if objected to, the sworn proof of claim is *prima facie* evidence of its validity; when objection is made, clause *f* provides that the objection shall be heard and determined,

ity therefor supported by the legal affidavit of the claimant is sufficient. *Matter of Collins* (D. C., W. Va.), 32 Am. B. R. 788, 215 Fed. 247; *Matter of Booth* (D. C., N. Y.), 33 Am. B. R. 183, 216 Fed. 575; *Matter of Hudson Porcelain Co.* (D. C., N. Y.), 35 Am. B. R. 18, 225 Fed. 325.

14. *In re Stevens* (D. C., Vt.), 5 Am. B. R. 806, 107 Fed. 243, holding that the statement of consideration should be sufficiently specific and full to enable creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim, and if it be so meagre and general in character as not to do this it is insufficient. *In re Cressinger* (Ref., Cal.), 17 Am. B. R. 538, 543.

15. Claims which do not comply with the requirements of the bankruptcy act are not "duly proved" within the meaning of section 57d of the Bankruptcy Act. *Matter of Hudson Porcelain Co.* (D. C., N. J.), 35 Am. B. R. 18, 225 Fed. 325.

The amount claimed by a creditor to be owing him from a bankrupt must be definitely stated in the proof of claim and not left to depend upon some future contingency. *Bay State Milling Co. v. Susman Feuer Co.* (Conn. Sup. Ct. of Enos), 39 Am. B. R. 132, 100 Atl. 19.

16. As to propriety of permitting attorney for trustee to make out and present formal proof of creditor's claim, see *In re McKenna* (D. C., Ark.), 15 Am. B. R. 4, 137 Fed. 611; *In re Kimball* (D. C., Mass.), 4 Am. B. R. 144, 100 Fed. 177, in which it was held that the fact that the attorney for a party takes the oath of his client to the proof of claim does not justify its disallowance.

17. *In re Coventry-Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 272, 116 Fed. 516; *In re Carter* (D. C., Ark.), 15 Am. B. R. 120.

Necessity for county clerk's certificate.—Although a proof of claim has been sworn to outside the district there is no necessity for a county clerk's certificate. *Matter of Eisenberg* (D. C., N. Y.), 40 Am. B. R. 864, 251 Fed. 427.

18. *Matter of Kessler* (C. C. A., 2d Cir.), 25 Am. B. R. 512, 184 Fed. 51. See under heading "Amendment of proof of claims," *post*.

19. *Matter of Thompson* (C. C. A., 3d Cir.), 36 Am. B. R. 190, 227 Fed. 981, affg. 34 Am. B. R. 242, 222 Fed. 167.

20. *Matter of O'Gara & Maguire, Inc.* (D. C., N. J.), 44 Am. B. R. 49, 259 Fed. 935; *In re Sumner* (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224; *In re Shaw* (D. C., Pa.), 6 Am. B. R. 499, 109 Fed. 780; *Whitney v. Dresser*, 15 Am. B. R. 328, 200 U. S. 532; *Matter of McIntyre & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 1, 174 Fed. 627. But where not so proven until after the bankrupt's death, the proof does not have this effect. *In re Shaw* (D. C., Pa.), 7 Am. B. R. 458, 112 Fed. 947.

A sworn proof of claim is *prima facie* evidence of its allegations, even if objected to; and it is regarded as a deposition rather than as a pleading, and has the force of evidence. *In re United Wireless Telegraph Co.* (D. C., Me.), 29 Am. B. R. 848, 201 Fed. 445.

Compliance with statute.—A proof of claim is not *prima facie* evidence of its allegations and entitled to allowance, unless it complies with the requirements of the bankruptcy act, as to the statement of the claim and its consideration. *Matter of Hudson Porcelain Co.* (D. C., N. J.), 35 Am. B. R. 18, 225 Fed. 325.

Claim against bankrupt on stock subscription.—A claim by a receiver of an insolvent insurance company against the bankrupt estate of a stockholder, based on the contention that it is necessary to enforce the liability of stockholders on their subscriptions in order to equalize claims between various stockholders who had paid their subscriptions in various proportions, should not be allowed where it does not appear how much the bankrupt has paid on his subscription. *Matter of Bass* (D. C., Ga.), 32 Am. B. R. 766, 215 Fed. 275.

21. *Matter of Welborne* (D. C., N. Y.), 45 Am. B. R. 312, 266 Fed. 385, quoting *Collier on Bankruptcy* (11th ed.), 783. See also under heading "Objection before Allowance," *post*.

and not the claim.²³ If the proof of debt is not relied upon by the creditor, but he attempts to establish his claim by other evidence, he cannot, on appeal, use the allegations of his proof of debt to supply deficiencies in his testimony.²⁴ If proof is properly made by witnesses who are competent to testify, the claim may be received. It is a serious matter to reject a claim upon the ground that the witnesses are unworthy of belief.²⁵

c. *Allegations of proof.*—The proof of claim is not a pleading, but a deposition which must set forth the evidence with particularity.²⁶ While strict rules of pleading do not apply, it is nevertheless necessary that the claim and its consideration should be so set forth as to enable the trustee and the creditors to make proper investigation as to its fairness and legality without undue trouble or inconvenience.²⁷ If the allegations of the proof do not set forth all of the necessary facts to establish a claim, or are self-contradictory, the

^{23.} *In re Castle Braid Co.* (D. C., N. Y.), 17 Am. B. R. 143, 145 Fed. 224; *In re Carter* (D. C., Ark.), 15 Am. B. R. 126, 139 Fed. 846, holding that when the creditor presents a properly verified claim, the burden of proof is shifted upon the objector; *In re Cannon* (D. C., Pa.), 14 Am. B. R. 114, 133 Fed. 837. But see *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 319; *In re Scott* (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418; *In re Wooten* (D. C., N. Car.), 9 Am. B. R. 247, 118 Fed. 670, holding that every creditor should establish his claim by a preponderance of evidence; *In re Dunlap Carpet Co.* (D. C., Pa.), 22 Am. B. R. 788, 171 Fed. 532.

Proof of claim as evidence.—The Supreme Court in the case of *Whitney v. Dresser*, 200 U. S. 532, 15 Am. B. R. 326, has sustained the principle declared in the text, holding that the words of section 57-*f* suggests, if they do not distinctly import, that the objector is to go forward; it is the objection, and not the claim, which is there pointed out for hearing and determination, indicating that the claim is regarded as having a certain standing already established by the oath.

The proof of claim is *prima facie* evidence that the allegations made therein are correct, and the petitioner's status as a creditor must stand until it shall be properly and successfully attacked. *In re Roanoke Furnace Co.* (D. C., Pa.), 18 Am. B. R. 661, 152 Fed. 646; *In re Coventry-Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 272, 166 Fed. 516.

Negative averment.—In the case of *Board of Commerce v. Security Trust Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 762, 225 Fed. 454, a claim was filed which was based on the alleged breach of contract between the bankrupt and a chamber of commerce consisting of a failure to maintain its factory as agreed, and objection was made as to the proof presented. The court said: "The objection that the claim is not sufficiently proved is based upon the fact that from the evidence it does not appear the breach of contract by the Company was not brought about by strikes, labor difficulties, fires, acts of the elements, panics, or other causes beyond its control. In the sworn proof of claim these

negatives were clearly alleged, and, in the absence of proof to the contrary, are held to be sufficiently proved under the Bankruptcy Act, since such allegations are *prima facie* evidence and the sworn proof of claim is some evidence, even when it is denied. *Whitney v. Dresser*, 200 U. S. 532, 15 Am. B. R. 326, 26 Sup. Ct. 316, 50 L. Ed. 584. These designated exceptions and contingencies are all matters which were peculiarly within the knowledge of the company. Under such circumstances the *prima facie* proof of the proof of claim itself must stand, unless the one against whom the averment was made shows an excuse from compliance by proving the causes named."

^{24.} *Matter of McIntyre & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 1, 174 Fed. 627.

^{25.} *Matter of Rome* (D. C., N. J.), 19 Am. B. R. 820, 162 Fed. 971.

^{26.} *Matter of Creasinger* (D. C., Cal.), 17 Am. B. R. 538, 145 Fed. 224. All the formalities required in ordinary pleadings do not apply to the filing of proof of a claim in bankruptcy. *Kelsey v. Munson* (C. C. A., 8th Cir.), 28 Am. B. R. 520, 198 Fed. 841.

What proof of claim should contain.—A proof of claim is not a pleading but a deposition and should inform to a certain extent of the origin and character of the debt, and the items of which it is made up should be given, and the statement of the consideration ought to be such as, if true, not to put the creditors or trustees upon proof or require oral explanation from the claimants, and should be sufficiently full to enable the trustee or creditors to pursue any legitimate inquiry as to the fairness and legality of the claim. *Matter of Creasinger* (Ref., Cal.), 17 Am. B. R. 538, 145 Fed. 224.

Statement upon information and belief.—The vital facts to support a proof of claim should be made to appear by positive averments, founded upon deponent's knowledge, and not upon his belief; and an allegation upon information and belief upon a vital point in a proof of claim is not sufficient to sustain such proof. *In re United Wireless Telegraph Co.* (D. C., Me.), 29 Am. B. R. 848, 201 Fed. 445.

^{28.} *Matter of Griffin* (D. C., Mass.), 33 Am. B. R. 894, 188 Fed. 389.

claim may be disallowed; or the referee may unquestionably order proper and legitimate inquiries into the fairness and legality of such claim so that he may pass upon it intelligently and judicially.²⁷ The proof presented to sustain the claim should conform to the statement, at least as to amount and grounds.²⁸

d. Statement as to consideration.—The statement as to consideration must be sufficiently full and explicit to enable the trustee and other creditors to investigate as to the fairness and legality of the claim.²⁹ It must be sufficient to enable the referee passing on it to do so intelligently and judicially.³⁰ It will not be sufficient to merely state that the consideration was "for legal services,"³¹ or "for goods, wares and merchandise."³² The statement of the

27. *Orr v. Parke* (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683; *In re Castle Braid Co.* (D. C., N. Y.), 17 Am. B. R. 143, 145 Fed. 224.

28. *In re Lansaw* (D. C., Mo.), 9 Am. B. R. 167, 118 Fed. 365.

29. *Orr v. Parke* (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683 in which the court quoted the language of the text; *In re Scott* (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418; *In re Stevens* (D. C., Vt.), 5 Am. B. R. 806, 104 Fed. 325; *Matter of Hudson Porcelain Co.* (D. C., N. J.), 35 Am. B. R. 18, 225 Fed. 325; *Matter of Welborne* (D. C., N. Y.), 45 Am. B. R. 312, 266 Fed. 383.

Statement of consideration.—This provision with reference to consideration relates only to the proof of claim and not to the averments of the petition. *In re Brett* (D. C., N. J.), 12 Am. B. R. 492, 130 Fed. 981. "For legal services" has been held to be an insufficient statement of consideration. *In re Scott* (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418. A statement that the claim is "for goods, wares and merchandise" is insufficient. *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619. A statement that the consideration is a written promise to pay a certain sum, "for value received," is not sufficient. *In re Coventry-Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 272, 166 Fed. 516. In the case of *In re Watertown Paper Co.* (C. C. A., 2d Cir.), 22 Am. B. R. 190, 169 Fed. 252, it was held that the rejection of a claim is not justified because the consideration of the debt was stated to be for "wood pulp sold and delivered," when it really was for the balance of a running account though wood pulp sold did in fact constitute a large part of the consideration, where it appeared that the whole matter of the account had been fully inquired into before the special master, and the claim which was irregular in form had been amended to conform to the proof and the amount was clearly stated. In the case of *In re United Wireless Telegraph Co.* (D. C., Mo.), 29 Am. B. R. 848, 201 Fed. 445, it was held that a proof of claim which merely states that deponent was in the employ of bankrupt's predecessor from on or about November 1, 1903, to on or about November 1, 1906, and that a specified sum was due him for salary when he left its employ on the latter date, but which does not state the character of the services, or otherwise give the consideration for them is insufficient.

Where claim is for money had and received.—A proof of claim, setting forth the amount of the debt and alleging the consideration to have been a loan by the claimant to the bankrupt of a certain sum of money, and further unnecessarily alleging that the money was received, accepted, and used by the bankrupt for its own use and benefit is a sufficient compliance with the act, and where it is sustained by the proof it is immaterial whether or not the allegations amount to a count in assumpsit for money had and received. *Flower v. Commercial Trust Co.* (C. C. A., 8th Cir.), 35 Am. B. R. 74, 223 Fed. 318.

30. *Orr v. Parke* (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683; *In re Wooten* (D. C., N. C.), 9 Am. B. R. 247, 118 Fed. 670; *In re Eagles* (D. C., N. C.), 3 Am. B. R. 733, 99 Fed. 695.

31. *Matter of Creasinger* (D. C., Cal.), 17 Am. B. R. 538, 145 Fed. 224; *In re Scott* (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418.

Sufficiency of claim for legal services.—A general statement that the consideration of a claim is for legal services rendered during a certain period, without stating the nature of the services except in one particular, without specifying the dates or the number of times the claimant appeared for the bankrupt, and fails to state whether the amount claimed is the reasonable value of the services performed, is insufficient. *Matter of Hudson Porcelain Co.* (D. C., N. J.), 35 Am. B. R. 18, 225 Fed. 325.

32. *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619.

Goods, wares and merchandise.—In *re Elder*, Fed. Cas. 4,326, it was said: "Looking then at the object of the law and the reasons for requiring a statement of the consideration in the deposition, I consider that a general statement that the consideration of a demand is 'goods, wares and merchandise,' or hay, barley and board, is not sufficient; that the kinds of goods, the quantity, the price and near the date of sale should be stated; that the quantity of hay or barley, the price and the time of delivery if delivered at one time, or if delivered continuously through a period of time, that period should be stated. If the proof falls short of this the register ought not to consider it satisfactory and should withhold his approval."

claim should be itemized and set forth the dates of the several items where possible.³³

e. Requirements of General Order XXI.—Strict practice requires, however, that proofs of debt conform to General Order XXI (1) (2) (3). Thus, proofs (1) should be entitled in the court and in the cause,³⁴ (2) should contain a clause to the effect that "no note has been received for such account, nor any judgment rendered thereon;" (3) if an open account, should state when the debt became or will become due, and (4) if on items maturing at different dates, the average date should be stated.³⁵ A proof of claim is not vitiated merely because the caption incorrectly states the court.³⁶ If made (a) by a partnership, it must appear by oath that the affiant is a member of the partnership; if (b) by agent, the reason why it is not made by the claimant must be stated; and if (c) on behalf of a corporation, it must be sworn to by the treasurer, or if none, the corresponding fiscal officer of such corporation.³⁷

f. Requirements of official forms.—Several forms have been officially adopted by the Supreme Court governing the practice on proof of claims. The forms prescribed are: (1) for an unsecured debt (No. 31); (2) for a secured debt (No. 32); (3) for a debt due a corporation (No. 33); (4) for a debt due a partnership (No. 34); (5) for proof by agent or attorney (No. 35); (6) for proof of secured debt by agent (No. 36). Blanks are not supplied by the government, but are on sale in law book or stationery stores. Each of them contains an allegation which is not required by law;³⁸ none of them contains the allegation to the effect that the claimant has no note or judgment.³⁹ When none of these forms fit a given case, they should be varied or combined, reference being had chiefly to the requirements of the statute as to what constitutes a proof of debt. Some of these variations are considered later. Illustrative cases will be found in the foot-note.⁴⁰

33. *Matter of Eisenberg* (D. C. N. Y.), 40 Am. B. R. 864, 251 Fed. 427; *In re Wooten* (D. C. N. Car.), 9 Am. B. R. 247, 118 Fed. 670. See *In re Ferguson* (D. C. Pa.), 11 Am. B. R. 871, 127 Fed. 407. In the case of *In re Blue Ridge Packing Co.* (D. C. Pa.), 11 Am. B. R. 86, 125 Fed. 619, it was held that a claim which specified the consideration to be for "printing done for said bankrupt at its request heretofore, to wit, in September, 1903, as per bill rendered" is insufficient; it may inform to a certain extent of the origin and character of the debt, but the items by which it is made should be given; *In re Elder*, Fed. Cas. 4,326; *In re Scott* (D. C. Tex.), 1 Am. B. R. 553, 93 Fed. 418.

Claim based on open account.—In the case of *In re Globe Boat Co.* (D. C. N. Y.), 27 Am. B. R. 48, 190 Fed. 92, there was attached to the claim a statement of account substantially as follows: "To money advanced and salary due from Sept. 18, 1909, to Dec. 19, 1910, \$2,295.96," crediting the bankrupt with \$801.13, "By money drawn from firm," thus leaving a balance of \$1,494.83, the amount of the claim. The claim was in no manner itemized nor did the proof of claim state when the salary became due, or that no note had been received for such account or judgment rendered thereon. It was held that the claim being on an open account, the proof of claim

was defective as not complying with General Order XXI.

34. General Order XXI (1). See "Supplementary Forms," *post*, and also Hagar & Alexander's *Bankr. Forms* (3d Ed.); Am. Bankr. Dig. § 735.

35. A proof of claim by a surety which is in the form of a petition for the establishment of its subrogated rights and which very elaborately sets forth a history of the entire transaction, substantially complies with General Order 21, § 3, regarding the proof of assigned claims, *Kilpatrick v. United States Fidelity & Guaranty Co.* (C. C. A. 5th Cir.), 37 Am. B. R. 36, 228 Fed. 587.

36. *In re Blue Ridge Packing Co.* (D. C. Pa.), 11 Am. B. R. 86, 125 Fed. 619.

37. General Order XXI (1).

Officer of corporation.—Sufficient reason should be given why a claim by a corporation is not made by the officer designated. *Matter of Reboulin Pills & Co.* (Ref., N. J.), 19 Am. B. R. 215.

The president of a corporation who performs the duties of the treasurer may sign a claim. *Matter of Eisenberg* (D. C. N. Y.), 40 Am. B. R. 864, 251 Fed. 427.

38. That relative to set-offs and counter-claims.

39. Required by General Order XXI(1).

40. *In re Ankeny*, 1 N. B. N. 511; *In re Scott* (D. C. Tex.), 1 Am. B. R. 553, 93 Fed. 418; *In re Wise*, 2 N. B. N. Rep. 151; *In re Stevens* (D.

g. **Before whom proofs taken.**—Proofs of debt can be taken before any of the officers designated in § 20 of the act.⁴¹ This is a marked change from the law of 1867. They are not now usually taken before the referee. There being no requirement to that effect, the mere signature of the officer, without a certificate as to his authority or even a seal, seems enough,⁴² though referees can perhaps by rule require a certificate as evidence that the officer is "authorized to administer oaths." The proof being in the nature of a deposition and, if objected to, amounting to a pleading also, claims should not be sworn to before the attorney for the bankrupt,⁴³ although this would not of itself be sufficient to justify the disallowance of a claim.⁴⁴

h. **Who may make proof.**—(1) **IN GENERAL.**—Claims must be made by the creditor.⁴⁵ The proof of claim should show on its face the true interest of the person presenting it.⁴⁶ The status of creditors for the purpose of determining their rights to prove their claims is fixed as of the date of filing the bankruptcy petition.⁴⁷ An endorser or surety for a bankrupt is a creditor.⁴⁸ The executor or administrator of a deceased creditor may prove a claim against the bankrupt in behalf of the decedent's estate.⁴⁹ In the case of embezzlement or misappropriation of funds by a bankrupt, the person defrauded may at his option prove a claim founded upon an implied contract to repay.⁵⁰ A creditor who is indebted to the bankrupt in an amount much larger than his claim will not be allowed to prove such claim.⁵¹ It has been held if proof is made of an equitable claim, as by a *cestui que trust*, it must be not only of his claim but of all others similarly situated.⁵²

(2) **RELATIVES AS CREDITORS.**—A father may prove a claim against the estate of his son who is a bankrupt.⁵³ Where the wife's common law disability to enter into contracts in respect to her separate property has been removed, she is entitled to prove a claim against her husband's estate in bankruptcy, in the absence of deception on her part or conduct inconsistent with such claim.⁵⁴ Where a creditor is related to a bankrupt his claim will be subjected to a more rigid scrutiny than it would be if no such relation existed; but the

C., Vt.), 5 Am. B. R. 11, 104 Fed. 325; In re Sumner (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224; In re Shaw (D. C., Pa.), 6 Am. B. R. 499, 100 Fed. 780; In re Stevens (D. C., Vt.), 5 Am. B. R. 806, 107 Fed. 243.

41. See discussion under § 20, *ante*. See also In re Sugenhelmer (D. C., N. Y.), 1 Am. B. R. 425, 91 Fed. 744.

42. Not so under the law of 1867. In re Nebe, Fed. Cas. 10,073. See also for instances of the strict practice under the former law, In re Haley, Fed. Cas. 5,918; In re Strauss, Fed. Cas. 13,532; In re Lynch, Fed. Cas. 8,635.

43. In re Keyser, Fed. Cas. 7,748; In re Nebe, Fed. Cas. 10,073.

44. In re Kimball (D. C., Mass.), 4 Am. B. R. 144, 100 Fed. 177.

45. The order of payment between the various creditors has no bearing upon the right to prove a claim. McKey v. Bruns (C. C. A., 7th Cir.), 40 Am. B. R. 159, 243 Fed. 370.

Privy between creditor and bankrupt.—Where arrangements for the sale of property was made between the owners and a foreign corporation and in consummation of that arrangement a domestic corporation was formed to take over the property and to issue bonds in payment therefor, there is sufficient privy between the two corporations to permit the vendors to file a claim against the domestic corporation in bankruptcy on the bonds thus issued. Matter of Georgia Steel Co. (D. C., Ga.), 39 Am. B. R. 426, 240 Fed. 473. See also Am. B. R. Dig., §§ 725-729.

46. Matter of Collins (D. C., Ia.), 37 Am. B. R. 692, 235 Fed. 937.

47. In re O'Callaghan (Ref., Mass.), 30 Am. B. R. 97.

48. Kobusch v. Hand (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660; Bank of Wayne v. Gold (N. Y. Sup. Ct.), 26 Am. B. R. 722, 146 App. Div. 296, 130 N. Y. Supp. 942; In re Lyon (C. C. A., 2d Cir.), 10 Am. B. R. 25, 121 Fed. 723.

49. In re Woods (D. C., Pa.), 13 Am. B. R. 240, 133 Fed. 82, holding that the right of the executors of the bankrupt's father who died after the adjudication, to prove a debt against her estate in bankruptcy cannot be affected by a provision of his will that "any indebtedness that either she or her husband might then owe him," should be deducted from her share in his estate.

50. Burgoyne v. McKillip (C. C. A., 8th Cir.), 25 Am. B. R. 387, 182 Fed. 452.

51. In re Gerson (D. C., Pa.), 5 Am. B. R. 850, 105 Fed. 891.

52. In re Kenney & Co. (D. C., Ind.), 14 Am. B. R. 611, 136 Fed. 451.

53. In re Rider (D. C., N. Y.), 3 Am. B. R. 192, 96 Fed. 811.

54. In re Nelman (D. C., Wis.), 6 Am. B. R. 329, 109 Fed. 113. Thus, she may prove a claim against her husband's estate for services rendered in his saloon. In re Domenig (D. C., Pa.), 11 Am. B. R. 562, 128 Fed. 148. Or for money loaned. James v. Gray (C. C. A., 1st Cir.), 12 Am. B. R. 573, 131 Fed. 401. See also Clarke v. Rogers (C. C. A., 1st Cir.), 26 Am. B. R. 413, 418, 183 Fed. 518.

honest or dishonest character of a debt is not to be determined by the existence of a relationship between the parties.⁵⁵

(3) **CLAIMS BY CORPORATIONS, STOCKHOLDERS OR BONDHOLDERS.**—A stockholder of a corporation cannot, by executory contract between the corporation and himself whereby the corporation agrees to purchase the stock held by him, be transmuted from a stockholder into a creditor and as such be entitled to share in the assets of the corporation.^{55a} If a firm having a corporation as a partner *de facto* is adjudicated a bankrupt, the corporation as a general creditor may not prove a claim against the estate for money advanced and goods sold to the firm upon the ground that the partnership agreement was *ultra vires*.⁵⁶ The fact that the stockholders of two corporations are identical will not prevent one corporation from proving a claim against the other.⁵⁷ The bondholders of a bankrupt corporation, whose bonds are secured by trust mortgage on all the property of the corporation, are creditors of the bankrupt notwithstanding the rights of the trust mortgagee under the mortgage.⁵⁸ A stockholder who has not paid for his stock must first pay the amount due before he can recover on a claim against the company.^{58a}

(4) **PROOF BY AGENT, ATTORNEY OR PROXY.**—The method of proof where the claim is made by agent, attorney, or proxy, is indicated above.⁵⁹ The

55. Relationship of creditor.—*Baumhauer v. Austin* (C. C. A., 6th Cir.), 28 Am. B. R. 385, 186 Fed. 200, revg. 21 Am. B. R. 750, 179 Fed. 966; *Ohio Bank v. Mack* (C. C. A., 6th Cir.), 23 Am. B. R. 40, 103 Fed. 155, 89 C. C. A. 005, 24 L. R. A. (N. S.) 184, in which the court said: "The fact that the bankrupt is closely related to a creditor is a circumstance which justifies a more rigid scrutiny than would be the case if no such relation existed. Nevertheless the honest or dishonest character of a debt is not to be determined by any mere question of relationship; *Matter of Brewster* (Ref., N. Y.), 7 Am. B. R. 480; *In re Wooten* (D. C., N. C.), 9 Am. B. R. 247, 118 Fed. 670; *Matter of Blanchard* (D. C., N. J.), 42 Am. B. R. 177, 253 Fed. 758; *Walter v. Atha* (C. C. A., 3d Cir.), 45 Am. B. R. 150, 262 Fed. 75.

55a. *Matter of Bruick & Wilson Co.* (D. C., N. Y.), 43 Am. B. R. 501, 258 Fed. 69; *Keith v. Kilmer* (C. C. A., 1st Cir.), 44 Am. B. R. 304, 261 Fed. 733.

56. *Wallerstein v. Ervin* (C. C. A., 3d Cir.), 7 Am. B. R. 256, 112 Fed. 124, affg. *In re Ervin*, 6 Am. B. R. 356, 109 Fed. 135.

57. Stockholders of two corporations identical.—In the case of *In re Watertown Paper Co.* (C. C. A., 2d Cir.), 22 Am. B. R. 190, 169 Fed. 252, the court said: "The case thus presented is one in which the stockholders of two corporations are largely the same, in which both corporations have been under the same management and in which their affairs have for years been involved and intermingled; and the legal question is whether these relations prevent the one corporation from enforcing against the bankrupt estate of the other a claim which in case the latter corporation had remained solvent would have been both valid and enforceable. It must be clearly borne in mind that this is not a case in which a creditor is suing a corporation upon the ground that it has so held itself out with another corporation as, upon principles of estoppel, to render it responsible for the particular debt of the latter. It is an elementary and fundamental principle of corporation law, that a corporation is an entity, separate and distinct from its stockholders and from other corporations with which it may be

connected. The fact that the stockholders of two separate chartered corporations are identical, that one owns shares in another and that they have mutual dealings, will not as a general rule merge them into one corporation, or prevent the enforcement against the insolvent estate of one of an otherwise valid claim of the other."

58. *United States Trust Co. v. Gordon* (C. C. A., 6th Cir.), 33 Am. B. R. 300, 216 Fed. 829; *Mackay v. Randolph Macon Coal Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 719, 178 Fed. 881.

Bondholders of an insolvent corporation deposited their bonds with a bondholders' committee pursuant to a plan of reorganization and vested in such committee the legal title to the bonds, with authority to do with them as they saw fit toward conserving the property of the insolvent company and providing means for the protection of the bondholders, who subsequently accepted bonds and stock of the new corporation which purchased the assets of the bankrupt corporation, using the bonds in part payment therefor, namely, to the extent to which bonds were entitled to share in the distribution of the amount realized on the sale. Held, that the acceptance of these bonds and stock of the new company by the bondholders did not constitute a novation, and did not preclude the bondholders' committee from making a claim against the bankrupt estate as an unsecured creditor for the difference between the amount allowed as dividends and the par value of the bonds. *In re Medina Quarry Co.* (D. C., N. Y.), 24 Am. B. R. 769, 170 Fed. 929.

58a. *Matter of Caledonia Coal Co.* (D. C., Mich.), 43 Am. B. R. 93, 254 Fed. 742; *Boatmen's Bank v. Laws* (C. C. A., 8th Cir.), 43 Am. B. R. 683, 257 Fed. 290.

59. See Am. B. R. Dig., § 730. For illustrative cases under the former law, see *In re Barnes*, Fed. Cas. 1,012; *Ex parte Norwood*, Fed. Cas. 10,364; *In re Whyte*, Fed. Cas. 17,006; *In re Watrons*, Fed. Cas. 17,270; *In re Ford*, Fed. Cas. 4,932; *In re South Boston Iron Co.*, Fed. Cas. 13,183. But the former law differs materially from the present as to when proof could be made by an agent.

term "creditor" includes a duly authorized agent, attorney or proxy.⁶⁰ In view of the provisions of General Order IV to the effect that a creditor "will only be allowed to manage before the court his individual business," and the further provision authorizing a party to appear by attorney authorized to practice in a bankruptcy court, it has been held that a person who is not an attorney of the court may not represent a creditor other than himself and present his claim.⁶¹ If proof is made by an agent or attorney in behalf of a creditor it must appear why it was not made by the creditor.⁶² Claims should not be proved by an agent when the principal is present and able to file his own proof.⁶³

i. **Against whom made.**—This question becomes sometimes important when a copartnership is bankrupt and the creditor holds obligations against it and its members.⁶⁴

j. **Proof of assigned claims.**⁶⁵—(1) **IN GENERAL.**—Assigned claims may be proven in the same manner, within the same time and under the same conditions as other claims.⁶⁶ If the claim was assigned after bankruptcy General Order XXI (3) controls. The requirement that the referee give immediate notice to the original creditor, and the ten-day limit on the filing of objections by such creditor, should be noted.

(2) **RIGHTS OF CLAIMANTS OF ASSIGNED CLAIMS.**—Claims assigned before the commencement of bankruptcy proceedings may be proved by the assignee upon a proper showing that he is the owner of the claim.⁶⁷ An assigned claim may be proved although assigned as collateral security for a loan.⁶⁸ Claims which have been assigned before proof or after adjudication must be supported by a deposition of the owner at the time of the commencement of proceedings setting forth the true consideration of the debt and that it is entirely unsecured or, if secured, it must state the security, as is required in proving secured claims.⁶⁹ The assignee cannot prove his claim unless it appears that the assignor could have done so if there had been no assignment.⁷⁰ If the assignee is also the claimant, the ordinary proof of debt

60. Bankr. Act. § 1 (9).

61. *Mater of Ploof Mfg. Co. (D. C., Fla.)*, 38 Am. B. R. 795.

62. *Matter of Reboulin Fils & Co. (Ref., N. J.)*, 19 Am. B. R. 215; *In re Medina Quarry Co. (D. C., N. Y.)*, 24 Am. B. R. 769, 179 Fed. 929; *In re McCarthy Portable Elevator Co. (D. C., N. J.)*, 30 Am. B. R. 247, 205 Fed. 966.

63. **Claim by attorney.**—A claim should not be presented by the attorney for the bankrupt where it is contested. *In re Wooten (D. C., N. Car.)*, 9 Am. B. R. 247, 118 Fed. 670. But it seems that the referee is not bound to reject a claim merely because it is filed by a bankrupt's attorney. *In re Kimball (D. C., Mass.)*, 4 Am. B. R. 144, 100 Fed. 777.

64. *Matter of Collins (D. C., Ia.)*, 37 Am. B. R. 692, 235 Fed. 937.

65. **Amendment to show real creditor.**—*Matter of A. J. Ellis, Inc. (C. C. A., 3d Cir.)*, 42 Am. B. R. 387, 252 Fed. 483, affg. 39 Am. B. R. 265, 242 Fed. 483.

66. See discussion under Section Sixty-three, *post*. Compare subtitle "Subrogation Claims," in this section. Consult also *Wallerstein v. Ervin (C. C. A., 3d Cir.)*, 7 Am. B. R. 256, 112 Fed. 124.

67. See Am. Bankr. Dig. § 737.

68. *Matter of Breakwater Co. (D. C., Pa.)*, 36 Am. B. R. 752.

69. *In re Miner (D. C. Ore.)*, 8 Am. B. R. 248, 117 Fed. 954, holding that in such a case the form of the assignment of a claim is immaterial, and the proof of the claim need only be such as will estop the assignor from making the same claim. *Matter of Page Motor Car Co. (D. C., Mass.)*, 41 Am. B. R. 646, 251 Fed. 318.

70. Claims assigned before bankruptcy are proved by the assignee. The original assignor is not entitled to be recognized. *In re Worcester County (C. C. A., 1st Cir.)*, 4 Am. B. R. 496, 504, 102 Fed. 808; *In re Fortune*, Fed. Cas. 3,586.

68. *In re American Specialty Co. (C. C. A., 2d Cir.)*, 27 Am. B. R. 463, 191 Fed. 807.

69. General Order XXI (3). See *In re McCarthy Portable Elevator Co. (D. C., N. J.)*, 30 Am. B. R. 247, 205 Fed. 966.

70. *In re Goodman Shoe Co. (D. C., Pa.)*, 3 Am. B. R. 200, 96 Fed. 949, holding that a person to whom a non-negotiable note has been assigned, and who, under the law of the State, takes it subject to all defenses and equities which could have been

would seem enough.⁷¹ It has been held that the assignee of a chose in action must state the consideration which passes between the original parties unless the instrument be negotiable.⁷² The proof of a claim which has been assigned should set forth the date and facts of transfer and the name of the original creditor.⁷³ The failure of a wife to register an assignment to her of a claim against her husband, as her separate property, under a State statute, does not preclude her from proving the claim against his estate.⁷⁴ If the assignor was entitled to priority in payment based upon the character of the claim the assignee is entitled to the same priority.⁷⁵ If the right to priority attaches to the claim rather than to the claimant there can be no question as to the priority right of the assignee.⁷⁶ The priorities here referred to are those prescribed under section 64-b of the act and will be further discussed under that section.

k. How proven, if evidenced by a written instrument.—This is regulated by subsection *b*, and its provisions must be strictly followed.^{76a} If founded on a note or bond, or written contract, the original instrument must be attached to the proof of debt; otherwise, it will not be allowed.⁷⁷ But the failure to file a written instrument with the proof of claim thereof raises no presumption against the existence of such instrument.⁷⁸ The attaching of the note does not relieve the creditor of stating the consideration in his proof of debt.⁷⁹ When the claim is allowed the written evidence may be withdrawn, upon leaving a copy in its place.

raised against it in the hands of the assignor of the note, cannot prove the same in bankruptcy unless the assignor could have done so.

71. *Ex parte Davenport*, Fed. Cas. 3,586. See also *In re Mills*, Fed. Cas. 9,612; *In re Pease*, Fed. Cas. 10,890. When a claim has been proven and allowed, and upon which dividends have been paid, an assignee need not and ought not make proof of the same claim in his own name as the then owner and assignee thereof. *Matter of Bergdall Motor Co.* (D. C., Pa.), 36 Am. B. R. 285, 230 Fed. 248; *Matter of Breakwater Co.* (D. C., Pa.), 36 Am. B. R. 752.

72. *In re Lake Superior Ship Canal, etc., Co.*, Fed. Cas. 7,998, 10 N. B. R. 76.

73. *In re Fortune*, Fed. Cas. 3,586, 1 Low. 384.

74. *In re Miner* (D. C., Oreg.), 9 Am. B. R. 100, 117 Fed. 953.

75. *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 17 Am. B. R. 77, in which case it was held that an assignee of a claim for wages earned within three months before the commencement of proceedings in bankruptcy against the debtor is entitled to priority of payment under clause 4 of § 64-b, when the assignment occurred prior to the commencement of such bankruptcy proceedings.

76. *In re Bennett* (C. C. A., 6th Cir.), 18 Am. B. R. 320, 153 Fed. 678, 82 C. C. A. 531.

76a. *Matter of Keller* (D. C., Mich.), 42 Am. B. R. 601, 252 Fed. 942.

77. Compare *In re McCauley*, 2 N. B. N. Rep. 1085. See also Am. Bankr. Dig., § 735.

A claim for rent, due and payable on a lease from the claimant to the bankrupt, is founded upon an instrument in writing. *Matter of Keller* (D. C., Mich.), 42 Am. B. R. 601, 252 Fed. 942.

A transcript of a judgment upon which a claim is based is not an instrument in writing, within the meaning of this section. *Matter of Harrison Waterproof Material Company* (D. C., N. J.), 40 Am. B. R. 382.

Claims for money paid by check.—A claim based upon payments to a bankrupt by checks cannot be said to be "founded upon an instrument in writing" so as to necessitate the filing

of the checks. *Matter of Keller* (D. C., Mich.), 42 Am. B. R. 601, 252 Fed. 942.

Claim by indorser on note filed by payee.—Where a note of the bankrupt, indorsed by a claimant, payments on which to the payee are included in the proof of claim, was duly filed in connection with the proof claim by the payee, and the payments made by claimant were found indorsed thereon, the note must be held to have been filed on behalf of both the indorser and payee. *Matter of Keller* (D. C., Mich.), 42 Am. B. R. 601, 252 Fed. 942.

78. *In re Dresser* (C. C. A., 2d Cir.), 13 Am. B. R. 747, 135 Fed. 495; *Kelsey v. Munson* (C. C. A., 8th Cir.), 28 Am. B. R. 530, 198 Fed. 841.

79. *In re Coventry-Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 272, 166 Fed. 516; *In re Castle Braid Co.* (D. C., N. Y.), 17 Am. B. R. 143, 145 Fed. 224.

Statement of consideration and payments.—

In the case of *In re Stevens* (D. C., Vt.), 5 Am. B. R. 808, 107 Fed. 243, the court said: "The claim is founded upon notes, endorsements and waivers of protest and notes in writing all of which appear to be filed except one such waiver stated to be lost, with the circumstances apparently sufficient to admit, on trial of the facts, of proof of the loss and the contents. And the consideration so far as it moved from the securities held by the claimant and payments so far as received by him are set forth. The requirement by § 57-a of a statement of the consideration and payments is of more than general allegations in these respects which might be sufficient in a declaration against the bankrupt upon those causes of action and extends to the particulars of each for the information of the trustee and those interested in the estate, but not beyond what relates to the claim as it accrued to the claimant. Other sources of information are as well open to them as to him. This requirement seems now to be sufficiently complied with by this claimant." See also *Baumhauer v. Austin* (C. C. A., 8th Cir.), 26 Am. B. R. 355, 196 Fed. 289, rev'd 34 Am. B. R. 750, 179 Fed. 908.

Where it is lost or destroyed, it may still be proven by a proper affidavit.⁸⁰ The practice of attaching both original note and copy to the proof of debt, and requesting the referee to return the former, is usual. Where the absence of the original notes upon which the claim is based is not objected to, the court may treat their presence as waived.⁸¹ Where a creditor holds several notes against a bankrupt the better practice is to prove all of them as one claim.⁸² Where a note contains a stipulation as to payment of costs in case of suit, such stipulated fee will not be considered in determining the amount of the claim.⁸³ If the consideration of the note and the allegations of the proof of claim are clearly self-contradictory there should be an investigation as to the fairness and legality of the claim before allowance.⁸⁴

1. Debts created by fraud.—The referee has no jurisdiction to decide that a claim was created by the fraud of the bankrupt. He may only allow such claim.⁸⁵ Where a personal judgment has been procured in a State court creditors who were not parties to the proceeding in the State court may show that such judgment was procured by fraud or collusion.⁸⁶ Creditors whose judgments have been annulled as fraudulent under the bankruptcy act are still entitled to prove their claims. The proof of fraud on the part of the creditor must be clear and convincing; the presumption is that the claim is an honest one.⁸⁷

m. Claims by one bankruptcy estate against another.—Here subdivision *m* regulates. Without it, the trustee of the creditor estate would have power to prove. The court could compel him to file the additional deposition if necessary.⁸⁸

n. Statements, transcripts of judgments, etc., attached.—The practice of attaching statements of accounts to claims is general and should be followed. Likewise, a transcript of judgment should be annexed as an exhibit when the claim rests on a judgment; the proof, itself, should, however, show the consideration of the debt so in judgment.⁸⁹ In the case of transactions with

80. In re Loden (D. C., Ga.), 25 Am. B. R. 917, 184 Fed. 965, holding that after a claim on a note has been proved and allowed the claimant may be permitted by the referee to withdraw his original note upon filing a copy thereof. Form No. 37. See also In re Emison, Fed. Cas. 4,459.

81. In re Carter (D. C., Ark.), 15 Am. B. R. 126, 188 Fed. 846.

82. Frederick v. Citizens National Bank (C. C. A., 3d Cir.), 37 Am. B. R. 22, 231 Fed. 967.

83. In re Hersey (D. C., Ia.), 22 Am. B. R. 963, 171 Fed. 1004. See Mechanics-American National Bank v. Coleman (C. C. A., 8th Cir.), 29 Am. B. R. 396, 204 Fed. 24.

84. Orr v. Parke (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683, holding that where a proof of claim in the form of a petition of intervention was filed against the bankrupt's estate setting up the giving of a note and chattel mortgage as security for money loaned, but the mortgage attached to the proof recited that the consideration of the note was for the purchase from claimant of the goods described the title to which was to remain in him until the note was fully paid, the allegations of the proof of claim were self-contradictory and were such as to warrant if not to require an investigation of its fairness and legality.

85. In re Lasarovic (Ref., Kan.), 1 Am. B. R. 476.

Fraud of creditor in prior composition.—Where prior to bankruptcy bankrupt entered into a composition agreement with his creditors to pay 40 per cent. of their claims and then agreed with claimant which did not sign the composition agreement until all the other creditors had signed it, that if it advanced the money necessary to pay the composition, he would pay its debts in full, such agreement was not a fraud on other creditors so as to bar claimant from proving the full amount of its debt in subsequent bankruptcy proceedings. In re Hawks (D. C., Kan.), 30 Am. B. R. 365, 204 Fed. 309.

86. In re Phelps (Ref., N. Y.), 3 Am. B. R. 434.

87. In re Hawks (D. C., Kan.), 30 Am. B. R. 365, 204 Fed. 309; Matter of Georgia Steel Co. (D. C., Ga.), 39 Am. B. R. 426, 240 Fed. 473.

88. In re Richard (D. C., N. Car.), 2 Am. B. R. 506, 94 Fed. 633; Matter of United States Grocery Co. (D. C., Fla.), 41 Am. B. R. 824, 253 Fed. 267. Compare In re Smith (Ref., N. Y.), 1 Am. B. R. 37.

89. In re Elder, Fed. Cas. 4,326. For the impeachment of judgments proven in bankruptcy. See under Section Sixty-three of this work.

a broker who maintains a bucket shop, a deposit made with knowledge that actual stock was not to be sold or purchased, does not entitle the depositor to prove a claim based upon alleged profits, but he must confine his proof to the amount which he actually deposited with the bankrupt broker.⁹⁰

o. Amendment of proof of claims.⁹¹—(1) **IN GENERAL.**—The practice in respect to proofs of claims has always been liberal and free from technicalities.⁹² The general rule is that if the defect in the proof is merely formal it may be either disregarded or an amendment may be permitted to remedy the defect.⁹³ The referee will usually allow such amendments to proofs of debt as justice requires,^{93a} and claims objected to are often expunged or allowed to be withdrawn, with leave to amend and refile.

(2) **CASES WHERE AMENDMENT WILL BE ALLOWED.**—A claim filed within the required time may be amended for the purpose of supplying the oath of the creditor and a statement that no payments have been made upon the amount claimed, in conformity with the law,⁹⁴ or for the purpose of itemizing the proofs where a gross charge has been made,⁹⁵ or in the case of a claim upon certain notes to show the balance due,⁹⁶ or where composition was offered but not finally accepted.⁹⁷ Where a claim was presented on the wrong theory, as, for instance, for a secured debt and it appeared that it was unsecured,⁹⁸ the creditor should have an opportunity to amend so as to prove the correct amount of his unsecured claim,⁹⁹ or to set up a counterclaim and have the claim allowed for the balance.¹⁰⁰ The informal presentation of a claim, not sufficient to constitute a valid "proof of claim" may be amended so as to conform to the requirements, where the record contains all the facts necessary to establish a *bona fide* indebtedness and the circumstances under which it was incurred.¹⁰¹

⁹⁰ *Streeter v. Lowe* (C. C. A., 1st Cir.), 25 Am. B. R. 774, 188 Fed. 263, in which case it was held that a creditor making such deposit was not entitled to prove a claim for the entire balance alleged to be due on account of purchases and sales, but that under the Massachusetts statute (Revised Laws of Massachusetts, Chap. 99, § 4), providing for the recovery of payments made on margins, the creditor was entitled to have his claim allowed to the extent of the cash payments actually made, his margins and interest thereon.

⁹¹ See Am. Bankr. Dig., §§ 740-732.

⁹² *Lowell on Bankruptcy*, § 221.

⁹³ *Streeter v. Lowe* (C. C. A., 1st Cir.), 25 Am. B. R. 774, 188 Fed. 263.

Amendments of date.—After a meeting of creditors resulting in the election of a trustee, applications to amend claims so as to correctly state the dates may be denied. *Matter of Eisenberg* (D. C., N. Y.), 40 Am. B. R. 884, 251 Fed. 427.

^{93a} **Supplementing defects by oral testimony.**—The orderly procedure, where a proof of claim is insufficient in that it fails to properly state the consideration, is to require the claimant to amend, but where the referee to save time permits the claimant to give oral testimony to supply the defects, the testimony will be regarded as written into the claim and on the review of an order disallowing the claim, as constituting the claimant's claim. *Matter of Welborne* (D. C., N. Y.), 45 Am. B. R. 312, 266 Fed. 385.

⁹⁴ *In re Roeber* (C. C. A., 2d Cir.), 11 Am. B. R. 464, 127 Fed. 122; *Buckingham v. Estes* (C. C. A., 6th Cir.), 12 Am. B. R. 182, 128 Fed. 584.

⁹⁵ *Matter of Cressinger* (Ref., Col.), 17 Am. B. R. 538, 145 Fed. 224.

⁹⁶ *In re Faulkner* (C. C. A., 8th Cir.), 30 Am. B. R. 542, 161 Fed. 900, holding that where

a paper is signed and sworn to by a creditor, by which it appears that he is a holder of overdue and unpaid notes of the bankrupt, and an order for the sale of collateral securities described therein is granted and the sale confirmed, an amendment will be permitted after the expiration of a year after adjudication. When the amount due upon the notes is ascertained after applying the proceeds of the sale of the collateral, is properly granted and the creditor is entitled to prove for the balance due.

⁹⁷ *In re Horne & Co.* (Ref., Miss.), 23 Am. B. R. 590.

⁹⁸ *Seligman v. Gray* (C. C. A., 1st Cir.), 35 Am. B. R. 518, 227 Fed. 417.

⁹⁹ *Matter of Soltman* (D. C., N. Y.), 38 Am. B. R. 270, 238 Fed. 241.

^{100a} *Matter of Progressive Wallpaper Co.* (D. C., N. Y.), 39 Am. B. R. 657, 240 Fed. 807.

¹⁰⁰ *In re Standard Telephone & Electric Co.* (D. C., Wis.), 26 Am. B. R. 601, 186 Fed. 583; *In re McCarthy Portable Elevator Co.* (D. C., N. J.), 30 Am. B. R. 247, 205 Fed. 968.

Amendment of informal proof of claim.—In the case of *Matter of Salvator Brewing Co.* (D. C., N. Y.), 26 Am. B. R. 21, 188 Fed. 522 (aff'd 23 Am. B. R. 50, 103 Fed. 950), it appeared that the directors of a corporation indorsed notes of the company which were discounted at a bank; certain securities were assigned to one of the directors to be held by him in trust as security for the indorsement; the company became bankrupt and the notes were paid by the directors; in a proceeding by the trustees the assignment of the securities was declared invalid, but evidence was given proving the indorsement by the directors and payment of the notes; no formal proof of claim was filed; subsequently upon the termination of such proceedings, the directors filed formal proof of claim for the amount paid on their indorsement; objection was made on the ground that a proof of claim had not been

As for instance where after adjudication the bankrupt's creditors enter into an agreement for a settlement, which was signed by the creditors and contained a statement of the amounts of their several claims, it was held sufficient in substance to constitute an amendable claim so as to permit the filing of formal proof of claims.¹⁰¹ To permit an amendment there must be in the record the substance of what is required to make a valid proof of the claim.¹⁰² If a claim has been recognized by the court in proceedings for the settlement of claims against a bankrupt as a condition of the sale of the assets of the bankrupt, formal presentation of such claim may be excused, and the creditor should be permitted to file an amended proof.¹⁰³ Illustrative cases under the present and former law will be found in the foot-note.¹⁰⁴

(3) AMENDMENT AFTER THE EXPIRATION OF YEAR.¹⁰⁵—It is apparent from the cases already cited that a claim which is filed within the required time may be amended even after the expiration of a year.¹⁰⁶ An amendment may be

filed within a year; it was held that the claim had been proved by the evidence given in a former proceeding and that such proof might be amended by adding the former proofs of claim. The court said: "It is also claimed in this case that the evidence given on the hearing in relation to the validity of the assignment of the securities, amounted substantially to a proof of the claim. Such evidence, of course, is not what is commonly known as a formal proof of claim, but it did prove facts which were essential to establish the claim, and indeed it was necessary, as a part of the claimant's proof in that proceeding, to establish that the notes had been paid by the endorers, in order to show any ground for claiming to enforce the securities. I think under the authorities, that the claim was proved in that proceeding, and that the motion made to amend the proof by adding the formal proofs of claim should be allowed." Citing *Buckingham v. Estes* (C. C. A., 6th Cir.), 12 Am. B. R. 182, 128 Fed. 584; *Matter of Roeber* (C. C. A., 2d Cir.), 11 Am. B. R. 464, 127 Fed. 122.

101. *In re Fairlamb Co.* (D. C., Pa.), 23 Am. B. R. 515, 199 Fed. 278.

Claim for money loaned.—A claim for moneys loaned to the bankrupt, which does not state that payments set forth were made or received on the claim mentioned, and which appears on its face to be barred by the statute of limitations, should be disallowed with leave to amend. *Matter of Ballentine* (D. C., N. Y.), 37 Am. B. R. 111, 232 Fed. 271.

102. A creditor which has not filed or attempted to file a claim within a year, will not be permitted to amend an alleged proof of claim, consisting of a letter stating the status of the bankrupt's account. The general right to amend, regardless of the time which has elapsed, is abundantly sustained by the authorities. But to do so, it is plain, there must be in the record, as it stands, the substance of that which is asked for. The right to amend can go no further than to bring forward and make effective that which in

some shape is already there. *Matter of Thompson* (D. C., N. J.), 34 Am. B. R. 242, 222 Fed. 169 (citing *In re McCallum & McCallum* (D. C., Pa.), 11 Am. B. R. 447, 127 Fed. 768), *affd.* 36 Am. B. R. 190, 227 Fed. 981.

103. *In re Baasha & Son* (C. C. A., 2d Cir.), 29 Am. B. R. 225, 200 Fed. 951, *revg.* 27 Am. B. R. 435, 193 Fed. 151.

Amendment to include secured claims.—To authorize the amendment of a proof of claim after the expiration of the year limited, there must be in the record the substance of that which is asked for. Hence, where at the time bankruptcy intervened bankrupt was indebted to claimant bank in a certain sum which was unsecured and in a further sum which then appeared to be amply secured, and the bank filed proof of its unsecured indebtedness only but filed nothing with reference to the secured claim, the bank cannot, after the expiration of the one year period when its security had failed, file an "amended or substituted" proof of claim, so as to include the balance due on its secured indebtedness after applying the proceeds of its security. *In re Daniel* (Ref., Tex.), 29 Am. B. R. 284.

104. *In re Friedman* (Ref., N. Y.), 1 Am. B. R. 510; *In re Smith* (Ref., N. Y.), 2 Am. B. R. 648; *In re Myers* (D. C., Ind.), 3 Am. B. R. 760, 99 Fed. 601; *In re Wilder* (D. C., N. Y.), 3 Am. B. R. 761, 101 Fed. 104; *In re Stevens* (D. C., Vt.), 5 Am. B. R. 806, 107 Fed. 243; *In re Montgomery*, Fed. Cas. 9,729; *In re McConnell*, Fed. Cas. 8,712; *In re Myrick*, Fed. Cas. 10,000; *In re Parkes*, Fed. Cas. 10,754; *In re Jaycox*, Fed. Cas. 7,242; *In re New Brunswick Carpet Co.*, 4 Fed. 514; *Matter of Schattman Bros.* (D. C., N. Y.), 40 Am. B. R. 537; *Lontos v. Coppard* (C. C. A., 5th Cir.), 40 Am. B. R. 575, 246 Fed. 803; *Matter of Keller* (D. C., Mich.), 42 Am. B. R. 601, 252 Fed. 942.

105. See Am. Bankr. Dig., § 742.

106. *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135; *Buckingham v. Estes* (C. C. A., 6th Cir.), 12 Am. B. R. 182, 128 Fed. 584; *In re Schiebler* (D. C., N. Y.), 21 Am. B. R. 309, 165 Fed. 363; *In re Standard Telephone & Electric Co.* (D. C., Wis.), 26 Am. B. R. 601, 186 Fed. 586. Where one wishes to amend a claim after the expiration of the

allowed even after the expiration of a year to permit the creditor to substitute for a claim based on an open account, a claim based on promissory notes given in consideration of the items of such account.¹⁰⁷ Where the assignment of a claim not filed within a year of the adjudication is filed in due time the claim may be amended after the year.¹⁰⁸ But an amendment amounting to the presentment of a new claim will not be allowed after a year has elapsed.¹⁰⁹ There must be before the court the substance of a claim in some form, filed or presented within the proper time; whether formal or informal a claim must show that a demand is made against the estate, and must show the creditor's intention to hold the estate liable.¹¹⁰ And where the claim has been unconditionally withdrawn, a like claim, but for a different amount, cannot be filed after the expiration of the year, upon the theory that it is an amended claim.¹¹¹ Nor will an amendment be allowed where it changes a claim from one against a partnership to one against the estate of an individual partner,¹¹² nor will an amended claim be allowed where the original was returned by the referee on the ground that it was defective.¹¹³

period, there must be some claim, already proven, to amend; the mere scheduling of a debt by a bankrupt does not constitute a debt which is subject to amendment. In *re Basha & Son* (D. C., N. Y.), 27 Am. B. R. 435, 193 Fed. 151, revd. 29 Am. B. R. 225, 200 Fed. 951, where the court held that the amendment should have been permitted since it appeared that the creditor's claim had been recognized by the court in a proposed settlement of claims against the bankrupt out of the proceeds of a receiver's sale of the bankrupt's assets. *Contra*: In *re Kempter* (D. C., Ia.), 15 Am. B. R. 675, 142 Fed. 210.

Amendment after lapse of years.—An application to amend a claim made after the expiration of one year and the affirmance of an order of the referee disallowing the claim, should be denied, where the trustee contests the claim most strenuously and the bankrupt's liability is not established. *Matter of Amsdell-Kirchner Brewing Co.* (D. C., N. Y.), 40 Am. B. R. 284, 243 Fed. 783. Clause n, of this section, cannot be taken to exclude an amendment to a claim already filed, admittedly defective, more than a year after adjudication, where the claim upon which the original proof was made is the same as that ultimately proved. *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, affg. 8 Am. B. R. 382, 115 Fed. 937. In this case the court said: "It is argued that the allowance of the amendment is within section 57-n, forbidding proof subsequent to one year after the adjudication. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The clause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action, after the statute of limitations has run, when the original declaration was bad. The proceedings remain in the district court, notwithstanding the appeal and the amendment properly was allowed there." *Matter of Kessler* (C. C. A., 2d Cir.), 25 Am. B. R. 512, 184 Fed. 51, holding that a proof of claim which is defective in some substantial particular may be amended subsequent to the expiration of one year after adjudication, although the effect of such amendment may be that proof of claim is thereby effectively made only

after the expiration of a year. The sole question in any given case is whether the document tendered is a proper amendment, and furtherance of justice requires it to be filed. If so, and the document proposed to be amended was filed within the year, it should be allowed to be filed even though the year has then elapsed. The statute prescribes no limit as to the time within which amendments may be filed. *Bennett v. American Credit Indemnity Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 260, 263, 159 Fed. 624. (Opinion of Judge Cochran in District Court.) See *Matter of Hamilton Automobile Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 205, 209 Fed. 598.

A creditor which has not filed or attempted to file a claim within a year, should not be permitted to amend an alleged proof of claim, consisting of a letter to the receiver stating the status of the bankrupt's account, so as to conform to the requirements of the bankruptcy act. *Matter of Thompson* (D. C., N. J.), 34 Am. B. R. 242, 223 Fed. 167, affd. 36 Am. B. R. 190, 227 Fed. 981.

107. *Brown v. O'Connell* (C. C. A., 9th Cir.), 29 Am. B. R. 653, 200 Fed. 229.

108. *Bennett v. American Credit Indemnity Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 253, 159 Fed. 624.

109. *Hutchinson v. Otis* (C. C. A., 1st Cir.), 8 Am. B. R. 382, 115 Fed. 937; affd. 10 Am. B. R. 135, 190 U. S. 552; In *re McCallum* (D. C., Pa.), 11 Am. B. R. 447, 127 Fed. 768. But see also In *re Moebius* (D. C., Pa.), 8 Am. B. R. 590, 116 Fed. 47.

110. *Matter of Thompson* (C. C. A., 3d Cir.), 36 Am. B. R. 190, 227 Fed. 981, affg. 34 Am. B. R. 242, 223 Fed. 167.

111. In *re Stevens* (D. C., Vt.), 5 Am. B. R. 806, 107 Fed. 243; In *re Thompson's Sons* (D. C., Pa.), 10 Am. B. R. 581, 123 Fed. 174.

112. In *re McCallum & McCallum* (D. C., Pa.), 11 Am. B. R. 447, 127 Fed. 768.

113. *Matter of Booth* (D. C., N. Y.), 33 Am. B. R. 183, 216 Fed. 575.

(4) **WITHDRAWAL OF CLAIM.**—The right to permit a withdrawal of a claim seems clear; for instance where a creditor files a claim based upon notes containing clauses waiving the bankrupt's homestead exemption, he will be permitted to withdraw such claim so as to proceed in the State court to subject the bankrupt's exempt property to the payment of the notes.¹¹⁴

p. Filing proofs of claims.—Proofs of debt should be filed with the referee. If with the clerk of the district court, it becomes his duty to transmit them to the referee.¹¹⁵ So also of claims filed with the trustee.¹¹⁶ Where the trustee does not deliver such proofs of claims to the referee, the creditor should not be charged with the failure.¹¹⁷ Where proof of claim has been delivered to the trustee the claim is sufficiently filed and it is the duty of the trustee to deliver it to the referee.¹¹⁸ Proofs on receipt are usually stamped with a filing stamp, showing the day and hour received, but are not allowed until called at a meeting of creditors.

III. PROOF OF SECURED, PRIORITY AND PREFERRED CLAIMS.

a. In general.—Subsections *e*, *g* and *h* relate specifically to the proof of claims of secured, priority and preferred creditors. Secured or priority creditors need not surrender their securities, but the value thereof may be determined and deducted, and dividends paid on unpaid balances. Preferred creditors, on the other hand, must surrender their advantage and place themselves on an equality with the other creditors before they will be permitted to share in the estate.

b. Secured claims.—(1) **IN GENERAL.**—The act contemplates that secured creditors may and shall prove their claims, and they are to set forth the claim, the consideration therefor, and whether any, and, if so, what securities are held therefor, etc. Claim of secured creditors and those having priority may also be allowed for certain purposes, thus, for the purpose of fixing the sum on which a dividend from the general estate is to be paid and also for limiting the voting power or voice of the secured creditor, or creditor having a priority, at creditors' meeting.¹¹⁹ Secured claims must be proven on one of the forms provided for that purpose.¹²⁰

(2) **WHAT CONSTITUTES A SECURED CREDITOR.**—Section 1, subdivision 23, defines a secured creditor as one who "has security for his debt upon the property of the bankrupt of a character to be assignable under this act, or who owns such a debt for which some indorser, surety or other person

114. In re Strickland (D. C., Ga.), 21 Am. B. R. 734, 167 Fed. 867.

115. General Order XX.

116. General Order XXI(1).

117. Orcutt Co. v. Green, 204 U. S. 96, 17 Am. B. R. 72.

Filing nunc pro tunc.—It has been held that proofs of claims, duly received by the trustee and handed to his attorney with instructions to file them, and the attorney's clerk neglects to file the same, cannot be filed *nunc pro tunc* in the discretion of the referee. Matter of Ingalls Bros. (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517.

118. Matter of Kessler (C. C. A., 2d Cir.), 25 Am. B. R. 512, 184 Fed. 51.

A proof of claim delivered to the trustee in bankruptcy within the year after adjudication is sufficiently filed within the meaning

of this section. In re Fairlamb Co. (D. C. Pa.), 28 Am. B. R. 515, 199 Fed. 278.

Delivery to employee of trustee not sufficient filing.—Although the presentation and delivery of a proof of claim to the trustee within the year after a bankrupt's adjudication is sufficient, the delivery for filing of a proof of claim to a person in the employ of the trustee, but in what capacity is not shown, does not constitute a sufficient filing, so as to permit the creditor to file a proof of claim *nunc pro tunc* after the expiration of the one year period. In re Lathrop, Haskins & Co. (C. C. A., 2d Cir.), 28 Am. B. R. 756, 197 Fed. 164.

119. In re Cramwood (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 566.

120. Forms Nos. 32 and 36.

secondarily liable for the bankrupt has such security upon the bankrupt's assets." ^{120a} Bondholders of a corporation are secured creditors and may prove their claims against a bankrupt corporation. ¹²¹ That "secured creditor" has a limited meaning in bankruptcy should always be remembered. ¹²² A holder of a promissory note containing a waiver of exemption is in effect a secured creditor. ¹²³ A holder of a mortgage on exempt property of the bankrupt is not a secured creditor. ¹²⁴ A person, holding a collateral note of a bankrupt corporation endorsed by one of its officers, is not a secured creditor. ¹²⁵ A creditor whose security has been destroyed by wrongful act of the bankrupt is not a secured creditor. ^{126a}

(3) CLAIM SECURED BY OTHER FUND OR ESTATE OR BY THIRD PARTY.—The question pertains in each case to the security which a creditor has upon the property of the bankrupt. He may prove his entire claim against the bankrupt estate notwithstanding the fact that he has other security for the payment of all or a part of such claim. He is not compelled to exhaust his remedy against the other fund before asserting his claim against the bankrupt estate. ¹²⁶ No matter how great may be the security which one may have, if it be property of another than the bankrupt, the creditor may prove his entire claim against the bankrupt estate, and receive a dividend thereon, and thereafter institute proceedings to enforce his claim upon the security for the balance. ¹²⁷ As where

120a. *Matter of Shatz* (D. C., Pa.), 41 Am. B. R. 576, 251 Fed. 351.

121. *Matter of San Antonio Land and Irrigation Co.* (D. C., N. Y.), 36 Am. B. R. 512, 228 Fed. 984; *United States Trust Co. v. Gordon* (C. C. A., 6th Cir.), 33 Am. B. R. 300, 216 Fed. 929; *In re Sampter* (C. C. A., 2d Cir.), 22 Am. B. R. 357, 170 Fed. 938.

122. In effect, no creditor is secured in bankruptcy unless there is a lien held by him or accruing to his benefit on the property of the bankrupt. Bankr. Act, § 1 (23). Thus see *Swarts v. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1.

A claim secured by a surety bond or by an indorser is not a secured claim within the meaning of the Bankruptcy Act. *U. S. Fidelity, etc. Co. v. Carnegie Trust Co.* (N. Y. Sup. Ct.), 39 Am. B. R. 647, 177 N. Y. App. Div. 176.

A subcontractor, who has a preferential right to moneys due the contractor, does not waive his right thereto by filing his proof of claim in the bankruptcy proceedings of the contractor and receiving dividends thereon. *Baker Lumber Co. v. Clark Co.* (Utah Sup. Ct.), 43 Am. B. R. 193, 178 Pac. 704.

123. *In re Meredith* (D. C., Ga.), 16 Am. B. R. 331, 144 Fed. 230.

Effect of proof of waiver note.—Notwithstanding that a creditor has proved his claim in bankruptcy as unsecured, he may assert in a court of competent jurisdiction any right that he may have on a waiver of homestead exemption. *In re Loden* (D. C., Ga.), 26 Am. B. R. 917, 184 Fed. 965. The waiver becomes in the nature of a security in that the debt may be made out of any property owned by the debtor without regard to any exemption rights which the debtor would have had but for the waiver. *Bell v. Dawson County Grocery Co.*, 12 Am. B. R. 159, 120 Ga. 628, 48 S. E. 150.

Claim against exempt property.—In the case of *In re Cale* (D. C., Minn.), 25 Am. B. R. 367, 182 Fed. 439, the claimant had recovered judgment after adjudication and before the bankrupt's discharge, which judgment became a lien upon a part of the debtor's homestead.

It was held that the judgment secured was enforceable only in the State courts, and not through sale of the property by the trustee and application of the proceeds, and that the claimant could only prove for the deficiency obtained by deducting from the judgment the value of the part of the debtor's homestead which could be applied in payment thereof. A creditor with an enforceable lien or claim against exempt property can collect only the deficiency from the general assets. This same question was again considered upon an appeal from a decision of the district court in the case of *Gregory Co. v. Bristol* (C. C. A., 8th Cir.), 26 Am. B. R. 938, 191 Fed. 31, the court holding that where a claimant had a statutory lien on certain of the bankrupt's property which was exempt in bankruptcy from the claims of general creditors by reason of which such claimant was secured in a specified amount, a deduction of such amount from its claim was proper.

124. *In re Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 950.

125. *Young v. Gordon* (C. C. A., 4th Cir.), 33 Am. B. R. 522, 210 Fed. 168.

126a. *Beal-Burrow Dry Goods Co. v. Talburt* (Ark. Sup. Ct.), 43 Am. B. R. 719, 113 S. W. 20.

126. *Gorman v. Wright* (C. C. A., 4th Cir.), 14 Am. B. R. 135, 136 Fed. 164; *Matter of Ballard* (D. C., Tex.), 44 Am. B. R. 651.

127. See *In re Hendley* (D. C., Mo.), 3 Am. B. R. 272, 97 Fed. 765, citing *Collier on Bankr.* (1st ed.), p. 283. See also *Haas-Baruck & Co. v. Portuondo* (D. C., Pa.), 15 Am. B. R. 130, 133 Fed. 949; *Matter of Thompson* (D. C., N. Y.), 31 Am. B. R. 236, 206 Fed. 207.

The equitable rule that a creditor having a lien upon two funds must exhaust that one upon which other creditors have no lien, does not apply in cases where it operates to the injury of the party having the double lien, and this rule has in substance been made part of the bankruptcy act. One who has been allowed to prove his claim as an unsecured creditor

a creditor has a claim against two bankrupt estates, he may assert his claim against one unimpaired by the fact that he held security against the other, and he may recover dividends from the two estates upon the full amount of his claim, until from all sources he has received full payment of his claim.¹²⁸ And this rule applies even where the security that is held is security for a partnership debt but is property of individual members of the firm, the partnership and the individual estates being considered distinct and separate.¹²⁹ A trust company which holds as collateral security for the note of a bankrupt company certain debenture bonds issued by the bankrupt as security for the note, but not secured by mortgage or other means, such bonds constitute simply another promise to pay money and the trust company is not a secured creditor.¹³⁰ But it is, of course, otherwise where the bonds are secured by a special fund set apart to provide for their payment when due; in such a case the bondholders may participate in such fund, independent of their right to prove an unsecured balance against the general assets.¹³¹ A creditor whose claim is secured or partly paid by an accommodation indorser may prove the claim to its full amount, and exclude from the bankrupt estate the avails of such security or part payment.¹³² Where a creditor has a claim which is guaranteed by a third person, who turns over a note of the bankrupt to the creditor, such creditor may prove both the claim and the note and receive dividends on both.¹³³

(4) **SURRENDER OF SECURITY.**—A secured creditor may or may not surrender his security, as he chooses.¹³⁴ If he does, it inures to the benefit of all creditors, and his claim, if otherwise unobjectionable, is allowed at the full amount. If he does not, he can, it seems, have his claim allowed temporarily to enable him to participate in creditors' meetings prior to the determination of the value of his security, but only for such sums as seems to be owing over the security. He may retain his security and prove for the amount of his claim after deducting therefrom the value of his security.¹³⁵

against a bankrupt indorser must realize and credit the proceeds of collateral securities held by him against the principal debtor, before he will be allowed to participate in the distribution of the estate of such indorser. *Gorman v. Wright* (C. C. A., 4th Cir.), 14 Am. B. R. 135, 136 Fed. 164.

128. *Matter of New York Commercial Co.* (C. C. A., 2d Cir.), 30 Am. B. R. 769; *Board of Commissioners of Shawnee County v. Hurley* (C. C. A., 8th Cir.), 22 Am. B. R. 200, 160 Fed. 92; *Matter of Shatz* (D. C., Pa.), 41 Am. B. R. 576, 251 Fed. 351.

129. *Ex parte Graves*, 2 J. N. S. 551; *Ex parte Peacock*, 2 G. & J. 67; *In re Howard, Cole & Co.*, 4 N. B. R. 571, Fed. Cas. 6,750; *In re Coe* (ReL., Ohio), 1 Am. B. R. 275.

130. *Matter of Matthews* (D. C., N. Y.), 26 Am. B. R. 19, 158 Fed. 445.

131. *Butterfield v. Woodman* (C. C. A., 1st Cir.), 34 Am. B. R. 510, 223 Fed. 956, modifg. 33 Am. B. R. 154. See also *Matter of Alberts* (D. C., Pa.), 40 Am. B. R. 113, 243 Fed. 777.

132. *In re Noyes Bros.* (C. C. A., 1st Cir.), 11 Am. B. R. 506, 127 Fed. 286; *In re Matthews* (D. C., N. Car.), 13 Am. B. R. 91, 132 Fed. 274.

133. *In re Keep Shirt Co.* (D. C., N. Y.), 23 Am. B. R. 765, 200 Fed. 80.

134. **Proof of Claims by secured creditors.**—Mortgage creditors of a bankrupt corporation are entitled to prove their claims without surrendering their lien, and if on foreclosure the proceeds of the sale were insufficient to pay the

debts in full, they are not barred from sharing *pro rata* in the distribution of the general assets. So also mortgage creditors may surrender their security and elect to file their claims in the bankruptcy court, which entitles them to participate in the distribution of the assets as general creditors. *In re Medina Quarry Co.* (D. C., N. Y.), 24 Am. B. R. 769, 179 Fed. 929. See *sub nom.* "What is a Surrender" in this section, *post*.

Acceptance of receiver's certificates.—A certificate as a partial payment of its claim, cannot thereafter assert a priority. *Matter of Veler* (C. C. A., 6th Cir.), 41 Am. B. R. 736, 249 Fed. 633.

135. *Kohout v. Chaloupka* (Sup. Ct., Neb.), 11 Am. B. R. 265, 69 Neb. 677; *In re Goldsmith* (D. C., Tex.), 9 Am. B. R. 419, 118 Fed. 103; *In re Hines* (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 142; *Steinhardt v. National Park Bank*, 19 Am. B. R. 72, 120 N. Y. App. Div. 255, 105 N. Y. Supp. 23, revg. 18 Am. B. R. 86; *In re Stevens* (D. C., Ore.), 23 Am. B. R. 239, 173 Fed. 842. Compare *In re Little* (D. C., Iowa), 6 Am. B. R. 661, 110 Fed. 621.

Retention of securities.—In the case of *In re Davison* (D. C., N. Y.), 24 Am. B. R. 460, 179 Fed. 750, a question arose as to the possession of life insurance policies which had been assigned to a bank as security for the payment of a debt. The court said: "The law does not provide that on crediting the value of the se-

(5) **RETENTION OF SECURITY; EFFECT ON PROOF OF CLAIM.**—If the security is equal in value to the claim, he cannot prove any part of his claim, although the creditor bids in the property at a foreclosure sale for less than his claim.¹³⁶ A creditor cannot prove both a debt and the security thereof, but he may prove either one.¹³⁷ He may rely on his security and enforce it according to his rights as they exist; in such a case it is optional with him to make a formal proof of his claim.¹³⁸ If he does not present his claim and rely on the administration of the bankrupt estate, he is relegated to the property retained as security for the debt, and, so far as the estate is concerned, the debt is released.¹³⁹ As has already been explained, the value of securities is often arrived at summarily at first meetings to permit a creditor to vote the unsecured balance. A claimant may, of course, be fully secured.¹⁴⁰ If so, he should not be allowed to file a proof, and does not become a party to the proceeding.¹⁴¹ A creditor by proving an unsecured claim is not barred from proving the amount of a secured claim less the sum realized on the security.¹⁴² Where a debt is secured by a life insurance policy the value of the policy should be deducted therefrom and the balance may be proved against the

curity on the debt and being allowed a dividend on the balance, the secured creditor is to surrender the security, even if tendered the value thereof as fixed by the court. The secured creditor has the right to retain the policies as security for any balance and any premiums it may pay to keep them alive. (In re Newland, 7 Nat. Bank. Reg. 477.) The policies belong to the bank as security until the debt is paid, but for purposes of a dividend as well as ultimate payment, it is compelled to credit now the value of such security. It does not follow that the policies and all sums received thereon, at maturity will become or now become the property of the bank absolutely, for the ownership is a qualified one and the bank cannot be deprived of them until the notes are fully paid. These policies were assigned to the bank in good faith more than four months before the bankruptcy, and the rights of the bank therein and thereto are in no way effected by the bankruptcy, except that it is compelled, if it elects to prove its claim, to credit the present value as fixed in the mode provided by the act on the debt, and I do not think this operates as an absolute sale and transfer to the bank. . . . The bankruptcy law in plain terms says that in such a case as this the secured creditor may prove his debt, have the value of his security determined, credit such value and have a dividend on the balance, except in cases where the contract of pledge provides a way of converting it into money, in which case that is to be done under and pursuant to the terms of the contract or agreement under which the thing pledged is held. In the absence of something in the bankruptcy act to the contrary. I am of the opinion that in cases where the value of the security is determined by agreement, arbitration or litigation as the court directs, it is contemplated that the secured creditor is to retain such securities, after receiving the dividends subject to such claims as others may have therein or thereon when finally converted into money."

¹³⁶ Matter of Davis (Ref., Pa.), 23 Am. B. R. 156, affd. 23 Am. B. R. 446, 174 Fed. 556.

¹³⁷ First National Bank v. Eason (C. C. A. 5th Cir.), 17 Am. B. R. 593, 149 Fed. 204; In re Knight, Yancey & Co. (C. C. Ala.), 28 Am. B. R. 787, 190 Fed. 893, holding in effect that claimants are not entitled to prove the full amount of a claim where a portion of it has been settled by the sale of merchandise held as security for the payment of the claim. Matter of Battisland Paper Co. (D. C., N. Y.), 44 Am. B. R. 240, 259 Fed. 921.

¹³⁸ Ward v. First National Bank of Iron-ton (C. C. A., 6th Cir.), 29 Am. B. R. 312, 302 Fed. 609; Robinson v. Roe (C. C. A., 2d Cir.), 38 Am. B. R. 26, 30, 233 Fed. 936.

¹³⁹ Matter of Old Oregon Mfg. Co. (D. C., Wash.), 38 Am. B. R. 409, 236 Fed. 504.

¹⁴⁰ Matter of Kenney (Ref., Mass.), 10 Am. B. R. 452, holding that where a claim offered in proof is fully secured it should be disallowed.

¹⁴¹ Illustrative cases on secured claims under the present laws are: In re Frick (Ref., Ohio), 1 Am. B. R. 719; In re Brown (D. C., Pa.), 5 Am. B. R. 220, 104 Fed. 763; In re Rhoads, 2 N. B. N. Rep. 178; In re Spring, 2 N. B. N. Rep. 509; In re Peasley (D. C., N. H.), 14 Am. B. R. 496, 137 Fed. 190; In re Grieve (D. C., Conn.), 18 Am. B. R. 737, 151 Fed. 711. Under the law of 1867. Yeatman v. New Orleans, etc., 95 U. S. 764; In re Southoff, Fed. Cas. 12,379; In re Gram, Fed. Cas. 3,343; In re Dunkerson, Fed. Cas. 4,157; In re Anderson, Fed. Cas. 350; In re Jaycox, Fed. Cas. 7,340; In re Newland, Fed. Cas. 10,170; Matter of Friedman (D. C., N. Y.), 39 Am. B. R. 777, 241 Fed. 603.

¹⁴² In re Ball (D. C., Vt.), 10 Am. B. R. 564, 123 Fed. 164.

estate.¹⁴³ If a trustee does not elect to redeem the security by paying the debt, the secured creditor may sell the security, if under the terms of his lien he has such right, and file a claim for the unpaid remainder of his debt.¹⁴⁴ There is no authority vested in the court, upon finding that there was an excess due the bankrupt after the payment of the secured claim, to enter a decree against the creditor, who is an adverse claimant, for the amount of the excess.¹⁴⁵ Where the claimant voluntarily appears before the referee in bankruptcy and presents his claim for allowance as a secured claim, alleging that he had a lien upon the land by virtue of a mortgage, deed of trust or the like, the referee has jurisdiction to determine the validity of the lien asserted, and to adjudge whether or not the claim should be allowed as a secured claim.¹⁴⁶ Where book accounts are assigned to secure a debt the creditor must turn over to the trustee the balance of the amount collected by him remaining after payment of his debt, without reference to the adverse claim of another creditor.¹⁴⁷ Where a lease did not provide security for the payment of water-rates and taxes by the bankrupt tenant, the landlord must establish his claim therefor before the referee.¹⁴⁸ Where the security is retained by the creditor he may enforce his lien in any court having jurisdiction, although he has availed himself of the privilege of filing his claim as a secured claim.¹⁵⁰

(6) ASCERTAINING VALUE OF SECURITIES.—The methods of ascertaining the value of the securities to be deducted are prescribed by subsection *h*. The value may be determined by "litigation," meaning any appropriate action or proceeding in the courts to ascertain the value of the security, wherein the

143. *In re Busby* (D. C., Pa.), 10 Am. B. R. 650, 124 Fed. 469; *In re Davison* (D. C., N. Y.), 24 Am. B. R. 400, 179 Fed. 750.

144. *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173, citing text.

145. *Matter of Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 362, 142 Fed. 445; *Matter of Bash* (D. C., Pa.), 40 Am. B. R. 341, 245 Fed. 808.

146. *In re Jackson Brick & Tile Co.* (D. C., Mo.), 26 Am. B. R. 915, 189 Fed. 636, citing the following cases: *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1, 55 C. C. A. 679; *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 192, 59 C. C. A. 368; *In re Granite City Bank* (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818, 70 C. C. A. 316; *In re Schermerhorn* (C. C. A., 8th Cir.), 16 Am. B. R. 508, 145 Fed. 341, 76 C. C. A. 215; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 531, 147 Fed. 684, 77 C. C. A. 668; *In re Dana* (C. C. A., 8th Cir.), 21 Am. B. R. 683, 167 Fed. 529, 93 C. C. A. 238; *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 685, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180; *Mound Mines Company v. Hawthorn* (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882, 97 C. C. A. 394; *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, 25 Sup. Ct. 778, 49 L. Ed. 1157, and see *Matter of Soltman* (D. C., N. Y.), 38 Am. B. R. 270, 238 Fed. 241.

Right of mortgage creditor to relief.—A mortgage creditor may come into a court of bankruptcy and ask for any relief to which he would be entitled in equity. *Matthews & Sons v. Wehre Co.* (D. C., La.), 32 Am. B. R. 180, 213 Fed. 396.

Possession of special fund by court.—

Where a bankruptcy court had possession of a special fund which was security for the claims of certain creditors of a bankrupt which claims were reserved for future liquidation in an order confirming a composition offer, it was held that the special fund must be distributed on the liquidation of the claims and before the distribution of the consideration of the composition, as otherwise secured creditors might get a larger proportion of their claims than other creditors. *Matter of Hollins & Co.* (D. C., N. Y.), 37 Am. B. R. 205, 230 Fed. 920.

148. *Fitch v. Richardson* (C. C. A., 1st Cir.), 16 Am. B. R. 835, 147 Fed. 196. A creditor whose security consists of assigned accounts does not abandon his security by consenting to a liquidation of the bankrupt's indebtedness. *In re Cyclopean Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 679, 167 Fed. 971.

149. *In re Yodleman-Walsh Foundry Co.* (D. C., N. Y.), 21 Am. B. R. 509, 166 Fed. 381.

150. *Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co.* (Col. Sup. Ct.), 38 Am. B. R. 639, 162 Pac. 159, holding that the filing of a secured claim is for the purpose of securing the right to share in the dividends in case the security is insufficient and the bankruptcy court thereby acquires no jurisdiction over the enforcement of the security; hence, the holder of such security is not estopped from attempting to enforce it in the State court.

secured creditor and the trustee may be heard.¹⁵¹ If the value has been legally determined outside of the court of bankruptcy, it will take proof of, and be governed by that fact.¹⁵² This subsection has no application where the securities were not the property of the bankrupt.¹⁵³ The agreement by the terms of which the securities are pledged usually provides for a sale of the securities, and the disposition of the proceeds.¹⁵⁴ The time for fixing the value of the security is the date of its actual conversion into money by the creditor and not the date of the filing of the petition.^{154a} Where the security is sold some time after the filing of the petition and the proceeds are not enough to pay the entire amount of the creditor's claims, it is not permissible to apply the proceeds, first to interest accrued since the filing of the petition, then to the principal, and afterwards to prove for the balance.¹⁵⁵ Where interest and dividends accrue upon securities held by creditors of the bankrupt after the date of the petition in bankruptcy, they may be applied in payment of the after-accruing interest upon the debt.¹⁵⁶ If by action in a State court, the trustee should intervene and see that the security brings what it is fairly worth.¹⁵⁷ Section 6 relating to exemptions does not limit the provisions of subsection *h*, so as to authorize a creditor to prove his entire claim and to receive dividends thereon from the estate, where such claim is secured by a mortgage on exempt property.¹⁵⁸ The value of the security may be ascertained by converting it into money pursuant to the contract, and in the absence of fraud, the creditor may prove the balance of his claim.¹⁵⁹ It is only when the securities have not been disposed of by the creditor in accordance with his contract that the court may direct what shall be done in the premises. Of course where there is fraud or a proceeding contrary to the contract, the interposition of the court might properly be invoked.¹⁶⁰ Although the property

151. *Matter of Soltman* (D. C., N. Y.), 38 Am. B. R. 270, 238 Fed. 241, *affd.* 41 Am. B. R. 42, 249 Fed. 455. See Am. Bankr. Dig., § 700.

152. *In re Crammond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 566; *Matter of Soltmann* (C. C. A., 2d Cir.), 41 Am. B. R. 42, 249 Fed. 455.

153. *Matter of Graves* (D. C., Vt.), 20 Am. B. R. 513, 163 Fed. 358, holding that where the bankrupt is indorser upon a corporation note, and the proof of claim thereon sets forth that the note is secured by a mortgage on both the real and personal property of the maker, the bankruptcy court has no jurisdiction over the mortgaged property except to ascertain its value and to see to its proper application in payment of the note when presented for allowance against the bankrupt's estate. See also the opinion of the district court in the same case reported in 25 Am. B. R. 372, 182 Fed. 443.

154. *In re Wiesen* (D. C., Pa.), 15 Am. B. R. 27, 138 Fed. 164.

154a. *Matter of Isaacs* (C. C. A., 2d Cir.), 40 Am. B. R. 468, 246 Fed. 820.

155. *Sexton v. Dreyfus*, 219 U. S. 339, 25 Am. B. R. 362, *revd.* *In re Kessler* (D. C., N. Y.), 22 Am. B. R. 606, 171 Fed. 751.

156. *Sexton v. Dreyfus*, 219 U. S. 339, 25 Am. B. R. 362.

157. See under §§ 11 and 47; also *In re Buse*, Fed. Cas. 2,221; *In re Stewart*, Fed. Cas. 13,413.

158. *In re Lantzenheimer* (D. C., Iowa), 10 Am. B. R. 720, 124 Fed. 716; *In re Meredith* (D. C., Ga.), 16 Am. B. R. 331, 144 Fed. 230; *In re Cale* (D. C., Minn.), 25 Am. B. R. 367, 182 Fed. 439, holding that the right of the general creditors to the general assets will be protected and that a cred-

itor with an enforceable lien or claim against exempt property can collect only the deficiency from the general assets. *In re Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 990.

159. *In re Peacock* (D. C., N. Car.), 24 Am. B. R. 159, 178 Fed. 851; *British & American Mortgage Co. v. Stuart* (C. C. A., 5th Cir.), 31 Am. B. R. 544, 210 Fed. 425.

160. *Hiscock v. Varick Bank*, 206 U. S. 23, 18 Am. B. R. 1, 9, *affg.* 15 Am. B. R. 363, holding that the court may direct the disposition of a pledge, or the ascertainment of its value, where the parties have failed to do so by their own agreement.

Where policies of life insurance were assigned in good faith to a bank to secure the payment of such sum as may be due to the bank at the time of the settlement of the policy, and more than four months thereafter the assignor was adjudicated a bankrupt and the bank filed its claim against his estate and petitioned for the ascertainment of the value of the securities to be credited on the claim so that the bank might share in the dividends on the unpaid balance, it was proper for the referee to proceed on due notice and hearing to determine the value of the policies in the absence of an agreement by the bank and the trustee as to such value.

pledged as security may be converted into money as agreed between the parties, yet the secured creditor may not dispose of the property to himself, under the guise of a sale.¹⁶¹ Where a debt is proved as a secured debt in the usual way, and the trustee objects on the ground that the security claimed constitutes a voidable preference, the court may hear and decide the issue, and allow the claim as a secured or unsecured debt, before the alleged security is converted into money.¹⁶² It is proper for the trustee to arrange with the secured creditor to accept the property held as security in satisfaction of the claim.¹⁶³

(7) **EFFECT OF PROVING SECURED DEBT AS UNSECURED.**—The law here was well settled prior to the present statute. If a secured creditor proves his debt as unsecured, he thereby waives his security.¹⁶⁴ This rule yields, however, where such a proof was made by one ignorant of his legal rights and without fraudulent intent.¹⁶⁵ Thus, where from ignorance or inadvertence a claim has been proved as unsecured the court, in the exercise of its discretion, may permit the creditor to have his proof expunged so that he may take steps to have the value of the security determined and to prove for the excess only. This right will generally be accorded to one asking it and excusing his mistake, if neither the bankrupt nor any other party will be injured; that is, if their rights after the granting of an order to expunge the proof will not be less or different than they would have been had not the mistake been made of proving the claim as unsecured.¹⁶⁶ A proof of claim may be amended so as to include therein a statement of a security in a case where the equities of general creditors will not be disturbed.¹⁶⁷ It has been held that proof without mention

In re Davison (D. C., N. Y.), 24 Am. B. R. 460, 179 Fed. 750.

Duty of court to consider value.—In the absence of a legal rule in the State making the sum for which property sold to satisfy a lien is bought is conclusive as to its value, the bankruptcy court on allegation of inadequate price realized at such sale is by duty bound to consider the question of value. *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

161. *Van Kirk v. Vermont Slate Co.* (D. C., N. Y.), 15 Am. B. R. 239, 140 Fed. 38; *In re Mertens* (D. C., N. Y.), 14 Am. B. R. 226, 134 Fed. 104, 105. Compare *Turner v. Metropolitan Trust Co.* (C. C. A., 9th Cir.), 31 Am. B. R. 181, 207 Fed. 495.

Purchase of property by creditor.—Where a proof of claim shows that claimant on a sale of property mortgaged as security for its debt bought in the property, the burden is on it to show that said property was of insufficient value to pay its debt. *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

163. *In re Quinn* (C. C. A., 8th Cir.), 21 Am. B. R. 264, 165 Fed. 144.

163. *Matter of Rose* (D. C., Ky.), 26 Am. B. R. 752, 193 Fed. 815.

164. *In re Bloss*, 4 N. B. R. 147, Fed. Cas. 1562; *Heard v. Jones*, 15 N. B. R. 402; *Ex parte Solomon*, 1 G. & J. 25; *Stewart v. Isador*, 1 N. B. R. 485; *Hatch v. Seely*, 13 N. B. R. 390; *Ex parte Downs*, 1 Rose, 96; *In re Brand*, 3 N. B. R. 324, Fed. Cas. 1,809; *In re Granger*, 8 N. B. R. 30, Fed. Cas. 5,684; *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 708, 217

Fed. 16; *Matter of Fisk & Robinson* (D. C., N. Y.), 34 Am. B. R. 194, 185 Fed. 974; *Morrison v. Rieman* (C. C. A., 7th Cir.), 41 Am. B. R. 325, 249 Fed. 97; *First National Bank v. Hoffman* (Kan. Sup. Ct.), 41 Am. B. R. 350, 171 Pac. 13.

One who claims a mechanic's lien but waives it on proving a claim in bankruptcy against the contractor, having voted upon the claim and transacted other business as a creditor at a meeting of creditors for the election of a trustee, may not thereafter assert that through the mistake made by a clerk of the lawyer who drew the proof of claim, the waiver therein was broader than he intended where the lien sought to be preserved must have been collected out of the proceeds of a contract belonging to the bankrupt. *Brown v. City National Bank* (N. Y. Sup. Ct., Spec. T.), 26 Am. B. R. 683, 72 Misc. 201, 131 N. Y. Supp. 92.

Conditional vendor.—The fact that a creditor files a general claim against a bankrupt for the purchase price of property, does not preclude him from reclaiming the property under a conditional sale contract, where, in his proof of claim he distinctly preserves his right to reclaim the property. *Smith v. Carakin* (C. C. A., 6th Cir.), 44 Am. B. R. 278, 259 Fed. 51.

165. *In re Brand*, Fed. Cas. 1,809; *In re Harwood*, Fed. Cas. 6,155; *In re Parkes*, Fed. Cas. 10,764; *In re Baxter*, 12 Fed. 72.

166. *In re Hubbard*, 1 N. B. R. 679, Fed. Cas. 6,513.

167. *In re Wilder* (D. C., N. Y.), 3 Am. B. R. 761, 101 Fed. 104. See also *In re Fisk & Robinson*, 34 Am. B. R. 194, 185 Fed. 974.

Amendment of claim to reinstate right to security.—Where a claimant has waived his right to security by filing his claim without asserting it, he may, before receiving a dividend, although more than a year after adjudication, be permitted to apply for an order authorizing the filing *anew pro tunc* of an amended claim thereby reinstating his right to security. *Matter of Fisk & Robinson* (D. C., N. Y.), 34 Am. B. R. 194, 185 Fed. 974.

of the security does not of itself operate as a discharge of a mortgage security; that while the creditor was prevented from setting up the same against the assignee, no one but the assignee could avail himself of the fact.¹⁶⁸ Where the security is the property of the bankrupt held by an indorser, or a person secondarily liable, it is not necessary that the creditor should prove as a secured creditor in order to retain his rights as against the indorser.¹⁶⁹ It seems that notwithstanding that a creditor has proved his claim based upon a waive note as unsecured, he may assert in a court of competent jurisdiction any right that he may have on a waiver of exemption.¹⁷⁰ A creditor, having a provable claim, may, upon the relinquishment of his security, share with the other creditors in the distribution of the estate, although the security was such as to be ineffectual against such creditors.¹⁷¹

c. **Priority claims.**—Subsection e of this section yokes priority claims with secured claims, both as to manner of proof and the ascertainment of the value of the property. A landlord's claim for rent, constituting a lien, by State statute, must be proved to protect the landlord's right to priority of payment.¹⁷² On the other hand, it has been ruled that where a claim is fully secured by a lien upon property of the bankrupt, the formal proof required by the bankruptcy act, is not necessary to the enforcement of the lien.¹⁷³ The reasons for the rule of *prima facie* proof applicable to proofs of claims do not apply to petitions for priority. Thus, allegations relating to priority are not *prima facie* evidence of their truth.¹⁷⁴ It is thought that what is said of secured claims, *ante*, applies equally to debts entitled to priority.

d. **Preference claims.**¹⁷⁵—(1) **IN GENERAL.**—Subsection g has been as much discussed as any clause in the present law. The former statute denied allowance to a claim filed by a creditor who accepted a preference "having reasonable cause to believe that the same was made or given by a debtor contrary to any provisions of the act;" nor could any dividend be paid on such a debt until the creditor surrendered his advantage.¹⁷⁶ The words quoted do not appear in the present act. Further, the definition of "preference" was, by a shifting of clauses while the bill was in committee, so changed as to lead to the ruling that any payment by debtor to creditor, after, though without knowledge of, actual insolvency, was a preference, even though lacking intent and made years before. This question is discussed at length elsewhere.¹⁷⁷ A few of the more valuable cases on the now historic controversy will be found in the foot-note.¹⁷⁸ *Carson, Pirie & Co. v. Chicago Title & Trust Co.*¹⁷⁹ settled

168. *Cook v. Farrington*, 104 Mass. 212.

169. *Merchants' Bank v. Comstock*, 55 N. Y. 24.

170. *In re Loden* (D. C., Ga.), 25 Am. B. R. 917, 184 Fed. 965.

171. *Lacy v. Citizens' Bank* (C. C. A., 8th Cir.), 28 Am. B. R. 433, 198 Fed. 484.

172. *In re Hayward* (D. C., Pa.), 12 Am. B. R. 264, 130 Fed. 720.

173. *Courtney v. Fidelity Trust Co.* (C. C. A., 6th Cir.), 33 Am. B. R. 400, 219 Fed. 57.

174. *In re Jones* (D. C., Mich.), 18 Am. B. R. 206, 151 Fed. 108.

175. See Am. Bankr. Dig., §§ 767-784.

176. Act of 1867, § 23, R. S., § 5084. Compare *In re Kingsbury*, Fed. Cas. 7,816; *In re Walton*, Fed. Cas. 17,130; *In re Forsyth*, Fed. Cas. 4,948; *In re Currier*, Fed. Cas. 3,492.

177. See discussion under Section Sixty, *post*.

178. Declaring payments in due course preferences.—*In re Knost* (Ref., Ohio), 2 Am. B. R. 471; *In re Conhaim* (D. C., Wash.), 3 Am. B. R. 249, 97 Fed. 923; *Columbus Elec. Co. v. Worden* (C. C. A., 7th Cir.), 3 Am. B. R. 634, 99 Fed. 400; *In re Fixen* (C. C. A., 9th Cir.), 4 Am. B. R. 10, 102 Fed. 295. *Contra*: *In re Piper*, 2 N. B. N. Rep. 8; *In re Smoke* (D. C., N. Y.), 4 Am. B. R. 434, 104 Fed. 289; *In re Hall* (Ref., N. Y.), 4 Am. B. R. 671. Apparently *contra*, even since *Carson, etc., Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814; *In re Dickson* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726.

179. 182 U. S. 438, 5 Am. B. R. 814.

the matter. After it, all payments subsequent to insolvency were preferences, the surrender of which was required before the claim of a creditor so "preferred" could be allowed. A further effect of that decision was to declare in substance that all of the indebtedness of the bankrupt to a particular creditor, existing during the period of insolvency, was to be treated as one claim, and any payment made and received, even in good faith, by both parties during such period was to be treated as a preference, and must be surrendered before the balance of the claim, or any part of it, could be allowed.¹⁸⁰ Under the act before the amendment of 1903 it was frequently held that a creditor was not required to surrender a payment made on an open account where, at the time of such payment or subsequent thereto, the creditor extended new credits to the bankrupt in excess of the amount of such payment, the net result of the entire transaction being to increase the indebtedness to the creditor, and the value of the bankrupt estate being enhanced to a like amount.¹⁸¹

(2) **THE AMENDMENTS OF 1903.**—The conditions resulting from this new doctrine—a reversal of the settled policy of all bankruptcy laws to protect transactions in due course even up to the moment of bankruptcy¹⁸²—were so unsatisfactory to business men and disastrous to the credit system, that the demand for remedial legislation became practically unanimous. Congress has responded by amendment (1) making it certain that no transaction more than four months before the bankruptcy is a preference,¹⁸³ and (2) limiting that which must be surrendered as a condition precedent to proving a debt to (a) preferences that are "voidable under section sixty, subdivision b," and (b) advantages possessed by creditors "to whom conveyances, transfers, assignments, or incumbrances, void or voidable under § 67, subdivision e, have been made or given."

(3) **MEANING OF THE AMENDMENTS.**—Considered broadly, subsection *g* seems now to mean what the "protected transactions" clauses of the English system have meant for nearly two centuries. He who has obtained an advantage over other creditors, in any of the ways indicated in the present law, and only such an one, must hereafter surrender his advantage before his claim can be filed or allowed. The intention of its framers is expressed in the sentence next before the last.¹⁸⁴ There may be some question, for instance,

180. *In re Delling* (D. C., N. Y.), 10 Am. B. R. 688, 124 Fed. 852. See also *In re Jones* (D. C., S. Car.), 10 Am. B. R. 513, 123 Fed. 128. *Contra*: *In re Wolf* (D. C., Tenn.), 10 Am. B. R. 153, 122 Fed. 127, holding that the case of *Carson, etc., Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, did not apply to a payment in full of a separate and independent debt.

181. *Matter of Sagor* (C. C. A., 2 Cir.), 9 Am. B. R. 361, 121 Fed. 658; *Gans v. Ellison* (C. C. A., 3d Cir.), 8 Am. B. R. 153, 114 Fed. 734; *Kimball v. Rosenham Co.* (C. C. A., 8th Cir.), 7 Am. B. R. 718, 114 Fed. 85; *Peterson v. Nash* (C. C. A., 8th Cir.), 7 Am. B. R. 181, 112 Fed. 311; *Dickson v. Wyman* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726. These cases were cited and apparently approved in the case of *Jaquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 73. See also *Yaple v. Dahl-Millakan*

Grocery Co., 193 U. S. 526, 11 Am. B. R. 596; *Matter of Watkinson* (D. C., Pa.), 16 Am. B. R. 38, 143 Fed. 602.

182. See English Act of 1883, § 49. See also historical review in *In re Hall*, 4 Am. B. R. 671.

183. This change is considered in detail under § 60.

184. The intention of Congress is indicated by the following from the analysis accompanying the House revision of the amendatory bill.

"*Carson, etc., Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, having held that § 60-a is a definition of 'preference,' it necessarily follows that payments and other *bona fide* transactions after actual insolvency, though in due course of trade and without knowledge or reasonable cause to believe that a preference was intended, must be, under § 57-g, surrendered before a creditor

about the necessity of surrendering where the advantage consists of a lien through legal proceedings within the preference period, such a lien not being strictly either a conveyance, transfer, or assignment, or even an incumbrance in the common meaning of the word. The intention to require the surrender of such an advantage is nevertheless clear; nor is it doubted that the words of the law accomplish it. The discrepancies between a preference which is an act of bankruptcy.¹⁸⁵ and one that is even now merely voidable may also cause discussion. Again, the intention is clear. If not voidable under § 60-b, a preference need not be surrendered; reasonable cause to believe a preference intended must appear.¹⁸⁶ But as to transfers it must appear that they were made with a fraudulent intent.¹⁸⁷ Cases under the former law are not in point, save remotely, and are, therefore, not cited. Still, whatever be the ultimate decisions as to transactions, less common or more subject to suspicion, the exasperating practice of requiring the surrender of mere payments, made and received in due course, is at an end. It is now definitely established that where a creditor at adjudication has a claim for a balance due upon an open account for goods sold and delivered to the bankrupt within the four months' period, payments received by the creditor within said four months, and in good faith, without knowledge of the bankrupt's insolvency, do not constitute preferences which must be surrendered before proof of the claim for the balance due will be allowed.¹⁸⁸

(4) EFFECT OF AMENDMENTS OF 1903.—The effect of this change in § 57-g is to make only those preferences voidable which are made so by § 60-b, or by § 67-e, which latter refers only to conveyances made with intent to defraud creditors or rendered invalid by some statute of the State. Section 60-b, thus referred to, makes transfers voidable by the trustee when the creditor has reasonable cause to believe that the debtor intends thereby to create a preference.¹⁸⁹ Only creditors whose transactions have been entirely in due course will be apt to offer proofs for allowance. This objection will therefore, not often be made. If it is—as to prevent voting for trustee—it must usually be heard and decided somewhat summarily. The action of the creditor in surrendering or not will often turn on the decision. Whether, if he does not surrender after the point is raised, he can thereafter prove his debt is a question; it is thought that, even after a refusal, the creditor can surrender at any time before a suit is brought.¹⁹⁰ For time when this amendment went into effect, see “supplementary section to amendatory act,” *post*.

(5) CASES PRIOR TO AMENDMENT OF 1903 STILL VALUABLE.—The amendments just considered have rendered many cases decided under the law of 1898 no longer applicable, and they will not be cited. Some cases are

who received such a payment could prove the balance of his debt. This was not what was intended by the framers of the law. There is a very urgent and widespread demand for such an amendment as will obviate this menace to trade.”

The fundamental purpose of this provision is to secure an equality of distribution of the assets of a bankrupt estate. *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 13 Am. B. R. 552.

^{185.} Compare § 3-a(2) with § 60-a-b.

^{186.} In *re Hines* (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 142.

^{187.} In *re Bloch* (C. C. A., 2d Cir.), 15 Am. B. R. 748, 142 Fed. 674.

^{188.} *Wild & Co. v. Provident Life & Trust Co.* (Sup. Ct.), 214 U. S. 292, 22 Am. B. R. 109; *Yaple v. Dahl-Milliken Grocery Co.*, 193 U. S. 526, 11 Am. B. R. 596; *Matter of Farmer's Store & Supply Co.* (D. C., W. Va.), 32 Am. B. R. 638, 214 Fed. 505.

^{189.} In *re First Nat. Bank of Louisville* (C. C. A., 6th Cir.), 18 Am. B. R. 766, 155 Fed. 100.

^{190.} Compare cases under this section, subtitle “What is a Surrender,” *post*.

nevertheless still of value. Those bearing on (1) what is a preference, and (2) whether a credit granted in good faith after the commission of a preference may be set off against the preference in determining the amount to be surrendered, will be found elsewhere.¹⁹¹ That until surrender a creditor has not a provable debt and may not be a petitioning creditor in an involuntary case is still the law.¹⁹² So also, it seems, is the doctrine that where the principal creditor cannot prove without surrendering, a guarantor cannot.¹⁹³ Likewise, the rule that creditors who cannot prove without surrendering their advantage on a particular debt, cannot prove other and detached debts not so tainted,¹⁹⁴ also that it is immaterial whether the creditor is entitled to priority or not.¹⁹⁵ The difference between a mere preference and a voidable preference, discussed in some of the cases,¹⁹⁶ now becomes important; the former need not be surrendered.¹⁹⁷

(6) WHEN SURRENDER REQUIRED.—(I) *In general*.—As the law now stands no claim is allowable where the claimant has received any advantage over his co-claimants by means of a preference which is voidable under § 60-b, or by means of a conveyance, transfer, assignment or incumbrance which is void or voidable under § 67-e.¹⁹⁸ A correct understanding of what is required under this section will necessitate a careful reading of the provisions of those sections and of the cases cited in the discussion thereunder. A creditor who has a voidable preference may make and file his formal proof of claim without surrendering his preference, and in that sense his claim is provable. In other words, it is susceptible of a formal statement in writing which may be filed in court. But the claimant may not secure an allowance of his claim, he may not vote upon it at a meeting of creditors, he may not obtain any advantage by means of it in the bankruptcy proceedings, until he first surrenders his preference.¹⁹⁹ It is incumbent on the parties opposing a claim to prove that in fact a preference has been received.²⁰⁰ The surrender must be made

191. See discussion under Section Sixty of this work.

192. *In re Rogers* (D. C., Ark.), 4 Am. B. R. 540, 102 Fed. 687.

193. *In re Schmechel Co.* (D. C., Mo.), 4 Am. B. R. 719, 104 Fed. 64; *In re Hurlbutt* (C. C. A., 2d Cir.), 16 Am. B. R. 198, 143 Fed. 958.

194. *In re Tealow* (D. C., Minn.), 4 Am. B. R. 757, 104 Fed. 229; *In re Conhaim* (D. C., Wash.), 3 Am. B. R. 249, 97 Fed. 923; *Matter of Beswick* (Ref., Ohio), 7 Am. B. R. 395; *In re Meyer* (D. C., Tex.), 8 Am. B. R. 598, 115 Fed. 997; *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1. *Contra*, under the former law, *In re Arnold*, Fed. Cas. 551; *In re Richter*, Fed. Cas. 11,803. But see *In re Barnes*, Fed. Cas. 1,013.

A creditor having two distinct claims of the same class, both of which are due at the time of his receiving a preferential payment upon one of them, is not entitled to prove either claim until he has surrendered the preference. *In re Mayo Contracting Co.* (D. C., Mass.), 19 Am. B. R. 551, 157 Fed. 469.

195. *In re Bashline* (D. C., Pa.), 6 Am. B. R. 104, 109 Fed. 965; *In re Proctor*

(Ref., Iowa), 6 Am. B. R. 660; *In re Read* (Ref., N. Y.), 7 Am. B. R. 111.

196. Compare, for instance, *In re Hall* (Ref., N. Y.), 4 Am. B. R. 671. For a case where *bona fides* was the test, see *In re Wyly* (D. C., Tex.), 8 Am. B. R. 604, 116 Fed. 38. And compare *In re Bullock* (D. C., N. Car.), 8 Am. B. R. 646, 116 Fed. 667.

197. Cases where transactions thought preferences under the former law were held not so, are the following: *In re Stevens*, Fed. Cas. 13,391; *In re Horton*, Fed. Cas. 6,707; *In re Independent Ins. Co.*, Fed. Cas. 7,019. The elements of "preference" under that law were so different from those under the present law as amended as to render these and similar cases valuable only as suggestions, not as precedents.

198. *Matter of National Boat & Engine Co.* (D. C., Me.), 33 Am. B. R. 154, 216 Fed. 208, citing *Collier on Bankruptcy* (9th ed.), 731.

199. *Stevens v. Nave-McCord Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71; *In re Greenberger* (D. C., N. Y.), 30 Am. B. R. 117, 203 Fed. 583. See Am. Bankr. Dig. §§ 767-780.

200. *In re Hickey* (D. C., Ia.), 7 Am. B. R. 282, 112 Fed. 287.

to the trustee, and not to the bankrupt or any other person.²⁰¹ It is no objection to a surrender that there is no trustee to receive the same since the estate can be reopened under section 2 (8).²⁰²

(II) *Compulsory surrender not a penalty.*—Subsection *g* was not intended to impose a penalty, but merely to give creditors who received preferences options to keep what they have received and take no dividends from the estate, or to surrender their preference and share equally with other creditors in the general distribution.²⁰³ And this right would not appear to be affected by the fraud of the creditor in trying to secure an advantage over other creditors, in the preferential payment of his debt, which was valid at its inception.²⁰⁴ As held by the Supreme Court the act contains no language forfeiting the whole or any part of an otherwise valid claim, on the ground that the creditor has afterward been guilty of fraud,²⁰⁵ and this being so the courts have no authority to enlarge the statute by adding such a provision.²⁰⁶

(III) *Result of transactions beneficial to estate.*—The fact that the net result of transactions within the four months was beneficial to the estate does not relieve the creditor from surrendering a large payment made on an account which had run for a long time prior to such period.²⁰⁷ But payments on a running account are not to be considered as preferences, required to be surrendered, where new sales succeed payments and the net result is to increase the value of the estate.²⁰⁸ Where in a running account payments by the bank-

201. In re Bailey (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 990.

202. In re Feinberg & Sons (D. C., Mass.), 26 Am. B. R. 587, 187 Fed. 283, holding that when at the time proofs of claims against the bankrupt's estate were presented to the court there was a trustee capable of acting, but the claims were not submitted for allowance until after the trustee's final account had been allowed and he had been discharged, and a composition agreement made prior thereto had been confirmed by the court, and it appears that the claimant had received from the bankrupt a preference voidable under section 60-b, the surrender of the preference is a condition precedent to the allowance of the claims.

203. In re Conhaim (D. C., Wash.), 3 Am. B. R. 250, 97 Fed. 923; Keppel v. Tiffin Savings Bank, 197 U. S. 356, 13 Am. B. R. 552.

A preferred creditor's claim will be disallowed unless he surrenders his preference. In re Coffey (Ref., N. Y.), 19 Am. B. R. 148, 167.

204. Matter of Bergdoll Motor Co. (C. C. A., 3d Cir.), 37 Am. B. R. 501, 233 Fed. 410, holding that a creditor whose receipt of a voidable preference has been set aside, may subsequently prove his claim, which was untainted by fraud in its inception, although he attempted to secure a preferential payment by fraud.

205. Keppel v. Tiffin Savings Bank, 197 U. S. 362, 13 Am. B. R. 552.

206. Matter of Bergdoll Motor Co. (C. C. A., 3d Cir.), 37 Am. B. R. 501, 233 Fed. 410.

207. In re Watkinson (Ref., Pa.), 17 Am. B. R. 56.

208. Wild & Co. v. Life & Trust Co. (C. C. A., 3d Cir.), 18 Am. B. R. 506, 153 Fed. 562, affg. 17 Am. B. R. 56. This case was reversed by the Supreme Court on the ground that the court below had directed a surrender of a payment made during the four months' period, notwithstanding the fact that the creditor had no knowledge of the insolvency of the bankrupt. See 214 U. S. 292, 22 Am. B. R. 109. The decision in this case is based upon Carson, etc., Co. v. Chicago Title & Trust Co., 182 U. S. 438, 5 Am. B. R. 814, and Jaquith v. Alden, 189 U. S. 78, 9 Am. B. R. 73.

Payments on running accounts.—In the case of Jaquith v. Alden, 189 U. S. 78, 9 Am. B. R. 773, it was held that where a debt for goods sold to the bankrupt upon a running account was all incurred within the four months' period while he was insolvent, of which fact the creditor was ignorant, payments on account do not constitute preferential transfers which must be surrendered before the creditor can prove his claim, although the greater part thereof was for goods sold before the last payment was made; Matter of Sagor & Bro. (C. C. A., 2d Cir.), 9 Am. B. R. 361, 121 Fed. 658. In the case of Yaple v. Dahl-Millikan Grocery Co., 193 U. S. 526, 11 Am. B. R. 594, it was held that where a creditor has a claim against an insolvent debtor for the balance due upon an open account for goods sold and delivered four months before the debtor's adjudication as a bankrupt, and during the same period makes a number of sales of merchandise on credit which becomes a part of the debtor's estate, payments on account from time to time received in good faith

rupt within the four months' period have induced new credits which resulted in the net increase of the estate, the creditor may be said to have once surrendered his preference by the giving of the subsequent credit, but where the bankrupt, beginning far beyond the four months' limit, makes a number of purchases and then finally within the four months makes a large payment on account, the creditor has been preferred.²⁰⁹

(IV) *Intent to prefer*.—A preference must have been actually intended in fact on the debtor's part, or there must have existed what the law regards as the equivalent of such an intent on his part, and such intent is not to be conclusively presumed from the mere fact that the debtor knows himself to be insolvent.²¹⁰ A trust deed given to secure the repayment of funds misappropriated within four months prior to the bankruptcy of the grantor

without knowledge of the debtor's insolvency on the part of the creditor, do not constitute preferences which he is obliged to surrender before he can prove his claim. In the case of *In re Jourdan* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726, the court said: "While the Supreme Court has adopted a liberal construction of the statute in question and we are bound to follow it, there must be a limit to that method of interpretation and these cases reach it. It is beyond all reason to hold because a creditor has, in the ordinary course of business, during the four months preceding bankruptcy received payments which under some circumstances might operate as a preference in some views of the law, that that fact can be held to bar the proof of his claim when, looking at all the transactions together, they demonstrate not only that they were without any intention to acquire any unjust preference, but also that they have increased the net indebtedness to the creditor and correspondingly increased the bankrupt's estate. In order to avoid so unreasonable a result, we might say that all the transactions covered by the account current should be regarded as one, so that it could not be held that the effect of the payments was to enable the creditors at bar to obtain a greater percentage of their debt than any other creditor of the same class, within the meaning of paragraph a of section 60."

Payments to an attorney in the settlement of a running account places him in the same position as any other creditor whose claims have been paid within the four months' period, and such payments to the extent of an excess of a reasonable allowance will be deemed preferential. In *re Shiebler & Co.* (D. C., N. Y.), 20 Am. B. R. 777, 163 Fed. 545.

²⁰⁹ In *re Watkinson* (D. C., Pa.), 17 Am. B. R. 56, 146 Fed. 142; *Kimball v. Rosenham Co.* (C. C. A., 8th Cir.), 7 Am. B. R. 718, 114 Fed. 85.

²¹⁰ In *re Mayo Contracting Co.* (D. C., Mass.), 19 Am. B. R. 551, 157 Fed. 469. See Am. Bankr. Dig. § 771.

Receipt of payment on pre-existing debts by the creditors, within the four months'

period, is sufficient cause to believe a preference intended. In *re Andrews* (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922, affg. 14 Am. B. R. 247.

The test is whether the creditor who is charged with having received a voidable preference had at the time of receiving it such information as ought to have led a reasonably prudent man to the conclusion that a preference was thereby intended. In *re Pfaffinger* (D. C., Ky.), 18 Am. B. R. 807, 154 Fed. 528; *Constam v. Haley* (C. C. A., 6th Cir.), 30 Am. B. R. 650, 206 Fed. 280.

Partial payment on a note does not constitute a preference which must be surrendered under this subdivision. *Rutland County Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 169.

Surrender of money paid to wife for family expenses.—Where the wife of a bankrupt filed a claim to the allowance of which objection was made, that within the four months' period prior to the adjudication the bankrupt had made payment to his wife which constituted a preference, to be surrendered before allowance of her claim, and the only evidence relating to such payment was the testimony of the wife herself who stated that the sum was to be paid to and used by her for living expenses and not in part payment of the debt, a finding by the referee that a preference had been received which should be surrendered before allowance of her claim was improper. *Neumann v. Blake* (C. C. A., 8th Cir.), 24 Am. B. R. 575, 178 Fed. 916.

Payment by corporation to officer.—Where claimant who was bankrupt's president and manager ascertained after he became connected with bankrupt that it was insolvent and was in a position to know that such condition continued until bankruptcy intervened, bankrupt was chargeable with his knowledge, and payments made to claimant within the four months' period on account of money loaned by him to bankrupt constituted preferences which were recoverable by bankrupt's trustee and which should be surrendered before a claim for the balance due on such loan could be allowed. *Cooper v.*

constitutes a preference which must be surrendered before proof of the claim based upon the misappropriation.²¹¹ It must appear affirmatively, where the surrender of a preference is insisted upon, that the creditor had reasonable cause to believe that the transaction would result in a preference, and to this end the trustee attacking the creditor's claim has the burden of proving the essential elements of a voidable preference.²¹²

(V) *Distinct and independent debts.*—Where payments were made upon an indebtedness during the period of four months prior to the debtor's bankruptcy, and notes were given for the balance, such notes cannot be proved as independent debts without a surrender of such payment.²¹³ A creditor who holds two separate and distinct debts against the estate of a bankrupt must surrender a preferential payment on one of such debts before he can prove the other.²¹⁴ But where such payment is made upon a distinct and independent debt from that which is sought to be proved it need not be surrendered.²¹⁵ Thus, if a creditor has received a preference from a firm composed of two persons, but has an individual claim against one of them, he may prove the latter without surrendering his preference.²¹⁶

(7) *PAYMENT OF NOTES DISCOUNTED AT A BANK.*—The payment of notes given to third parties and discounted by a bank is a preferential payment to the bank and not to the payees of the notes, and must be surrendered before the bank can prove its claim for other indebtedness of the bankrupt.²¹⁷ In

Miller (C. C. A., 6th Cir.), 30 Am. B. R. 194, 203 Fed. 383.

Creditor's knowledge of debtor's insolvency or intent to prefer.—A farmer operating a dairy farm which he rented, within four months before bankruptcy executed a chattel mortgage to a creditor and also assigned a portion of the money due from the sale of the milk. The creditor knew that all the property on the farm was mortgaged to himself and others and that the farmer was unable to pay his bills as he had "dunned" him on several occasions. Held on all the evidence, that the creditor had knowledge of the debtor's insolvency or intent to prefer, and that he must surrender the preferences before being allowed his claim. Matter of French (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255.

Accommodation indorser; surrender of preference paid to holder.—An accommodation indorser before notes are paid is a creditor, his claim is provable as a contingent claim founded on a contract, and, therefore, he must refund to the bankrupt estate any preferential part payment made by the maker to the holder on account of the notes before he can prove his own claim for payments as indorser. Platt v. Ives (Inf. Ct. of Errors, Conn.), 32 Am. B. R. 846, 86 Atl. 579.

211. *Burgoyne v. McKillip* (C. C. A., 8th Cir.), 25 Am. B. R. 387, 182 Fed. 452. in which case it was also held that in case of embezzlement or misappropriation of funds by a bankrupt, the person defrauded may at his option assert a demand as upon implied contract to repay and such demand is provable in bankruptcy. The acceptance of a trust deed as security for the repayment of

such funds is an election to assert such a demand.

212. *Peck & Co. v. Whitmer* (C. C. A., 8th Cir.), 36 Am. B. R. 722, 231 Fed. 893.

213. *Dunn v. Gans* (C. C. A., 3d Cir.), 12 Am. B. R. 316, 129 Fed. 750; *In re Thompson* (D. C., Pa.), 10 Am. B. R. 288, 121 Fed. 607; arising under the act before the amendment of 1903.

214. *In re Mayer* (D. C., Tex.), 8 Am. B. R. 598, 115 Fed. 997; *Livingston v. Heineman* (C. C. A., 6th Cir.), 10 Am. B. R. 39, 120 Fed. 786; *Matter of Silvernail* (D. C., Kan.), 33 Am. B. R. 59, 218 Fed. 979.

215. *In re Abraham Steers Lumber Co.* (C. C. A., 2d Cir.), 7 Am. B. R. 332, 112 Fed. 406, affg. 6 Am. B. R. 315, 110 Fed. 738; *In re Sear* (D. C., Ga.), 7 Am. B. R. 700, 113 Fed. 989; *In re Bullock* (C. C., N. Ct.), 8 Am. B. R. 644, 116 Fed. 667; *In re Wolf & Levy* (C. C., Tenn.), 19 Am. B. R. 153, 122 Fed. 127.

216. *In re Comstock & Co.*, 12 N. B. R. 116 Fed. Cas. 3,079.

217. *Bartholow v. Bean*, 18 Wall. (U. S.) 635; *In re Hill & Co.* (C. C. A., 7th Cir.), 12 Am. B. R. 221, 120 Fed. 315; *In re Thompson* (D. C., Pa.), 10 Am. B. R. 288, 121 Fed. 607; *Swartz v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 5 Am. B. R. 673, 117 Fed. 1; *In re Waterbury Lumber Co.* (D. C., Ct.), 8 Am. B. R. 79, 114 Fed. 225; *Matter of Matthews* (Ref., Mass.), 15 Am. B. R. 721; *In re Wright-Dana Hardware Co.* (D. C., N. Y.), 31 Am. B. R. 192, 207 Fed. 636; *State Bank of Clearwater v. Ingram* (C. C. A., 8th Cir.), 38 Am. B. R. 447.

Where it appears that a creditor of a bankrupt holding notes and a deed of trust as security therefor, took them with knowledge of the bankrupt's insolvency, a bank which is not a holder for value of the notes and which is protected by a solvent endorser, should not be allowed to enforce its claim. *Bridgton Nat. Bank v. Way* (C. C. A., 4th Cir.), 43 Am. B. R. 204, 253 Fed. 731.

Credit by clearing house.—In the case of

determining the preference to be surrendered by the bank, the increase of the contingent indebtedness of the bankrupt on the indorsement of notes given to it by customers and discounted by the bank should not be considered, since it cannot be said that such increased indebtedness resulted in a corresponding increase of the bankrupt's estate.²¹⁸

(8) WHAT IS A SURRENDER.—(I) *Compulsory surrender; effect on proof.*—Here the doctrines declared under the law of 1867 seem at least somewhat applicable. The phrasing of that statute undoubtedly colored some of the decisions under it. In a former edition of this work, the following language was used: "Under well-recognized principles of law, a surrender that is compulsory is not a surrender. The element of fraud is usually present, but may be lacking; the test is: was the act a voluntary one? Each case turns on its own facts and there is some conflict, but the weight of decision under the present law supports this view."²¹⁹ This view as here expressed received the approval of four of the nine judges of the Supreme Court, but the majority maintained a contrary view.²²⁰ The rule as now established is as follows: A creditor, who has received a voidable preference and retained the same until deprived thereof by a judgment of the court, may surrender the preference and thereafter prove his claim against the estate.²²¹

(II) *Rule under former law.*—Under the former law, there were no authoritative decisions. They varied from the rigid rule that, if a suit was brought to recover, it was too late,²²² to the rather watery doctrine that, even after judgment adverse, the recusant creditor was entitled to time to reflect and decide whether he would pay costs and yield, or continue recusant.²²³

(III) *Surrender by direction of court or as a result of litigation.*—A creditor should not be punished for submitting to the court the question as to whether the alleged preference is voidable; upon determining that it is voidable, the court should fix a reasonable time within which the creditor may surrender and have his claim allowed. Where a creditor has been compelled to surrender by direction of the court in a litigation to compel such surrender, he is entitled to prove his claim and to dividends thereon; the court may

Rector v. City Deposit Bank Co., 200 U. S. 405, 15 Am. B. R. 336, it was held that credit by clearing house association of check, payable to a bank subsequently adjudicated a bankrupt, to the account of another bank in the association, was an illegal preference which must be surrendered.

²¹⁸ *In re Hill & Co.* (C. C. A., 7th Cir.), 12 Am. B. R. 221, 130 Fed. 315.

²¹⁹ *Collier on Bankr.* (4th and 5th Ed.), citing *In re Greth* (D. C., Pa.), 7 Am. B. R. 598, 112 Fed. 978; *In re Owings* (D. C., Mo.), 6 Am. B. R. 454, 109 Fed. 623; *In re Keller* (D. C., Iowa), 6 Am. B. R. 351; 109 Fed. 131; *In re Beiber*, 2 N. B. N. Rep. 943. *Contra: In re Baker*, 2 N. B. N. Rep. 195.

²²⁰ *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 13 Am. B. R. 552.

²²¹ *In re Oppenheimer* (D. C., Iowa), 15 Am. B. R. 267, 140 Fed. 51; *In re Lange Co.* (D. C., Iowa), 22 Am. B. R. 414, 170 Fed. 114. Compare *In re Privett* (D. C., N. Car.), 13 Am. B. R. 151, 132 Fed. 592, holding that a creditor who has received a preferential payment may either surrender his preference

and file his claim, or abandon his claim and stand on his preference; he cannot do both; *Union Central Life Ins. Co. v. Drake* (C. C. A., 8th Cir.), 32 Am. B. R. 252, 214 Fed. 536; *Matter of Wenatchee Hgts. Orchard Co.* (C. C. A., 9th Cir.), 32 Am. B. R. 620, 214 Fed. 227.

Effect of fraud in receiving preference.—A preferred creditor may prove his claim notwithstanding there has been no surrender of his preference by him beyond what is involved in the payment of a final judgment secured against him in a proceeding instituted by the trustee to avoid the preference. This is true, although the creditor, in furtherance of his fraud in receiving the preference, exposed the estate to delay and expense by prolonged and unwarranted litigation. *Matter of Bergdoll Motor Co.* (D. C., Pa.), 36 Am. B. R. 265, 230 Fed. 248.

²²² *In re Lee*, Fed. Cas. 8,179. Compare *Phelps v. Sterns*, Fed. Cas. 11,080.

²²³ *Zahm v. Fry*, Fed. Cas. 18,198; *Hood v. Karper*, Fed. Cas. 8,864.

settle the amount of dividend coming to him, and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend.²²⁴ Where as a result of the litigation the creditor surrenders a preferential payment he is entitled to prove his claim against the estate irrespective of whether the suit to avoid the preference was instituted in a State court or in a court of bankruptcy, even though more than a year had expired from the time of the bankrupt's adjudication.²²⁵ The court may summarily diminish or expunge an allowed claim unless the claimant pays to the trustee the value of property of the bankrupt which he has taken and converted to his own use without any prior claim to it, after the petition in bankruptcy was filed.²²⁶ The surrender must be to the trustee, and not to the bankrupt.²²⁷

c. Subrogation claims.—(1) IN GENERAL.—Under subsection i a surety or indorser or other person secondarily liable for the bankrupt may prove the principal creditor's debt, but only when the principal creditor could prove and does not.²²⁸ The proving party simply has the same relief he would have had if the principal creditor had proved his claim.

224. *Page v. Rogers* (Sup. Ct.), 211 U. S. 575, 21 Am. B. R. 496; *Matter of Wenatchee Hgts. Orchard Co.* (C. C. A., 9th Cir.), 32 Am. B. R. 620, 214 Fed. 227.

Compulsory surrender of preferences.—The surrender clause contained in section 57-g should not be construed as inflicting a penalty upon creditors coming within the scope of the enlarged preference clauses of the bankruptcy act thereby entailing an unjust and unprecedented result. The surrender clause was intended simply to prevent a creditor from creating inequality in the distribution of the assets of a bankrupt estate by retaining a preference, and at the same time collecting dividends from the estate by a proof of his claim against it. Whenever the preference has been abandoned or yielded up and thereby the danger of inequality has been prevented, such creditor is entitled to stand upon an equal footing with other creditors and prove his claim. *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 13 Am. B. R. 552.

Where within the four months' period a bankrupt corporation pays its notes secured by mortgage upon property of the indorser and judgment in an action to recover the payment as an alleged preference is rendered in favor of the trustee, more than a year after the adjudication in bankruptcy, the bank, upon payment into court of the full amount of the said judgment with interest and costs, is entitled to prove its claim upon the note as an unsecured claim. *In re Lange Co.* (D. C., Ia.), 22 Am. B. R. 414, 170 Fed. 114.

Right to prove as unsecured creditor where preference has been set aside.—Where a bank in good faith has asserted a preference based upon certain deeds of trust executed by the bankrupt which were subsequently held fraudulent and void, it is entitled to prove as an unsecured creditor for the amount of its indebtedness. *In re Elletson Co.* (D. C., W. Va.), 23 Am. B. R. 434, 193 Fed. 84.

225. *In re Baker Notion Co.* (D. C., N. Y.), 24 Am. B. R. 508, 180 Fed. 922. See *In re Venstrom* (D. C., Wash.), 30 Am. B. R. 569, 205 Fed. 325; *Matter of Hamilton Automobile Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 205, 209 Fed. 596, holding that a claim disallowed because of the creditor's refusal to surrender a preference may be subsequently reconsidered and allowed after the recovery of the preference by the trustee.

226. *In re Patterson Co.* (C. C. A., 8th Cir.), 25 Am. B. R. 555, 186 Fed. 620.

227. *In re Currier*, 13 N. B. R. 68, Fed. Cas. 3,492.

228. *Swarts v. Siegel* (C. C. A., 8th Cir.), 9 Am. B. R. 689, 117 Fed. 13; *In re Nickerson* (D. C., Mass.), 8 Am. B. R. 707, 116 Fed. 1003; *In re Carter* (D. C., Ark.), 15 Am. B. R. 126, 128 Fed. 849, where a mortgage was given by a married woman on her separate estate to secure her husband's debt to a bank, and she was permitted to prove her claim for money paid on the loan, in the name of the bank; *In re McGuire* (D. C., Ohio), 13 Am. B. R. 704, 137 Fed. 967. See *In re Coe* (D. C., N. Y.), 19 Am. B. R. 618, 157 Fed. 308; *In re Lange Co.* (D. C., Iowa), 22 Am. B. R. 414, 170 Fed. 114; *Sessler v. Paducah Distilleries Co.* (C. C. A., 5th Cir.), 21 Am. B. R. 723, 168 Fed. 44; *Matter of Manhattan Brush Mfg. Co.* (D. C., N. Y.), 31 Am. B. R. 747, 200 Fed. 907; *In re Salvator Brewing Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 54, 193 Fed. 980; *Moore v. Simms* (C. C. A., 6th Cir.), 44 Am. B. R. 19, 257 Fed. 540.

A corporation formed by a debtor for the purpose of putting his property out of his hands but not out of his control in fraud of the rights of his creditors, is not entitled to be subrogated to execution liens paid off by it before the debtor was adjudicated bankrupt. *Matter of Liller* (D. C., W. Va.), 42 Am. B. R. 621, 653 Fed. 845.

Where the creditor has exhausted his rights by proving his claim a person who is individually liable on the claim cannot file his claim against the bankrupt based upon the same obligation. *Matter of American Paper Co.* (D. C., N. J.), 40 Am. B. R. 171, 243 Fed. 753.

Sale of property.—If a referee allows subrogation, common creditors are entitled to have the property sold in order that it may be determined whether it will bring a surplus for their benefit and in order that the property itself will not suffer dissipation, deterioration and loss pending the determination of their contest against the right to subrogation in case they determine to contest it. *Liller Bldg. Co. v. Reynolds* (C. C. A., 4th Cir.), 40 Am. B. R. 371, 246 Fed. 90.

Claim of indorser of bankrupt corporations' joint note.—Bankrupt, a corporation, and one of its promoters, who was engaged in no other business except the management of the company's affairs, executed a joint negotiable note payable to the order of the third person who indorsed it over to claimant bank, for its face value less the discount.

(2) **CLAIM OF PRINCIPAL TO BE PROVED.**—It is the fixed liability of the bankrupt to the creditor which is to be proved, not the contingent liability of the bankrupt to the surety.²²⁹ The surety proves not his contingent claim, but the claim of the creditor, and he must prove it in the creditor's name. This right to prove arises, not from the original contract, but from the equities of the subsequent transaction.²³⁰ Since the right to prove exists primarily in the principal creditor, the surety cannot, after discharging part of the debt, be subrogated *pro tanto* and prove to that extent against the estate.²³¹ It is clear that if the principal creditor does not prove the debt, the surety is not released by the bankrupt's discharge.²³² The doctrine of subrogation may be applied to permit a third party who pays a debt and takes into his possession personal property held as security therefor, to prove the amount of such debt against the estate of the bankrupt debtor.²³³ A surety paying the debt of his principal after bankruptcy may set off the amount so paid against his debt to the bankrupt, and this is so, irrespective of the provisions of the bankruptcy act.²³⁴

(3) **SURETY ON ATTACHMENT BONDS.**—A surety on an attachment bond given by a bankrupt is a creditor, and if the surety pays a judgment rendered in an action on such bond, after the adjudication of the bankrupt, he is subrogated to the rights of the attachment creditor, and may prove the debt against the bankrupt.²³⁵ The attachment creditor may not waive its claim or withdraw proof thereof, with the effect of depriving the surety of the right to prove the claim.²³⁶

(4) **RESTORATION OF PREFERENTIAL PAYMENTS.**—Where preferential payments have been made by the bankrupt to the holder of notes to be applied thereon, and an indorser subsequently pays the balance due on such notes, he is subrogated to the rights of the holder *cum onere*, and can only prove such

The company acknowledged the debt to be its own and sought to secure it by a deed of trust, and it appeared that, at the time, it was purchasing new stock and material. *Held*, that bankrupt having received the benefit of the proceeds of the note it was liable therefor, and the indorser being liable to claimant bank on his indorsement, he was entitled to file proof of claim. *In re Elletson Co.* (D. C., W. Va.), 28 Am. B. R. 434, 193 Fed. 84.

^{229.} *Inaley v. Gardaide* (C. C. A., 9th Cir.), 10 Am. B. R. 52, 121 Fed. 699, citing *Collier on Bankruptcy* (3d ed.), p. 383.

^{230.} *In re Bingham* (D. C., Vt.), 2 Am. B. R. 223, 94 Fed. 796. See also *Courier, etc., Co. v. Schaefer-Myers Co.* (C. C. A., 6th Cir.), 4 Am. B. R. 183, 101 Fed. 699; *In re Schmechel, etc., Co.* (D. C., Mo.), 4 Am. B. R. 710, 104 Fed. 64.

^{231.} *In re Heyman* (D. C., N. Y.), 2 Am. B. R. 651, 95 Fed. 800, and cases cited.

^{232.} *National Bank of South Reading v. Sawyer* (Sup. Ct., Mass.), 6 Am. B. R. 154; *In re Perkins*, Fed. Cas. 10,983. Compare *Smith v. Wheeler*, 5 Am. B. R. 46, 55 N. Y. App. Div. 170, 66 N. Y. Supp. 780.

^{233.} *In re Rudd* (D. C., N. Y.), 25 Am. B. R. 35, 180 Fed. 312.

^{234.} See *In re Dillon* (D. C., Mass.), 4 Am. B. R. 63, 100 Fed. 931, holding that

where upon the dissolution of a firm one partner agrees with his retiring copartners to become responsible for the payment of all firm debts and liabilities, the retiring partners become in equity sureties for the remaining partner, and this relation is recognized in bankruptcy.

^{235.} *Kilpatrick v. United States Fidelity & Guaranty Co.* (C. C. A., 5th Cir.), 37 Am. B. R. 36, 228 Fed. 587.

^{236.} **Waiver by principal; effect.**—A creditor held an attachment bond against a debtor who was afterwards adjudicated a bankrupt. After the adjudication judgment was entered on the bond in a proceeding pending at the time of the adjudication. Thereafter the creditor waived his right to dividends from the bankrupt's estate. *Held*, that the surety on the bond was a creditor at the time of the adjudication and at that time had the right to insist on the liquidation of any claim which the creditor had against the bankruptcy estate, and to discharge its liability on the bond, and therefore the creditor was powerless to waive, without consideration passing to the surety, and without its consent, any rights it had against the estate of the bankrupt. *Kilpatrick v. United States Fidelity & Guaranty Co.* (C. C. A., 5th Cir.), 37 Am. B. R. 36, 228 Fed. 587.

notes and participate in the distribution of the bankrupt's estate when he restores the preferential payments.²³⁷ Additional illustrative cases will be found in the foot-note.²³⁸ General Order XXI (4) should also be read in connection with this subsection.

f. Penalty and forfeiture claims.—The purpose of subsection *j* is clear. The creditors at large are not to be mulcted "except to the amount of the pecuniary loss sustained," interest and costs, because of debts owing the sovereign as a penalty or forfeiture. This clause does not affect a claim for a statutory penalty imposed for non-payment of a tax, in the nature of interest.²³⁹ A penalty imposed by statute for a wrongful act is not a provable claim in behalf of the person for whose benefit such penalty is imposed,²⁴⁰ and the same is true of a penalty for using the mails to defraud.^{240a} A claim for a penalty inflicted upon a corporation for a failure to file a report falls within this subsection and is therefore not provable.²⁴¹ A judgment secured on a penalty is not provable, except as to any pecuniary loss sustained by the act out of which the penalty arose, together with actual and reasonable costs and interest, because it is not for a fixed liability.²⁴² The general subject of debts due the State is considered elsewhere.²⁴³

IV. CONTEST OF CLAIMS.

a. In general.—It is provided by subsection *a* that claims duly proved shall be allowed "unless objection to their allowance shall be made by the parties in interest." It is then provided in subsection *f* that such objections shall be heard and determined "as soon as the convenience of the court and the best interests of the estates and the claimant will permit." Subsections *k* and *l* provide for a reconsideration and rejection after allowance.²⁴⁴

b. Objection before allowance.—(1) **PROCEEDINGS ON CONTEST.**—Contests on claims usually arise from objections stated at the time claims are called before the election of a trustee. The result is a trial, as of an issue in equity, the objections being the bill, the proof of debt the answer.²⁴⁵ On the call of

^{237.} *Livingston v. Heineman* (C. C. A., 6th Cir.), 10 Am. B. R. 39, 120 Fed. 796.

Surrender of preference by surety, etc.—The rule is thus stated in the case of *In re Siegel-Hillman Dry Goods Co.* (D. C., Mo.), 7 Am. B. R. 351, 111 Fed. 980: "An indorser, an accommodation maker, or a surety on the obligation of a bankrupt, is a creditor, and a payment on such an obligation by the principal debtor while insolvent to the innocent holder of the contract, within four months before the filing of the petition for adjudication in bankruptcy, will constitute a preference which will debar the indorser, accommodation maker, or surety from the allowance of any claim in his favor against the estate of the bankrupt, unless the amount is first returned to that estate." See also *In re Lyon* (C. C. A., 2d Cir.), 10 Am. B. R. 25, 121 Fed. 723; *Swarts v. Siegel* (C. C. A., 8th Cir.), 8 Am. B. R. 689, 117 Fed. 13; *In re Scherzer* (D. C., Iowa), 12 Am. B. R. 451, 130 Fed. 631.

^{238.} *In re Christensen*, 2 N. B. N. Rep. 1094; *In re New* (D. C., Ohio), 8 Am. B. R. 566, 116 Fed. 116; *Whithed v. Pillsbury*, Fed. Cas. 17,572. Compare also *Hayer v. Comstock* (Sup. Ct., Iowa), 7 Am. B. R. 493,

115 Iowa 187, and *Phillips v. Dreher Shoe Co.* (D. C., Pa.), 7 Am. B. R. 326, 112 Fed. 404; *Swarts v. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1.

^{239.} *Matter of Scheidt Bros.* (D. C., Ohio), 23 Am. B. R. 778, 177 Fed. 599.

^{240.} *In re Southern Steel Co.* (D. C., Ala.), 25 Am. B. R. 358, 183 Fed. 498, in which case it was held that a statutory penalty for cutting trees under Code of Alabama, section 6065, is not in the nature of an implied contract to reimburse the owner of the trees to the extent of the damage caused, but is an arbitrary fine imposed on the wrongdoer and is not therefore a claim which may be proved against a bankrupt.

^{241.} *Matter of York Silk Mfg. Co.* (D. C., Pa.), 26 Am. B. R. 650, 188 Fed. 735.

^{241a.} *United States v. Birmingham Trust & Savings Co.* (C. C. A., 5th Cir.), 43 Am. B. R. 430, 258 Fed. 562.

^{242.} *Matter of Abramson and Fichandler* (C. C. A., 2d Cir.), 32 Am. B. R. 156, 210 Fed. 873. See also *United States v. Birmingham Trust & Savings Co.* (C. C. A., 5th Cir.), 43 Am. B. R. 430, 258 Fed. 562.

^{243.} See under Sections Seventeen and Sixty-four.

^{244.} See Am. Bankr. Dig. §§ 747-755.

^{245.} For a breach of promise case in bankruptcy, see *In re Crocker* (Ref., N. Y.), 8 Am. B. R. 188.

claims duly approved and filed there must be an opportunity for objections to allowances by parties in interest.²⁴⁶ If the claimant appears at a hearing on his claim and participates in a proceeding without objecting to the form of the objections, he thereby waives any informality which may have existed.²⁴⁷

(2) **FORM OF AND MANNER OF MAKING OBJECTIONS.**—In some districts, it is the custom to dispatch business by noting an oral objection, with the proviso that it shall be reduced to writing and filed within ten days, or the claim stand allowed. A trustee's objections may be stated orally, although preferably they should be filed in writing.²⁴⁸ Although the statute is silent as to the form of the objections, it is better that they should be in writing, and sufficiently explicit to indicate to the claimant the nature and character thereof.²⁴⁹ The manner of making such objections is largely committed to the discretion of the referee.²⁵⁰ They need not be under oath.²⁵¹ Delay by a trustee of several months after a claim has been filed before objecting thereto does not necessarily render him guilty of such laches as to justify overruling his exceptions.^{251a}

(3) **WHO MAY OBJECT.**—The phrase "parties in interest" applies to those who have an interest in the *res* which is to be administered and distributed in the proceeding and does not include those who are merely debtors or alleged debtors of the bankrupt.²⁵² Stockholders of a bankrupt corporation having no provable claims against the corporation are not parties in interest.²⁵³ An unsecured creditor may object to the proof of claim by another unsecured creditor.²⁵⁴

(4) **TESTIMONY UPON HEARING OBJECTIONS.**—Testimony taken at meetings of creditors, which the claimant did not attend and of which he received no notice, is not admissible upon the hearing of his claim.²⁵⁵ A verified proof of claim will be considered as testimony in behalf of the claimant; no inference is to be drawn from his failure to testify in his own behalf since he is subject to call by the court or contestant to explain his claim.²⁵⁶ The verified claim of the claimant has some probative force. It is *prima facie* evidence of the allegations contained therein. A person who objects to the claim must produce some evidence in support of the assertion that the claim is invalid.²⁵⁷

246. In re Back Bay Automobile Co. (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33; In re Two Rivers Woodenware Co. (C. C. A., 7th Cir.), 29 Am. B. R. 518, 199 Fed. 877.

247. Orr v. Park (C. C. A., 5th Cir.), 25 Am. B. R. 554, 183 Fed. 683, citing Collier on Bankruptcy (8th ed.), p. 606.

248. In re Cannon (D. C., Pa.), 14 Am. B. R. 114, 133 Fed. 837; Irwin v. Maple (C. C. A., 6th Cir.), 41 Am. B. R. 532, 252 Fed. 10.

249. In re Royce Dry Goods Co. (D. C., Mo.), 13 Am. B. R. 257, 133 Fed. 100.

250. In re Cannon (D. C., Pa.), 14 Am. B. R. 114, 133 Fed. 837.

Discretion of referee.—The bankruptcy act and the rules in bankruptcy are silent as to the form of objections to claims against the bankrupt estate and the manner of making such objections should be largely committed to the discretion of the referee. Orr v. Park (C. C. A., 5th Cir.), 25 Am. B. R. 554, 183 Fed. 683, citing Collier on Bankruptcy (8th ed.), p. 608.

251. In re Wooten (D. C., N. Car.), 9 Am. B. R. 247, 118 Fed. 670.

251a. Matter of Star Spring Bed Co. (D. C., N. J.), 43 Am. B. R. 328, 257 Fed. 176.

252. Matter of Sully & Co. (C. C. A., 2d Cir.), 18 Am. B. R. 123, 152 Fed. 619.

solidated (D. C., Mo.), 28 Am. B. R. 880, 198 Fed. 316.

254. In re Hatem (D. C., N. Car.), 20 Am. B. R. 470, 161 Fed. 895.

255. In re Hersey (D. C., Iowa), 22 Am.

253. In re Pittsburg Lead & Zinc Co., Con- B. R. 863, 171 Fed. 1004.

256. Baumhauer v. Austin (C. C. A., 5th Cir.), 26 Am. B. R. 385, 186 Fed. 280, revg. 24 Am. B. R. 750, 179 Fed. 968; Moore v. Crandall (C. C. A., 9th Cir.), 30 Am. B. R. 517, 205 Fed. 689.

257. **Verified claim as evidence.**—In the case of Whitney v. Dresser, 200 U. S. 532, 15 Am. B. R. 326, the court said: "The words of the statute suggest if they do not distinctly import that the objector is to go forward and show that the formal proof is evidence even when put in issue. The words are 'Objections to claims shall be heard and determined as soon,' etc. (§ 57-f). It is the objection in the claim which is pointed out for hearing and determination. This indicates that the claim is regarded as having a certain standing already established by the oath. Some force also may be allowed to the word 'proof' as used in the act. Convenience, undoubtedly, is on the side of this view. Bankruptcy proceedings

Where a claimant promptly files his claim and offers evidence in support of objections to a subsequent claim which is identical, the subsequent claimant may be permitted to introduce evidence in rebuttal.²⁵⁸

(5) **DETERMINATION OF REFEREE.**—The right to a review of the referee's decision is generally recognized; but the decision below is in effect that of a court of first instance and on questions of fact the judge will not disturb it, unless clearly erroneous.²⁵⁹ Where a referee's order disallowing a claim upon claimant's proof has been reversed, the matter should be remanded to enable the trustee to controvert the claim.²⁶⁰ A claim may be allowed in part and it is not error for a referee to deduct one item and allow the claim as reduced without requiring it to be resworn.²⁶¹

c. **Reconsideration and rejection.**—(1) **PRACTICE AND PETITION.**—(I) *In general.*—A claim once allowed can be re-examined and excluded in whole or in part, but the methods prescribed by this section seem to be exclusive.²⁶² Such a claim may be reconsidered for cause before the estate has been closed and a subsequent disposition thereof may be made according to the equities.²⁶³

are more summary than ordinary suits. Judges of practical experience have pointed out the expense, embarrassments and delay which would be caused if a formal objection necessarily should put the creditor to the production of evidence or require a continuance. Justice is secured by the power to continue the consideration of a claim whenever it appears there is good reason for it. We believe that the understanding of the profession, the words of the act and convenient and just administration are all on the side of treating a sworn proof of claim as some evidence even when it is denied."

Burden of proof.—The presentation of a claim evidenced by promissory notes, supported by deposition and proof or duly executed by the treasurer of a corporation constitutes a *prima facie* cause against the estate and casts the burden upon the objector to go forward with proof. *Matter of Montgomery* (D. C., Tex.), 25 Am. B. R. 431, 185 Fed. 955. See also *In re Carter* (D. C., Kan.), 15 Am. B. R. 126, 128 Fed. 846, holding that the presentation of the claim in proper form, duly verified except as to particulars which the court treats as waived, presents a *prima facie* case in favor of the claimant upon which it has a right to rest and the burden of proof is upon the objectors; *In re Cannon* (D. C., Pa.), 14 Am. B. R. 114, 133 Fed. 837; *In re Sumner* (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224. In the case of *In re Schwarz* (D. C., N. Y.), 29 Am. B. R. 700, 200 Fed. 309, it was held that the presentation of a promissory note accompanied by a duly verified claim casts upon a creditor objecting thereto the burden of furnishing some evidence to rebut that furnished by possession of the note and by the verified allegations of the claim; but upon such testimony being presented and further evidence being offered in support of the note, the question to be determined is whether the claimant has sustained the

burden of proof, which necessarily rests upon him to establish his claim. *Matter of Pratt Co.* (D. C., N. Y.), 42 Am. B. R. 406, 232 Fed. 917; *Matter of U. S. Molybdenum Co.* (D. C., Me.), 43 Am. B. R. 401, 255 Fed. 790; *Matter of O'Gara & Maguire* (D. C., N. J.), 44 Am. B. R. 49, 259 Fed. 936. Compare *Matter of German Sav. & Loan Assn.* (C. C. A., 7th Cir.), 42 Am. B. R. 559, 253 Fed. 722.

258. *In re Dunlap Carpet Co.* (D. C., Pa.), 39 Am. B. R. 664, 206 Fed. 726.

259. *In re Wood* (D. C., N. Car.), 2 Am. B. R. 695, 95 Fed. 846; *In re Rider* (D. C., N. Y.), 3 Am. B. R. 192, 96 Fed. 811. See also *In re Clark* (D. C., Wash.), 7 Am. B. R. 94, 111 Fed. 893; *Matter of La Jolla Lumber & Mill Co.* (D. C., Cal.), 40 Am. B. R. 273, 243 Fed. 1004.

The findings of fact of a referee as to the validity of a claim will not be overruled, except upon convincing proof that he was wrong in his conclusions. *In re Hatem* (D. C., N. Car.), 20 Am. B. R. 470, 161 Fed. 895. A referee's decision, allowing the bankrupt a rebate upon his purchases as against the creditor's claim, may be affirmed, although the court may not have come to the same conclusion. *In re Douglas & Sons Co.* (D. C., Conn.), 8 Am. B. R. 113, 114 Fed. 772. The determination of a referee as to the validity of a claim upon objections filed by the trustee should be sustained when it does not appear that it was clearly erroneous. *In re Greenfield* (D. C., Pa.), 27 Am. B. R. 427, 193 Fed. 98.

Right of bankrupt to present claim as guardian after refusal of discharge.—Where a voluntary bankrupt has been refused a discharge, his application to have the action of the referee reviewed in refusing to allow his claim as guardian for his children to be filed is without merit, because in no event could he be discharged from the same. *Matter of Roberts* (D. C., W. Va.), 32 Am. B. R. 541, 213 Fed. 905.

260. *In re Livingston Co.* (C. C. A., 2d Cir.), 16 Am. B. R. 385, 144 Fed. 971.

261. *In re Goldstein* (D. C., Mass.), 29 Am. B. R. 301, 199 Fed. 665.

262. *In re Roanoke Furnace Co.* (D. C., Pa.), 18 Am. B. R. 661, 152 Fed. 846; *Matten of Collins* (D. C., Ia.), 37 Am. B. R. 692, 235 Fed. 937. See Am. Bankr. Dig. § 700.

263. *In re Effinger* (D. C., Md.), 25 Am. B. R. 924, 184 Fed. 784.

The time for filing the petition for reconsideration of a claim may be fixed by rule of the District court, which may authorize an extension of time for good cause shown,^{263a} or if not so fixed, objections after allowance should be made within the year within which an amended proof of claim might have been filed.²⁶⁴ Upon reconsideration the court may either diminish the claim or expunge it entirely.²⁶⁵

(II) *Jurisdiction of court or referee.*—The practice is indicated in General Order XXI (6). The referee is the court of first instance; the register under the former law was obliged to certify such contests to the judge. If a claim is rejected, it must be "for cause," and "before but not after the estate has been closed." The district court has no jurisdiction to act upon a petition for a rehearing of the claim during pendency of appeal under § 25-a.²⁶⁶ A bankruptcy court in which an estate is being administered has full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or claim against the estate is based.²⁶⁷

(III) *Petition; who may present.*—The application is by petition,²⁶⁸ by parties in interest,²⁶⁹ and when there is a trustee in existence can only be presented by him, and then only when demanded by the interests of all the creditors.²⁷⁰ But where no trustee has been appointed the bankrupt may move to set aside and expunge a claim which has been allowed.²⁷¹ If a trustee refuses to move for the reconsideration of a claim which has been allowed when he ought to do so, he may be compelled to act or to permit the objecting creditors to act in his name.²⁷² The right of a creditor who moves to expunge

^{263a} Matter of Caledonia Coal Co. (D. C., Mich.), 43 Am. B. R. 93, 254 Fed. 742.

²⁶⁴ A delay by a trustee in bankruptcy of a year in filing a petition for the re-examination of a claim does not constitute laches, where it appears that the delay has not resulted in injury or prejudice to the claimant which would make it inequitable to allow the trustee to file his objections to the claim. Matter of Caledonia Coal Co. (D. C., Mich.), 43 Am. B. R. 93, 254 Fed. 742.

Time within which objection should be made.—After the lapse of four years since the allowance of a claim the trustee is estopped from objecting to the sufficiency of the form of the claim. Matter of Collins (D. C., W. Va.), 32 Am. B. R. 785, 215 Fed. 247.

²⁶⁶ In re Paterson Co. (C. C. A., 8th Cir.), 25 Am. B. R. 535, 186 Fed. 629.

²⁶⁶ First Nat'l Bank v. State Nat'l Bank (C. C. A., 9th Cir.), 12 Am. B. R. 420, 440, 131 Fed. 422.

²⁶⁷ Lesser v. Gray, 236 U. S. 70, 34 Am. B. R. 8.

²⁶⁸ See form of petition and notice among the "Supplementary Forms," *post*. See also Hagar and Alexander's Bankruptcy Forms (2d Ed.). As to a time limit on such petitions, see In re Chambers (Ref. B. I.), 6 Am. B. R. 707. As to a petition against several creditors, see In re Lyon (Ref. N. Y.), 7 Am. B. R. 61.

²⁶⁹ Matter of Sully & Co. (C. C. A., 2d Cir.), 18 Am. B. R. 123, 152 Fed. 610.

Stockholders of a bankrupt corporation upon whom has been levied an assessment which they will have to pay if the claim they object to is allowed, are "parties in interest," and may move to set aside the order allowing such claim and to expunge and disallow the same. Rosenbaum v. Dutton (C. C. A., 8th Cir.), 30 Am. B. R. 155, 203 Fed. 838.

²⁷⁰ Matter of Lewensohn (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 538; Matter of Sully & Co. (D. C., N. Y.), 15 Am. B. R. 304, 142 Fed. 895. Compare In re Levy (Ref. N. Y.), 7 Am. B. R. 56; In re Howard (D. C., Cal.), 4 Am. B. R. 69, 100 Fed. 630.

Reconsideration of claims; rights of creditors.—Where certain creditors have made objection to and conducted a controversy over a claim in their own names, having voluntarily assumed the liability for costs and expenses, and have shown that the claim should be disallowed, the court will not ignore what has been done, upon the technical ground that the trustee is the only person to dispute the validity of claims against a bankrupt's estate. In re Canton Iron & Steel Co. (D. C., Md.), 23 Am. B. R. 791, 197 Fed. 767.

²⁷¹ In re Ankony (D. C., Iowa), 4 Am. B. R. 72, 100 Fed. 614, 2 N. B. N. 240.

²⁷² Refusal of trustee to act.—In the case of In re Stern (C. C. A., 8th Cir.), 16 Am. B. R. 510, 144 Fed. 956, the court said: "In respect to opposing the allowance of claims and moving for their reconsideration after they have been allowed, the trustee is not bound to comply with every request preferred by objecting creditors, irrespective of its merits, nor is he clothed with absolute discretion to refuse. As the representative of the estate, he is bound to exercise his judgment and to act for the best interests of all concerned, but subject to the supervising power of the referee and the district judge. He does not act judicially but only administratively, and if he refuses to oppose a claim or to move for its reconsideration when he ought to do so, he may be compelled to act or to permit the objecting creditors to act in his name." See also In re Lewensohn (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 538; In re Baird (D. C., Pa.), 7 Am. B. R. 448, 112 Fed. 960; Chatfield v. O'Dwyer (C. C. A., 8th Cir.), 4 Am. B. R. 313, 101 Fed. 797; Matter of Ferrer (D. C., Porto Rico), 22 Am. B. R. 785, holding that if a

the allowance of another creditor's claim is no higher than that of the bankrupts.²⁷³ Creditors themselves should not be permitted to supersede the trustees, and intervene for the purpose of a re-examination.²⁷⁴ A referee may, upon his own motion, take such action as may be necessary to correct an erroneous determination as to the allowance of a claim, due notice being given to the parties concerned.²⁷⁵

(IV) *Practice on application; pleadings, hearings and evidence.*—The application must be made promptly or it will be denied because of laches.²⁷⁶ But it has been held that reconsideration may be allowed after twelve months have elapsed since the filing of a claim, where it appears that no dividend has been paid on the claim and nothing has happened to prejudice the rights of the claimant.²⁷⁷ When application is made to increase or decrease the sum at which a claim has previously been allowed, the better practice is to vacate the former order of allowance, and allow the claim for the new amount.²⁷⁸ The creditors whose claims it is sought to reconsider should be given an opportunity to oppose the application for reconsideration. The bankrupt is not interested in the application and is charged with no duty

trustee wrongfully refuses to take the necessary action to secure a reconsideration, an order will be granted, compelling the trustee to show cause why he should not move for a reconsideration.

Remedy of creditors.—Where a general creditor is dissatisfied with the allowance of the claim of another creditor, his proper remedy is a demand upon the trustee to move for a reconsideration or review of such claim, or, if the trustee upon demand declines to act, then by a motion to the District Court that the trustee be required to move, or that the objecting creditor be permitted to move in his own name. In re Mexico Hardware Co. (D. C., N. Mex.), 28 Am. B. R. 736, 197 Fed. 660.

273. In re Arnold & Co. (D. C., Mo.), 13 Am. B. R. 320, 133 Fed. 789.

274. Matter of Sully & Co. (D. C., N. Y.), 15 Am. B. R. 304, 142 Fed. 895.

Application for re-examination in the interest of bankrupt's debtors.—That an application by creditors whose claims have been proven and allowed for an order compelling a trustee to petition for the re-examination of the claims of other creditors was made in the interest of alleged debts of the bankrupt is not a sufficient reason for denying it where it does not appear that in other respects the application was not a meritorious one as the application being a legitimate one and the assertion of a clear, legal right, under section 57, should not have been denied upon a consideration of motive. Matter of Sully & Co. (C. C. A., 2d Cir.), 18 Am. B. R. 123, 152 Fed. 619.

Debtors of a bankrupt estate are denied the right to move for the reconsideration of claims which have been allowed. In re Pittsburgh Lead & Zinc Co., Consolidated (D. C., Mo.), 28 Am. B. R. 880, 198 Fed. 316.

275. *International Agricultural Corp. v. Cary* (C. C. A., 6th Cir.), 38 Am. B. R. 753, in which the court said: "While it is probably the better practice generally for the referee to act upon petition of the trustee or of creditors, and, in case the information comes in the first instance to the referee, to direct the trustee to institute proceedings for re-examination, yet we cannot think that the referee is without jurisdiction to act, as in the case in question, upon his own motion. There may or may not have been good reason for proceeding *sua sponte*, but the presence or absence of such reason is not fatal to jurisdiction. A court of bankruptcy is a court of equity (*Bardes v. National Bank*, 178 U. S. 524, 535, 4 Am. B. R. 163); the proceedings therein are more summary than in ordinary suits; and it cannot be that an equity court, acting under such summary practice, is powerless, in the interests of justice, on its own motion to take steps to correct what it believes to have been an erroneous action had upon insufficient knowledge; and the general rule is that firm creditors are not entitled to receive dividends from the separate estates of the partners until separate creditors have been paid in full."

276. In re Hamilton Furniture Co. (D. C., Pa.), 8 Am. B. R. 588, 116 Fed. 115; in Matter of Hinckel Brewing Co. (D. C., N. Y.), 10 Am. B. R. 484, 123 Fed. 492; Matter of Collins (D. C., W. Va.), 32 Am. B. R. 785; 215 Fed. 247.

The question of laches is a question of law where the facts are undisputed. Matter of Sully & Co. (C. C. A., 2d Cir.), 18 Am. B. R. 123, 152 Fed. 619.

277. In re Globe Laundry (D. C., Tenn.), 28 Am. B. R. 831, 198 Fed. 365.

278. In re Smith (Ref., N. Y.), 2 Am. B. R. 648.

concerning it and is therefore not entitled to be heard upon it.²⁷⁹ The claimant is entitled to "due notice" by mail; the time is usually fixed by the referee. It is customary to notify the claimant's attorney of record also. The issue is made by the petition and the proof of debt, the burden being on the petitioner, at least to overcome the *prima facie* case made by the proof of debt.²⁸⁰ Objections to proofs of claims should be set forth in the form of a petition for review.²⁸¹ Each creditor must file his own objections, and make an issue, he cannot adopt the answer of the bankrupt.²⁸² The defense of usury is as available to the debtor's trustee in bankruptcy as to the debtor himself.²⁸³ A trustee's petition for the reconsideration of an allowed claim should allege facts which, if true, are sufficient cause for a re-examination. It is not necessary to allege facts which, if proved, would defeat the claim.²⁸⁴ Although the bankrupt has failed to deny an allegation that one of the petitioners is a creditor, the petitioner must prove his claim, and the trustee or any creditor may contest the claim.²⁸⁵ Neither party is entitled to a jury.²⁸⁶ The customary rules of evidence apply.²⁸⁷ The practice on trials in equity should be followed.²⁸⁸

(V) *Decision; form of order.*—The result is an order either (1) reallowing the claim, or (2) rejecting it, or (3) reducing or increasing it. The referee cannot allow the claim conditionally.^{289a} If the claim is rejected, Form No. 39 should be used; if it is reduced, Form No. 38. The referee cannot pass upon and decide controversies involving questions of fact pertaining to or involving the interests of third parties in property belonging to the estate.²⁸⁹ After a decision and before a formal order has been entered, the referee may, in his discretion, deny a trustee's motion to dismiss his petition for a reconsideration and disallowance.²⁹⁰

279. In re Effinger (D. C., Md.), 25 Am. B. R. 924, 184 Fed. 724.

280. In re Doty (Ref., N. Y.), 5 Am. B. R. 58; In re Sumner (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 223. Compare also In re Saunders, Fed. Cas. 12,371.

The burden of proof is upon a creditor moving for the re-examination of another's claim on the ground of an alleged release of the same to the bankrupt. In re Howard (D. C., Cal.), 4 Am. B. R. 69, 100 Fed. 630.

281. Matter of Linton (Ref., Pa.), 7 Am. B. R. 676.

Irregular procedure.—Where creditors have filed exceptions to a claim which have been treated precisely as a petition for the reconsideration and disallowance of the claims, an order disallowing the claim will not be set aside on the ground that a petition for reconsideration and disallowance, and not exceptions, should have been filed. In re Canton Iron & Steel Co. (D. C., Md.), 28 Am. B. R. 791, 197 Fed. 767.

282. Ayres v. Cone (C. C. A., 8th Cir.), 14 Am. B. R. 739, 746, 138 Fed. 783.

283. In re Stern (C. C. A., 8th Cir.), 16 Am. B. R. 570, 144 Fed. 956.

284. In re Watkinson & Co. (D. C., Pa.), 12 Am. B. R. 370, 130 Fed. 218.

Sufficiency of petition.—Where the petition for reconsideration of a claim avers the renewal and extension of an obligation without the knowledge of the bankrupt, but does

not aver that the renewed obligation was taken in lieu of the original obligation or that there was a consideration given for the contract of renewal, it is sufficient to let in proof showing an extension. In re Ankeny (D. C., Ia.), 4 Am. B. R. 72, 100 Fed. 614, 2 N. B. N. 249.

285. In re Harper (D. C., N. Y.), 23 Am. B. R. 918, 175 Fed. 412.

286. In re Christensen (D. C., Iowa), 4 Am. B. R. 99, 101 Fed. 243; Barton v. Barbour, 104 U. S. 126.

287. See, in this connection, In re Shaw (D. C., Pa.), 6 Am. B. R. 499, 109 Fed. 780. Consult also In re Merrill, Fed. Cas. 9,460; In re Moore, Fed. Cas. 9,752; Canby v. McLearn, Fed. Cas. 2,378.

Oral confessions, denied and uncorroborated, are not sufficient to support a claim. In re Kaldenberg (D. C., N. Y.), 5 Am. B. R. 6, 105 Fed. 232.

288. Compare the Equity Rules. See also In re Keller (D. C., Iowa), 6 Am. B. R. 334, 109 Fed. 118.

Expiration of time to file answer.—Where the time allowed a claimant to file an answer to a petition to expunge his claim expires without petition to expunge being filed, an application for leave to file an answer, made after the trustee has presented all his testimony, is properly denied. In re Lewis, Eck & Co. (D. C., Pa.), 18 Am. B. R. 657, 133 Fed. 495.

288a. Matter of United Grocery Co. (D. C., Fla.), 41 Am. B. R. 824, 253 Fed. 267. No. Car.), 24 Am. B. R. 159, 178 Fed. 851.

289. In re Peacock (D. C., Ky.), 35 Am. B. R. 228, 228 Fed. 533, holding that ordinarily a plaintiff may dismiss his suit, but

(VI) *Review of order*.—The right of a party aggrieved by such an order to review, and the practice on a review, and the binding effect of the rulings below on questions of fact, are considered elsewhere;²⁹¹ likewise, the effect of proving judgments in other courts.²⁹²

(VII) *Costs and expenses*.—Costs, while often not allowed on such contests, are discretionary. Where it appears that either the claim or the contest was not in good faith, they will usually be given.²⁹³ The referee is not entitled to extra compensation for hearing and deciding, but he can insist on reimbursement or indemnity for his expenses, as in the employment of a stenographer, and the like.²⁹⁴ Illustrative cases under the present law, not already cited, will be found in the foot-note.²⁹⁵

(2) *RECOVERY OF DIVIDENDS IN SUCH CASES*.—It is the trustee's duty to recover a dividend that has been paid, if a claim is rejected, or the proportional part, if it is reduced. The statute is silent as to how this should be done. The claimant being a party, it would seem possible to require him to repay as a part of the order rejecting or reducing, and then, at the instance of the trustee, proceed in contempt if the claimant does not obey. In any event, the trustee can proceed by suit in the proper court.²⁹⁶

V. TIME LIMITATION ON THE ALLOWANCE OF CLAIMS.

a. *Purpose and effect of limitation*.—(1) *IN GENERAL*.—Subsection *n* is new and provides that claims cannot be proved against the bankrupt estate subsequent to one year after the adjudication.²⁹⁷ The purpose of the law is to give

a trustee petitioner cannot be allowed to speculate upon the chances of obtaining a favorable decision and upon learning that the decision will be unfavorable frustrate the whole purpose of the proceeding by dismissing his petition.

^{291.} See pp. 667-675, *ante*; also General Order XXVII.

^{292.} Consult Section Sixty-three, *post*.

^{293.} Compare *In re Little River Lumber Co.* (D. C., Ark.), 3 Am. B. R. 682, 101 Fed. 558; *Matter of Elk Valley Coal Co.* (D. C., Ky.), 31 Am. B. R. 545, 210 Fed. 386; *Matter of All Star Feature Corp.* (D. C., N. Y.), 37 Am. B. R. 610, 232 Fed. 1004; *In re Troy Woolen Co.*, Fed. Cas. 14,203.

^{294.} General Order X.

^{295.} *In re Hendley* (D. C., Mo.), 3 Am. B. R. 272, 97 Fed. 765; *In re Wise*, 2 N. B. N. Rep. 250; *In re Smith* (Ref., N. Y.), 2 Am. B. R. 643.

^{296.} When creditors may be required to refund dividends.—After an adjudication in bankruptcy a judgment was entered against the bankrupt in an action pending in the State court at the time the petition was filed. The bankruptcy court ordered that the judgment creditors perfect an appeal within sixty days, otherwise the court would not delay its action. No appeal having been perfected within sixty days, dividends were paid according to the judgment of the State court; but thereafter an appeal was perfected and the judgment reversed. It was held that the judgment creditor, not having appealed within the time fixed, must refund the dividends received prior to the reversal of his judgment on the ground that having waived the condition as to time reopened and litigation they should abide the final result. *Nelson v. Heckscher* (C. C. A., 4th Cir.), 33 Am. B. R. 514, 219 Fed. 670.

^{297.} *In re Stein* (D. C., Ind.), 1 Am. B. R. 662, 94 Fed. 124; *Bray v. Cobb* (D. C., N. Car.), 3 Am. B. R. 738, 100 Fed. 270; *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982; *In re Rhodes* (D. C., Pa.), 5 Am. B. R. 197, 105 Fed.

231; *In re Leibowitz* (D. C., Tex.), 6 Am. B. R. 268, 108 Fed. 617. Note also *Hutchinson v. Otis* (C. C. A., 1st Cir.), 8 Am. B. R. 382, 115 Fed. 937; *In re Moebius* (D. C., Pa.), 8 Am. B. R. 590, 116 Fed. 47; *In re Hawk* (C. C. A., 5th Cir.), 8 Am. B. R. 71, 114 Fed. 916; *In re Rosenberg* (D. C., Pa.), 16 Am. B. R. 465, 144 Fed. 442; *Steinhardt v. Nat. Park Bank*, 19 Am. B. R. 72, 120 N. Y. App. Div. 255, 105 N. Y. Sapp. 23, revg. 18 Am. B. R. 86; *Cartwright v. West* (Ala. Sup. Ct.), 26 Am. B. R. 831, 55 So. 917, citing *Collier on Bankruptcy* (8th ed.), pp. 612, 613. As to expiration of year, see *In re Co-operative Knitting Mills* (D. C., N. Y.), 30 Am. B. R. 181, 202 Fed. 1016.

Effect of subsection.—This subdivision, "while providing that no claim shall be proved subsequent to one year after the adjudication, provides by implication and effect that any claim may be proved within one year after the adjudication." (Opinion of referee.) *Matter of Bell Piano Co.* (D. C., N. Y.), 18 Am. B. R. 183, 155 Fed. 272.

Where over two years and six months after the adjudication in bankruptcy of one of several persons who had signed a written agreement to jointly guarantee the payment of notes, claims were filed by the other guarantors for the bankrupt's proportionate liability which had been paid by them, said claims should be dismissed. *Matter of Edelen* (D. C., Ky.), 40 Am. B. R. 834, 248 Fed. 580.

Effect of order dismissing involuntary petition after adjudication.—Where an adjudication was made on January 7, 1919, and the adjudication vacated by an order granted April 1, 1919, which order was vacated on November 23, 1919, and the order of adjudication and the receiver reinstated, it would seem that the year would not expire until a year from November 29, 1919, or in any event that the time from April 3, 1919, to November 29, 1919, should be deducted. *Matter of Malkin* (D. C., N. Y.), 45 Am. B. R. 86, 265 Fed. 867.

to each and every creditor one year after adjudication in which to prove and file his claim. It is optional with him to do so or not. This provision is intended for the benefit of creditors who file their proofs of claim promptly and to give them the benefit of their own diligence. It was also intended to facilitate the administration and settlement of the assets of bankrupts.²⁹⁸ The authorities hold that the language of this subsection is more than a limitation of time and is an absolute prohibition.²⁹⁹ But this prohibition is not binding on the United States.³⁰⁰ If an appeal is brought from the order of adjudication it has been held that the time begins to run from the date of the dismissal of the appeal.³⁰¹

(2) APPLICATION OF LIMITATION.—It has no application to an adverse claim of title to property in the possession of a trustee; such a claim is not a debt of the bankrupt or his estate.³⁰² Nor does it apply to a controversy arising between an assignee of a proven claim and the assignor.³⁰³ The limitation was not intended to apply to a claim arising after the bankruptcy proceedings were instituted, as part of the cost of administration.³⁰⁴ The requirement is in line with the policy of the statute to compel rapidity of administration, and is applicable where a composition has been effected.³⁰⁵ The section only applies to claims sought to be asserted in bankruptcy; it would not prevent

"No statutory right to file a proof of claim subsequent to the expiration of a year after adjudication exists." *Matter of Ingalls Bros.* (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517. The court has no discretionary power to permit the filing and proof of a claim after the expiration of the statutory period. *In re Sanderson* (D. C., Vt.), 20 Am. B. R. 396, 160 Fed. 278.

An application by creditors who were neither deprived of an opportunity to ascertain the value of the assets and whether or not property had been concealed or otherwise improperly disposed of, nor prevented from filing their claims in time, for leave to file and prove claims, will be denied, where, after the expiration of a year following adjudication, it is discerned that assets scheduled and stated to be of no value are valuable. *In re Peck* (D. C., N. Y.), 20 Am. B. R. 629, 161 Fed. 762.

^{298.} *In re Peck* (D. C., N. Y.), 20 Am. B. R. 629, 161 Fed. 762, *affd.* 21 Am. B. R. 707, 168 Fed. 48.

^{299.} *Matter of Blimberg* (D. C., N. Y.), 9 Am. B. R. 001, 121 Fed. 942; *Matter of Bickmore Shoe Co.* (D. C., Ga.), 45 Am. B. R. 24, 263 Fed. 926.

^{300.} *Extension of time.*—§ 57n, requiring claims to be proved within one year from adjudication, is prohibitory and leaves the court no discretion to extend the time. Hence, a creditor who has failed to prove a scheduled claim within the period required is not entitled to have his claim allowed against the objection of the bankrupt out of moneys deposited by the bankrupt for the purposes of a composition, although such deposit is sufficient. *Matter of Blond* (D. C., Mass.), 34 Am. B. R. 193, 188 Fed. 452.

^{301.} *In re Stover* (D. C., Pa.), 11 Am. B. R. 345, 127 Fed. 394; *United States v. Birmingham Trust & Savings Co.* (C. C. A., 5th Cir.), 43 Am. B. R. 430, 258 Fed. 562.

^{302.} *In re Lee* (D. C., Pa.), 22 Am. B. R. 820, 171 Fed. 206.

^{303.} *Nauman Co. v. Bradshaw* (C. C. A., 8th Cir.), 27 Am. B. R. 565, 193 Fed. 350.

^{304.} *Matter of Breakwater Co.* (D. C., Pa.), 36 Am. B. R. 752.

^{305.} *Matter of Green* (D. C., Pa.), 36 Am. B. R. 188, 231 Fed. 253.

^{306.} *In re Brown* (D. C., Colo.), 10 Am. B. R. 588, 123 Fed. 336; *Matter of Bickmore Shoe Co.* (D. C., Ga.), 45 Am. B. R. 24, 263 Fed. 926. *Contra*, *Matter of Aarons* (D. C., N. J.), 40 Am. B. R. 229, 243 Fed. 634.

Where a composition is effected a bankrupt may be heard to object to the allowance of the claim offered for proof after the expiration of the year, although he in good faith omitted it from his schedules. *In re Lane* (D. C., Mass.), 11 Am. B. R. 136, 125 Fed. 772. But it was doubted in *In re Fox* (Ref., Ohio), 6 Am. B. R. 525, whether the year's limitation for proving claims against bankrupt estates, laid down in section 57-n, had any application to composition cases. In the case of *In re French* (D. C., Mass.), 25 Am. B. R. 77, 181 Fed. 583, it was held that in proceedings for the confirmation of a composition the bankrupt has the right to appear in opposition to the allowance of claims which, although scheduled, had not been filed within the year and he would have this right even if he had inadvertently omitted such claims from his schedules; claims which have not been filed within one year after adjudication are not only barred from allowance in bankruptcy proceedings but lose all standing before the court for the purpose of composition.

When an estate is to be administered it is necessary to put a time limit to the proving of claims, because the rate of dividend depends upon what claims are proven, but this is not so in a composition because the dividend is necessarily fixed by the bankrupt upon the schedules alone. *Matter of Atlantic Construction Co.* (D. C., N. Y.), 35 Am. B. R. 838, 228 Fed. 571.

the creditor from setting up his claim, which had not been presented within the year, as a defense in an action brought against him by the trustee.³⁰⁸

(3) **FILED WITH REFEREE.**—The word "proved" must be read to include filing the claim with the referee; consequently no claim can be allowed against the bankrupt estate unless it has not only been filed but also filed with the referee within one year after the date of the adjudication.³⁰⁷ It is not sufficient that a sworn statement of the claim be made within the time limitation, but such sworn statement must be filed or presented in some form in the bankruptcy proceeding to prevent such claim from being barred by the statute.³⁰⁹

(4) **PRESENTATION TO TRUSTEE.**—Where a claim is duly presented to the trustee within the year, it is a sufficient compliance with the requirement of the statute, although not delivered to the referee until after that time.³⁰⁹

(5) **PRESENTATION OF FACTS SHOWING CLAIM.**—It has been held that a presentation of facts before the court establishing the existence of a valid claim against the bankrupt estate is a sufficient compliance with the requirement that a claim must be filed within one year after the adjudication.³¹⁰

^{308.} *Norfolk & W. R. Co. v. Graham* (C. A., 4th Cir.), 16 Am. B. R. 610, 145 Fed. 809.

^{307.} *Matter of Pettingill Co.* (Ref., Mass.), 14 Am. B. R. 763.

^{308.} *In re French* (D. C., Mass.), 25 Am. B. R. 77, 181 Fed. 583.

^{309.} *Orcutt Co. v. Green*, 204 U. S. 96, 17 Am. B. R. 72, revg. 13 Am. B. R. 512 (*sub nom.* *Matter of Ingalls Bros.*), see *In re Co-operative Knitting Mills* (D. C., N. Y.), 30 Am. B. R. 181, 202 Fed. 1016.

Presentation of claim to trustee.—In the case of *Orcutt Co. v. Green*, 204 U. S. 96, 17 Am. B. R. 72, revg. 13 Am. B. R. 512 (*sub nom.* *Matter of Ingalls Bros.*), the court said: "General Order XXI provides that 'proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.' There is nothing in that provision inconsistent with or opposed to anything stated in the bankruptcy law upon the subject and we must therefore take the statute and the order and read them together, the order being simply somewhat of an amplification of the law with respect to procedure, but nothing which can be construed as beyond the powers granted to the court by virtue of the law itself. The question is not whether any one but the court or referee can pass upon a claim and allow it or disallow it. That must be done by the court or referee, but it is simply whether a delivery of a claim properly proved to the trustee is a sufficient filing. The law provides (subsection c of section 57) that a claim after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if a cause has been referred; but that does not prohibit their being filed somewhere else prior to their allowance and the order in bankruptcy in substance provides that they may be filed after being proved with the trustee. Such order is equivalent to saying that proofs of debt or claim may be received by

the trustee. When they are so received by him they are in legal effect received by the court, whose official the trustee is. Having been received by the trustee under authority of law, the proofs of debt are thereby sufficiently filed so far as creditors are concerned and it is the duty of the trustee to deliver them to the referee. If a trustee inadvertently neglects to perform that duty it is the neglect of an officer of the court and the creditors are in no way responsible therefor. The presentation and filing having been made within the time provided for and with one of the proper officers, his failure to deliver to the referee cannot be held to be a failure on the part of the creditor to properly file his proofs." In the case of *Matter of Kessler* (C. C. A., 2d Cir.), 25 Am. B. R. 512, 184 Fed. 51, it was held that where a proof of claim against a bankrupt estate has been delivered to its trustee, the claim is sufficiently filed and it is the duty of the trustee to deliver it to the referee.

^{310.} **Presentation of facts showing indebtedness.**—*In re Strobel* (D. C., N. Y.), 20 Am. B. R. 884, 163 Fed. 787; *In re Roeher* (C. C. A., 2d Cir.), 11 Am. B. R. 464, 127 Fed. 122, in which case a document inartificially drawn setting forth the amount due and claiming a lien on a certain special fund due the bankrupt was considered a proof of claim; *In re Standard Telephone & Electric Co.* (D. C., Wis.), 26 Am. B. R. 601, 186 Fed. 586, in which case the claimant was the holder of certain bonds secured by mortgage given by the bankrupt company and covering all its property; the mortgagee filed a petition before the referee setting up a mortgage and praying that it be declared a first lien upon the property of the bankrupt; issue was joined on the petition and at a hearing before the referee the bonds were put in evidence; the referee found that the mortgage was void, but it was held that the facts presented established a *bona fide* indebtedness and was sufficient as a proof of claim.

(6) **EXCEPTIONS TO REQUIREMENTS.**—An exception seems to be made in favor of tax claims, which need not even be filed,³¹¹ and where the administration was halted by an adjustment out of court, sufficient money being deposited to pay all claimants.³¹² Other exceptions are made by the language of the subsection, as where the claimant is an infant or insane.

b. Claims against property.—The presentation of claims against specific property in the possession of the trustee is on a different basis, as to time limitation, than the allowance of claims against the estate, upon which dividends are to be awarded. In such a case the court may, for the prompt administration of the estate, require such claims to be presented within a reasonable time, to be fixed by order, or thereafter to be barred.³¹³ The court may do this in the exercise of its equity jurisdiction, which includes the power to limit the time within which a remedy may be pursued, and to refuse relief where by laches the claimant has unduly delayed the prosecution of his claim.³¹⁴

c. Liquidated by litigation.—(1) **IN GENERAL.**—The subsection makes an express exception in the case of claims “liquidated by litigation.”³¹⁵ It has

311. *In re Cleanfast Hosiery Co.* (Ref., N. Y.), 4 Am. B. R. 702.

312. *In re Lockwood* (D. C., N. Y.), 4 Am. B. R. 731, 104 Fed. 794.

313. *In re Lathrop, Haskins & Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 739, 223 Fed. 912; *In re McIntyre & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 4, 176 Fed. 552; *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 721, 741-2; s. c. 216 Fed. 458, 472.

314. *Matter of Lathrop, Haskins & Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 739, 223 Fed. 912, in which the order of the court provided that “all claimants who did not file notice of claim to the said stock on or before May 1, 1910, should be forever barred from making any claim or asserting any title or interest in or to any of the stocks, bonds or securities of this estate or the proceeds thereof,” and the court said: “The order did not fix a time for general creditors to file claims against the estate. That the court could not have done, as the Bankruptcy Act in providing in section 57, subdivision n, that ‘claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication’ plainly implies that creditors shall be entitled to file claims at any time within the year. But the court sought by its order to require persons claiming stocks or bonds then in the possession of the receiver, or which might subsequently come into his possession or into the possession of the trustee, to give notice of their claims within a time specified or be barred of the right to recover them from the receiver or trustee. We are at a loss to understand why the authority of the court to make such an order should be denied. It is said that such an order is in effect a short statute of limitations, and that as such beyond the power of the court to establish. In making the order the court was in the exercise of its equity jurisdiction. The equity courts, in jurisdictions where the dis-

inction between law and equity is maintained, while not bound by statutes of limitation not *in totidem verbis* applicable to equitable demands have nevertheless from the earliest times asserted the right to adopt and apply statutes of limitation to cases over which their jurisdiction was concurrent with that of the courts of law. And in cases over which the courts of equity have exercised an exclusive jurisdiction they have acted upon the maximum *vigilantibus non dormientibus aequitas subvenit* and recognized laches as a defense peculiar to the chancery courts and refused to grant relief to one who has unduly delayed the prosecution of his claim. And it has also been the practice of equity courts in appointing receivers to limit the time within which claimants could assert a claim against the receivers so appointed. In the exercise of the right thus to limit rights of action the equity courts have not derived their power from any statute but have exercised an inherent power. It is too late in the history of these courts to challenge their right in this respect.”

315. See Am. Bankr. Dig. § 733.

Liquidation by litigation.—Where in a litigation as to property in possession of the bankrupt at adjudication, it is determined, more than a year thereafter, that the transaction by which delivery of the property was made constituted a sale sufficient to pass the title, the defeated claimant may prove for purchase price as a claim “liquidated by litigation” within this section. *In re Landis* (D. C., Pa.), 19 Am. B. R. 420, 156 Fed. 318. A creditor’s claim under a chattel mortgage, recorded in the wrong county, having been defeated, and his claim of ownership of property in possession of the bankrupt having been determined against him under decisions made more than a year after his adjudication in bankruptcy, his claims may be allowed under this subdivision.

been held that this exception should be interpreted as if it read: "If the final judgment therein is rendered within thirty days before the expiration of such time or at any time thereafter."³¹⁵ A final judgment establishing the amount of a debt or claim should be framed in such a limited form as not to involve a judgment *in personam*, but be adequate to enable the creditor to reap the benefit of a proof of claim.^{316a}

(2) **WHAT CONSTITUTES LITIGATION.**—The phrase "liquidated by litigation" is general, and the object of the exception which is made to the statutory limit of time is plainly to allow the proof of the claim after the expiration of a year by a creditor who during that time was engaged in litigation with the bankrupt's estate concerning its liability to him.³¹⁷ The litigation referred to means litigation between the claimants and the bankrupt.³¹⁸

(3) **RECOVERY OF PREFERENCES OR SETTING ASIDE LIENS AND TRANSFERS.**—A suit to recover a preference is a "litigation" within the meaning of this clause, and after judgment against a creditor in such suit, he may prove his claim within sixty days thereafter.³¹⁹ An agreement by a secured creditor and trustee in bankruptcy as to the value of the creditor's security, made pending a litigation in the State courts in which both were parties, constitutes a liquidation by litigation.³²⁰ Where it is sought to establish the validity of a mortgage upon the bankrupt's property in a proceeding before the referee,

In re Stobel (D. C., N. Y.), 20 Am. B. R., 884, 160 Fed. 918. As to effect of portions of claim being "liquidated by litigation," see *In re Veststrom* (D. C., Wash.), 30 Am. B. R. 569, 205 Fed. 825.

³¹⁵ *Powell v. Leavitt* (C. C. A., 1st Cir.), 18 Am. B. R. 10, 150 Fed. 89; *In re Keyes* (D. C., Mass.), 20 Am. B. R. 183, 100 Fed. 763; *Barry v. New York Holding & Construction Co.* (Mass. Sup. Jud. Ct.), 41 Am. B. R. 134, 118 N. E. 639. Compare *Matter of Edelen* (D. C., Ky.), 40 Am. B. R. 834, 248 Fed. 580.

Action to establish validity of mortgage.—Where, in an action brought by a creditor in the State court to establish the validity of a mortgage upon a bankrupt's stock-in-trade, the final judgment was rendered in favor of the trustee after the expiration of the year subsequent to the bankrupt's adjudication, declaring such mortgage to be an invalid preference, the claim of the creditor is "liquidated by litigation" within the meaning of section 57-n, and he is entitled to prove the same as an unsecured debt at any time within sixty days of the rendition of the judgment in the action in the State court. *Powell v. Leavitt* (C. C. A., 1st Cir.), 18 Am. B. R. 10, 150 Fed. 89. It has been held, however, that if a secured creditor delays filing his claim until after the year because the security is being liquidated, he loses all right to file it. *In re Sampter* (C. C. A., 2d Cir.), 22 Am. B. R. 357, 170 Fed. 938, 96 C. C. A. 98. See also *In re Baker Notion Co.* (D. C., N. Y.), 24 Am. B. R. 806, 180 Fed. 922.

^{316a} *Barry v. New York Holding & Construction Co.* (Mass. Sup. Jud. Ct.), 41 Am. B. R. 134, 118 N. E. 639.

³¹⁷ *In re Noel* (C. C. A., 1st Cir.), 18 Am. B. R. 10, 150 Fed. 89, revg. 18 Am. B. R. 457.

The liquidation intended is the determination in the bankruptcy court or elsewhere of the amount or validity of a claim deposited by the trustee, or, at the time of the bankruptcy, not of such a nature as to be capable of exact measurement in terms of dollars. *Matter of Damon & Co.* (Ref., N. Y.), 14 Am. B. R. 809; *First National Bank of Atlanta v. Cameron* (C. C. A., 5th Cir.), 31

Am. B. R. 209. As to the meaning of words "liquidated" by "litigation" see the following cases: *Hutchinson v. Otis* (C. C. A., 1st Cir.), 8 Am. B. R. 332, 115 Fed. 937, a. c. in Supreme Court, 190 U. S. 552, 10 Am. B. R. 135; *In re Prindle Pump Co.* (Ref., N. Y.), 10 Am. B. R. 405; *In re Mertens* (C. C. A., 2d Cir.), 16 Am. B. R. 825, 147 Fed. 177; *In re Noel* (C. C. A., 1st Cir.), 18 Am. B. R. 10, 150 Fed. 89; *In re Keyes* (D. C., Mass.), 20 Am. B. R. 183, 100 Fed. 763; *Matter of Edelen* (D. C., Ky.), 40 Am. B. R. 834, 248 Fed. 580; *Barry v. New York Holding & Construction Co.* (Mass. Sup. Jud. Ct.), 41 Am. B. R. 134, 118 N. E. 639; *Moore v. Simms* (C. C. A., 6th Cir.), 44 Am. B. R. 19, 257 Fed. 540. A claim for a deficiency arising upon the foreclosure of a mortgage within a year after the mortgagor's adjudication is not provable after the expiration of that period. *In re Sampter* (C. C. A., 2d Cir.), 22 Am. B. R. 357, 170 Fed. 938.

³¹⁸ *In re Thompson's Sons* (D. C., Pa.), 19 Am. B. R. 581, 123 Fed. 174, holding that where the amount of the bankrupt's debt is not in controversy, the fact that litigation ensues between the creditor and the surety of the bankrupt to determine the surety's liability does not make the claim of the surety against the bankrupt estate one "liquidated by litigation." *In re Pittsburgh Industrial Iron Works* (Ref., Pa.), 22 Am. B. R. 851; *In re Daniel* (Ref. Tex.), 29 Am. B. R. 284, holding that where the litigation was as between the claimant and third parties as to securities held by the claimant it was no a "liquidation by litigation," so as to permit proof by the claimant after his claim to the securities had been decided, in part adversely thereto.

³¹⁹ *In re Coventry-Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 623, 171 Fed. 673. See also *In re Lange Co.* (D. C., Ia.), 22 Am. B. R. 414, 170 Fed. 114; *Matter of Cahill* (D. C., Ohio), 30 Am. B. R. 794; *Matter of Bergdoll Motor Co.* (D. C., Pa.), 36 Am. B. R. 265, 230 Fed. 248.

³²⁰ *First National Bank of Atlanta v. Cameron* (C. C. A., 5th Cir.), 31 Am. B. R. 695, 209 Fed. 611.

and it is decided by the referee that such mortgage is void, the decision is a process of "liquidation," so as to authorize the filing by the mortgagee of a claim as an unsecured creditor within sixty days after the question was determined.³²¹ The provision applies to a case where a creditor has claimed to hold a security and has litigated that question and been defeated; in such a case the creditor may thereafter prove as a general creditor.³²²

(4) **LIMITATION AS TO TIME.**—The words "such time" refer to the one year after or following adjudication.³²³ If the final judgment is rendered more than thirty days before the expiration of the period of one year after the adjudication, the claim of the creditor will be barred unless he files the same prior to the expiration of the year.³²⁴ If final judgment in the litigation was rendered within the period of thirty days before the expiration of the year, the claim must be filed within sixty days after the rendition of the judgment.³²⁵

d. **Proof after expiration of year.**—A claim may be offered for proof after the expiration of the year where the delay in its presentation was caused by the fraud of the bankrupt in so preparing his schedules as to lead creditors to believe that there was practically no estate for distribution.³²⁶ The statute was intended to affect the right of a tardy creditor to prove in competition with creditors who had been diligent, not the right of a bankrupt to prevent the payment of a creditor whose tardiness had been caused by the bankrupt's own fraud.³²⁷ But the section must be strictly construed to carry into effect its evident purpose. The expiration of the year terminates the jurisdiction of the court in respect to the filing of claims.³²⁸ The fact that the

³²¹ In re Standard Telephone & Electric Co. (D. C., Wis.), 26 Am. B. R. 601, 186 Fed. 586.

³²² Matter of Salvator Brewing Co. (D. C., N. Y.), 26 Am. B. R. 21, 188 Fed. 522, citing In re Keyes (D. C., Mass.), 20 Am. B. R. 183, 160 Fed. 763; In re Strobel (D. C., N. Y.), 20 Am. B. R. 884, 163 Fed. 787; Keppel v. Tiffin Savings Bank, 197 U. S. 356, 13 Am. B. R. 552; Page v. Rogers, 211 U. S. 575, 21 Am. B. R. 496.

³²³ In re Peck (D. C., N. Y.), 20 Am. B. R. 629, 161 Fed. 762. See Matter of Damon & Co. (Ref., N. Y.), 14 Am. B. R. 809.

³²⁴ In re Sampster (C. C. A., 2d Cir.), 22 Am. B. R. 357, 170 Fed. 938, 96 C. C. A. 98.

³²⁵ **Additional sixty days, when to commence.**—In re Clover Creamery Ass'n (C. C. A., 7th Cir.), 23 Am. B. R. 884, 176 Fed. 907, holding a claim to be barred because not filed within sixty days after the rendition of judgment in an action brought in the State court liquidating the claim. But see Matter of Eldred (D. C., N. Y.), 19 Am. B. R. 52, 155 Fed. 686, where the court said: "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication except in a case of litigation, when ninety days additional may possibly be added; and in the case of infancy or insanity a creditor laboring under these disabilities without notice, may have six months longer within which to file a claim." This statement of the court was not essential to the determination of the question at issue and

may not be considered controlling upon this question. The language of the subsection clearly indicates that the additional sixty days' time begins to run at the date of the rendition of the judgment.

³²⁶ In re Towne (D. C., Mass.), 10 Am. B. R. 284, 122 Fed. 313. The construction of section 57-n forbidding proofs subsequent to one year after adjudication is too narrow. National Bank v. Williams (C. C. A., 5th Cir.), 20 Am. B. R. 79, 85, 159 Fed. 615. Compare In re Peck (C. C. A., 2d Cir.), 21 Am. B. R. 707, 168 Fed. 48.

³²⁷ In re Hawk (C. C. A., 8th Cir.), 8 Am. B. R. 71, 114 Fed. 916; In re Moebius (D. C., Pa.), 8 Am. B. R. 590, 116 Fed. 47; In re Leibowitz (D. C., Tex.), 6 Am. B. R. 268, 108 Fed. 617; In re Rhodes (D. C. Pa.), 5 Am. B. R. 197, 105 Fed. 231; In re Shaffer (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982; Bray v. Cobb (D. C., S. Car.), 3 Am. B. R. 788, 100 Fed. 270; Matter of Knosco (D. C., Ohio), 31 Am. B. R. 238, 208 Fed. 201.

³²⁸ In re Knosco (D. C., Ohio), 31 Am. B. R. 238, 208 Fed. 201.

An unsecured claim filed more than two years after adjudication is too late under section 57-n of the Bankruptcy Act, which provides that claims with certain exemptions, shall not be proved subsequent to one year after adjudication. Matter of Trion Manufacturing Co. (D. C., Ga.), 35 Am. B. R. 480, 224 Fed. 521.

bankrupt has fraudulently concealed assets may not be relied upon to extend the time within which claims may be proved.³²⁹ The period is not enlarged or started anew by the discovery of unschedule assets.³³⁰ The time may not be extended where the creditor fails to file proof of his claim because acting under the advice of counsel he believed that his rights under an attachment might be prejudiced,³³¹ nor where the delay was caused by the creditor's attempt to establish a lien on the bankrupt's property,³³² nor where the creditor's failure to make and file his claim in time was due solely to accident and mistake,³³³ nor where the creditor claims he was misled by the schedules, which stated that a particular asset was of little or no value.³³⁴ It has been suggested, however, that the statute would not run against the claim of a creditor who had sought to maintain as valid an alleged preferential payment but had not succeeded.³³⁵ Where a creditor has been compelled to surrender a voidable preference he will be permitted to prove his claim after the expiration of a year.³³⁶ The fact that the creditor did not receive the required notice, and within the period of one year had no knowledge of the bankruptcy, does not authorize a proof of the claim after the expiration of such period.³³⁷ The filing of a

329. Effect of concealment of assets.—In the case of *In re Meyer* (D. C., Or.), 25 Am. B. R. 44, 181 Fed. 904, the court said: "Section 57-n of the Bankruptcy Act so far as applicable here provides 'that no claim shall be proved against a bankrupt subsequent to one year after adjudication.' The provision has been repeatedly construed by the courts and they are practically agreed that it is more than a limitation and is prohibitory and that the courts have no power or discretion to extend the time therein specified or permit the proof of claims after the expiration of the year, even if the claimant has been misled by the fraudulent concealment of assets of the bankrupt." See also *In re Peck* (C. C. A., 2d Cir.), 21 Am. B. R. 707, 168 Fed. 48, 93 C. C. A. 470; *In re Ingalls Bros.* (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517, 70 C. C. A. 101; *In re Muskoka Lumber Co.* (D. C., N. Y.), 11 Am. B. R. 761, 127 Fed. 886; *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

In the case of *In re Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246, the court said: "It may well be that Congress could with wisdom have put into the clause an exception covering cases where there had been a fraudulent concealment of assets; but that was a matter exclusively for Congress to determine and not for the courts to remedy. This court at least assumes no power to interpolate an exception, and thus put into the statute what Congress declined to embrace therein. The language of the clause is plain and unequivocal. There is no ambiguity about it and it admits of no construction. The decisions are equally clear to the effect that no proof of debt can be made after the expiration of one year after the adjudication, except in those instances where the period is extended by the act to not exceeding one year and six months."

330. *Chapman v. Whitsett* (C. C. A., 8th Cir.), 38 Am. B. R. 424, 236 Fed. 873.

331. *In re Baird & Co.* (D. C., Pa.), 18 Am. B. R. 228, 154 Fed. 215.

332. *In re Noel* (D. C., N. H.), 16 Am. B. R. 457, 144 Fed. 439.

333. *In re Sanderson* (D. C., Vt.), 20 Am. B. R. 396, 160 Fed. 278.

334. *In re Peck* (C. C. A., 2d Cir.), 21 Am. B. R. 707, 168 Fed. 48, affg. 20 Am. B. R. 629, 161 Fed. 762.

335. *In re Fagan* (D. C., S. Car.), 15 Am. B. R. 520, 140 Fed. 758. *Contra: In re Kempter* (D. C., Ia.), 15 Am. B. R. 675, 142 Fed. 210; *Matter of Damon* (Ref., N. Y.), 14 Am. B. R. 809.

336. *In re Lange Co.* (D. C., Ia.), 22 Am. B. R. 414, 170 Fed. 114, in which case the court holds that the Supreme Court of the United States does not regard the claims of creditors who have been deprived of merely voidable preferences by the judgment of a court at the suit of the trustee, as falling within the provisions of section 57-n, but as claims accruing under section 57-g, at the time the preference is surrendered or the creditor is deprived thereof by the judgment of the court, and that they may be proved and allowed before the settlement of the estate.

Judgment declaring payment voidable preference.—A creditor may offer a proof of claim within sixty days of a judgment declaring payment of said claim to be a voidable preference, although more than a year has passed since the adjudication. *Matter of Bergdoll Motor Co.* (C. C. A., 3d Cir.), 37 Am. B. R. 501, 233 Fed. 410.

337. *Matter of Prindle Pump Co.* (Ref., N. Y.), 10 Am. B. R. 406; *In re Muskoka Lumber Co.* (D. C., N. Y.), 11 Am. B. R. 761, 127 Fed. 886.

clear statement of the claim in writing, duly verified, within the year is sufficient, even though it may be liquidated and allowed after that time.³³³

VL EFFECT OF PROOF AND ALLOWANCE.

a. **In general.**—Under the former law, a creditor who proved his claim could not proceed thereon in another court.³³⁹ This is not the law now. He can proceed, though he will usually be halted by a stay.³⁴⁰ He becomes, however, a party to the bankruptcy proceeding, with all that that condition implies.³⁴¹ If his claim, voluntarily filed, is disallowed it is a bar to a suit against the bankrupt on the same cause of action in another jurisdiction.³⁴² The action of a referee in bankruptcy in allowing a claim is *res adjudicata* as to all who have been made parties to the proceedings in the bankruptcy court.³⁴³ But it has been held that a creditor who has proved in bankruptcy a claim based on a contract and has been paid dividends thereon, may proceed in a State court to recover in tort for the balance due.³⁴⁴ A reservation, in a customer's proof of claim, of whatever rights he has against the bankrupts on account of their failure to return stock covered by a receipt, does not preclude him after discovery that his shares of stock have been returned to the trustee, from reclaiming them as his own.³⁴⁵

b. **Waiver of lien.**—A creditor's lien may be waived by the proof and allowance of his claim.³⁴⁶ How far a proof of debt that is not affected by a discharge amounts to a waiver has not yet been much discussed under the present law. Under former laws, proving for such a debt did not estop the creditor from asserting it against after-acquired property.³⁴⁷

333. *In re Mertens* (C. C. A., 2d Cir.), 16 Am. B. R. 825, 147 Fed. 177.

Where a wife succeeds in an action against her husband and his trustee in bankruptcy, commenced within a year after adjudication, her claim is "proven" within the meaning of the act. *Buckingham v. Estes* (C. C. A., 6th Cir.), 12 Am. B. R. 182, 128 Fed. 584.

339. Act of 1867, § 21; *In re Meyers*, Fed. Cas. 9,518; *Cook v. Coyle*, 113 Mass. 252.

340. *In re Buchanan's Soap Corporation* (D. C., N. Y.), 22 Am. B. R. 382, 169 Fed. 1017; *Roth v. Pechin* (Pa. Sup. Ct.), 41 Am. B. R. 845, 103 Atl. 894.

341. *Wiswall v. Campbell*, 93 U. S. 347. Compare *In re Jones*, Fed. Cas. 7,447; *In re Coffey* (Ref., N. Y.), 19 Am. B. R. 148; *In re Kenyon* (D. C., Ohio), 19 Am. B. R. 195, 156 Fed. 863, citing *Collier on Bankruptcy* (6th Ed.), 437, and holding that a claimant may not rescind his agreement after proof of his claim. *Matter of Kinnane Co.* (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488, citing *Collier on Bankruptcy* (10th Ed.), 749.

Election of remedies.—Proof of claim against the bankrupt bars the claimant from bringing an action against another party on the ground that the bankrupt was acting as agent of such party in incurring the liability. *Com. Bank, etc. v. Central Nat. Bank* (Mo. Ct. of App.), 41 Am. B. R. 660, 203 S. W. 662.

342. *Hagardine, etc., Co. v. Hudson* (C. C. A., 8th Cir.), 10 Am. B. R. 225, 122 Fed. 232, affg. 6 Am. B. R. 657; *Elmore, Quillian & Co. v. Henderson-Mizell Mercantile Co.* (Sup. Ct., Ala.), 32 Am. B. R. 658, 179 Ala. 548, quoting text with approval.

343. *Elmore, Quillian & Co. v. Henderson-Mizell Mercantile Co.* (Sup. Ct., Ala.), 32 Am. B. R. 658, 179 Ala. 548; *Spencer Commercial Club v. Bartmess* (Ind. App. Ct.), 43 Am. B. R. 569, 128 N. E. 435.

344. *Matter of Menzin* (C. C. A., 2d Cir.), 38

Am. B. R. 435, 238 Fed. 773, revg. 37 Am. B. R. 468, 233 Fed. 333. And see *Friend v. Talcott*, 228 U. S. 27, 30 Am. B. R. 31; *Bay State Milling Co. v. Susman Feuer Co.* (Conn. Sup. Ct. of Errors), 39 Am. B. R. 132, 100 Atl. 19.

Effect on right against third party.—Proceedings in bankruptcy against a bankrupt tenant in which a landlord has filed a claim for rent are not a bar to an action for conversion in the State court against a purchaser from the tenant of property on which the landlord has a lien. *Boles v. Missouri Valley Elevator Co.* (Iowa Sup. Ct.), 41 Am. B. R. 439, 166 N. W. 1067.

345. *Thomas v. Taggart* (Sup. Ct.), 209 U. S. 385, 19 Am. B. R. 710, affg. 17 Am. B. R. 467; *Matter of Berry & Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 27, 174 Fed. 400, holding that where a customer of a firm of stockbrokers with full knowledge of all the facts, elects to prove against their estate in bankruptcy, for the value of corporate stock hypothecated by them, he cannot subsequently claim the stock or its profits specifically. See also *Matter of Kaplan v. Myers* (C. C. A., 3d Cir.), 39 Am. B. R. 367, 241 Fed. 459.

346. A lien created by the commencement of a judgment creditor's action within the four months' period to set aside an alleged fraudulent transfer by a bankrupt is waived by the proof and allowance of the creditor's claim upon his judgment in the bankruptcy proceeding without a disclosure of the pendency of the action. *Dunn Salmon Co. v. Pillmore*, 19 Am. B. R. 172, 56 Misc. 546, 106 N. Y. Supp. 546. See *Sessler v. Paducah Distilleries Co.* (C. C. A., 5th Cir.), 21 Am. B. R. 723, 168 Fed. 44.

347. *In re Robinson*, Fed. Cas. 11,339; *In re Clews*, Fed. Cas. 2,891; *McBean v. Fox*, 1 Ill. App. 177. The opposite was true under the law of 1841. *Chapman v. Forsyth*, 2 How. 202. See also *Clay v. Smith*, 3 Pet. 411.

SECTION FIFTY-EIGHT.

NOTICE TO CREDITORS.

§ 58. Notice to creditors.—*a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, *and* (9) *there shall be thirty days' notice of all applications for the discharge of bankrupts.**

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c All notices shall be given by the referee, unless otherwise ordered by the judge.

Analogous provisions: In U. S.: As to notices of first meeting, Act of 1867, § 11, R. S., § 5019; As to notice of filing trustee's account, Act of 1867, § 28, R. S., § 5096; As to notice of dividends, Act of 1867, § 27, R. S., § 5102; Act of 1841, § 9; Act of 1800, § 29; As to notice of application for discharge, Act of 1867, § 29; R. S., § 5109; Act of 1841, § 4; As to notice of application for confirmation of compositions, R. S., § 5103A; As to notice of meetings in general, Act of 1867, § 17, R. S., § 5094.

In Eng.: Generally to different sections, to Schedule I and the General Rules; there is no corresponding single section on notices in the English act.

In Can.: Act of 1919, §§ 42, 83.

Cross-references: To the law: Examinations of bankrupts, how conducted, § 7 (9); examination of bankrupt and other persons, § 21-a.

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*Amendment of 1910 in italics.

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See also Supplementary Forms, *post*; Hagar and Alexander's Bankruptcy Forms, (2d ed.).

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III. Notice to Creditors by Publication, 835.**IV. By Whom Notices Are Given, 836.**

I. NOTICE TO CREDITORS GENERALLY.

a. *In general.*—The present statute requires a notice to creditors of every important step in a bankrupt proceeding. Its predecessor was somewhat loose in this regard, notices being often discretionary, and the time and

method subject to the direction of the court.¹ The present law, perhaps, goes too far the other way. Notices should not contain the names of the creditors or the amounts of their claims, as seems sometimes to have been the practice under the law of 1867. Subsection *a* requires that the notice given shall be (1) by mail, (2) at least ten days before the day set for the meeting, and (3) addressed to the creditors at "their respective addresses as they appear in the list of creditors . . . or as afterwards filed with the papers in the case." The last clause quoted seems to cover cases where a creditor's address is changed during the proceeding, or is found to have been incorrect in the schedules, as well as those where a creditor requires a referee to mail to a specified address.² Notices may, however, be waived. For the first meeting, the addresses given in the schedule should be used,³ thereafter, those specified on the proof of debt, unless a request giving a specified address be filed as provided in General Order XXI (2). The sufficiency of addresses given in the schedules, is discussed under section 7 (8), and as to the effect of a failure to schedule properly under § 17. Whether or not the use of initials and the omission of a street address will make notices to such persons ineffectual will almost invariably depend on extrinsic circumstances.⁴ The cases under the former law will be found of little value.

b. Notices under rules and forms.—The general orders provide for notices in certain cases and regulate the method of service. Notices which are not required by the act or the general orders to be served personally on the party may be served on his attorney.⁵ Property may be sold under an order of the court with or without notice to the creditors.⁶ Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.⁷ The official forms prescribe the form of the notice of the first meeting,⁸ and of the application for a discharge.⁹ So also is the form of the notice to creditors of the payment of a dividend.¹⁰

c. Construction and scope of section.—This section should be read and construed together with § 59. The former enumerates the proceedings, of which notice is to be given to creditors, and prescribes the length of time of the notice and the mode of giving it to the creditors, while the latter is particularly directed to the subject of filing and dismissing petitions.¹¹

1. See "Analogous Provisions," *ante*.

2. General Order XXI (2).

3. In re Schiller (D. C., Va.), 2 Am. B. R. 704, 96 Fed. 400.

Where addresses of creditors are unknown. — When the bankrupt gives a list of creditors, but states that their addresses are unknown, the referee should require the addresses to be furnished, or satisfactory proof to be made that the same cannot be ascertained after due search had been made. In re Dvorak (D. C., Ia.), 6 Am. B. R. 66, 107 Fed. 76.

4. Chaffin v. Wolff (N. J. Ct. of Errors & App.), 38 Am. B. R. 852, 96 Atl. 73, holding that in the case of a well known business firm which on its business letter heads uses initials and does not give any street address, a notice to such firm addressed to the city in

which it transacts business is sufficient; Kreitlein v. Ferger, 238 U. S. 21, 34 Am. B. R. 862, 59 L. Ed. 1184, holding that a schedule containing the address "Indianapolis, Ind." is *prima facie* sufficient.

5. General Orders IV.

6. General Orders XVIII. See also Am. B. R. Dig. § 595. Compare, *post*, this section, "Of proposed sales," *post*, p. 831.

7. General Orders XXI (2).

8. Official Form No. 18.

9. Form No. 57. Additional Forms for other necessary notices will be found in "Supplementary Forms," *post*; and see Hagar & Alexander's Bankruptcy Forms (2d Ed.).

10. Official Form No. 41.

11. Matter of Levi & Klauber (C. C. A., 2d Cir.), 15 Am. B. R. 294, 142 Fed. 962.

d. **When notice not necessary.**—A notice of a meeting of creditors is not necessary where the referee is the sole judge and acts independently of the creditors; unless, of course, required by subsection *a*. Neither is it essential, where, though similar to or the negative of a meeting of which notice is necessary, the statute does not specifically require it. Thus, a ten-day notice need not be given of the appointment of a special referee,¹² or of a receiver,¹³ or of examinations before the first meeting,¹⁴ or of a trial on a contested claim,¹⁵ or of sales of perishable property,¹⁶ or of the hearing of exceptions to the trustee's report on exemptions,¹⁷ or of many other minor steps in a proceeding.¹⁸ Indeed, no notice whatever need be given in some of them. Where possible, however, the ten-day notice by mail should always be given, unless otherwise prescribed by the general orders or local rules. Such is the policy of the law. Congress has made no provision for giving notice to creditors of the institution of involuntary proceedings, other than that which results by operation of law from the filing of the petition,¹⁹ but it is as true of the present law as it was of the act of 1867 that the filing of a petition is a *caveat* to all the world and in effect an attachment and injunction.²⁰

e. **Combined notices.**—Form No. 18, itself, is a combined notice—of the first meeting and of the examination of the bankrupt. It is possible also to notify creditors in one notice, say, of (1) a proposed compromise, (2) a proposed sale to be followed, without objection, by a public auction forthwith, (3) the declaration and (4) the payment of a final dividend, and (5) a final meeting to pass on the trustee's account.²¹ Notices should be combined and meetings consolidated, where possible.²²

12. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

13. *In re Abrahamson* (Ref., N. Y.), 1 Am. B. R. 44.

14. *Id.*

15. Bankr. Act, § 57-k.

16. General Order XVIII (3). See also Am. B. R. Dig. § 595.

17. General Order XVII.

18. *In re Stotts* (D. C., Ia.), 1 Am. B. R. 641, 93 Fed. 438, holding that where an attorney is employed by the trustee of a bankrupt, an allowance for such services may be made by the referee without notice to the creditors.

19. *Matter of Zotti* (Ref., N. Y.), 23 Am. B. R. 601, holding that the filing of the petition was a command to all having possession of property which the bankrupt at that moment owned, to hold the same subject to the orders of the court. The "*rem*" was reached by the filing of the petition, no matter where it was.

Oral notice to a sheriff that a petition in bankruptcy has been filed against a debtor whose property has been attached and notice of the appointment of a receiver in bankruptcy, and the issuance of a restraining order is sufficient, and he thereafter deals with the property at his peril. *Matter of Luffy* (D. C., N. Y.), 19 Am. B. R. 614, 156 Fed. 873.

Constructive notice.—Notice of facts which would incite a person of reasonable

prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop. *Coder v. McPherson* (C. C. A., 8th Cir.), 18 Am. B. R. 523, 152 Fed. 951.

20. *Mueller v. Nugent*, 184 U. S. 1, 14, 7 Am. B. R. 224, 269; *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814; *State Bank of Chicago v. Cox* (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91; *Matter of Pittsburgh-Big Muddy Coal Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 452, 215 Fed. 703; *Clay v. Waters* (C. C. A., 8th Cir.), 24 Am. B. R. 293, 178 Fed. 385; *In re Billings* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395; *Matter of Schon* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514; *In re Breslau* (D. C., N. Y.), 10 Am. B. R. 33, 121 Fed. 910; *In re Mertens* (D. C., N. Y.), 12 Am. B. R. 699, 131 Fed. 507; *In re Donnelly* (D. C., Ohio), 26 Am. B. R. 304, 188 Fed. 1001. See also Am. B. R. Dig. § 236.

21. For one of these notices, see "Supplementary Forms," *post*; Hagar and Alexander's *Bankruptcy Forms* (2d Ed.).

22. Justice Brown said in *In re Price* (D. C., N. Y.), 1 Am. B. R. 419, 91 Fed. 635, that "Hereafter the published and mailed notices of applications for a discharge should contain a notice of examination of the debtor to avoid the necessity of further notice to all creditors in case such an examination is allowed."

f. Effect of notice on jurisdiction.—The filing of the petition gives jurisdiction, both *in rem* and *in personam*.²³ Failure to receive the notice is, therefore, not an objection to the regularity of the proceeding.²⁴ The important fact under the present law is: was the debt duly scheduled?²⁵ If so, there seems to be jurisdiction of the creditor, even without notice. Illustrative cases under the former law will be found in the foot-note.²⁶

g. Presumption that notice was given.—It is made by subsection *c* the official duty of a referee to give the notices prescribed by the section. It will be presumed, nothing appearing to the contrary, that the officer has properly and legally performed the duty devolved upon him.²⁷ As for instance, it has been held, authoritatively, that an order of discharge will be presumed to be based on sufficient notice to creditors, and that the introduction of the order casts a burden upon a creditor attacking it to show that there was absence of notice or other statutory cause affecting the validity of the order.²⁸ Where the record shows that notices were served as provided by law, it is not sufficient to assert merely that the notices were not received; there must be evidence adduced indicating that the notices were not sent.²⁹

II. WHEN NOTICE REQUIRED.

a. In general.—The mandatory phrasing of subsection *a* indicates that for all the proceedings there enumerated the ten-day notice by mail is absolutely essential.³⁰

b. Of examination of bankrupt.³¹—Subdivision (1) requires notice of an examination of the bankrupt. This refers to an examination under § 7 (9); it may to one under § 21-a. But a bankrupt may be examined at any continuance of a meeting in the call of which his examination has been noticed, and, if present at any other meeting, he can, it is thought, be examined even without such a notice.³² If examined for the purpose of preparing schedules,³³ or on the hearing of his discharge, no notice to creditors seems to be required.³⁴

c. Of proposed confirmation of composition.³⁵—Notice of the confirmation of a composition is required under subdivision (2). In this connection § 12-b

23. *Southern Loan & Trust Co. v. Benbow* (D. C., N. Car.), 3 Am. B. R. 9, 96 Fed. 514; *Rayl v. Lapham*, 27 Ohio St. 452.

The filing of the petition in bankruptcy against a debtor is notice to all his creditors of the pendency of the proceeding. *Matter of Levi & Klauber* (C. C. A., 2d Cir.), 15 Am. B. R. 294, 296, 142 Fed. 962.

24. *In re Stetson*, Fed. Cas. 13,381. See also *Clafin v. Wolff* (N. J. Ct. of Errors & App.), 38 Am. B. R. 652, 96 Atl. 73.

25. See Bankr. Act, § 17 (3), and discussion thereunder; *Keefanner v. Hevenor* (Sup. Ct. App. Div., N. Y.), 32 Am. B. R. 580, 148 N. Y. Supp. 434.

26. *Thurmond v. Andrews*, 10 Bush (Ky.), 400; *Heard v. Arnold*, 56 Ga. 570; *Pattison v. Wilbur*, 10 R. I. 448; *in re Archenbrow*, Fed. Cas. 504.

27. *Clafin v. Wolff* (N. J. Ct. of Errors & App.), 38 Am. B. R. 852, 96 Atl. 73.

28. *Kreitlein v. Feger*, 238 U. S. 21, 34 Am. B. R. 862, 59 L. Ed. 1184.

29. *Clafin v. Wolff* (N. J. Ct. of Errors & App.), 38 Am. B. R. 852, 96 Atl. 73.

30. *In re Gilbert*, 2 N. B. N. Rep. 733; *In re Campbell*, Fed. Cas. 2,348.

31. See also Am. B. R. Dig., § 48.

32a. *Heaven v. Stuart* (C. C. A., 5th Cir.), 41 Am. B. R. 81, 250 Fed. 972.

33. *In re Franklin Syndicate* (D. C., N. Y.), 4 Am. B. R. 244, 101 Fed. 402; *in re Abrahamson* (Ref., N. Y.), 1 Am. B. R. 33, holding that, although the statute contemplates an examination of bankrupts at a time directed, of which the creditors shall have notice, yet a bankrupt may be directed to furnish information to aid the court, and its officer, the receiver, in the preservation of the estate for the benefit of creditors, and such information may be elicited by an examination, and notice to the creditors may be dispensed with.

33. *In re Price* (D. C., N. Y.), 1 Am. B. R. 419, 91 Fed. 635, holding that the published and mailed notices of application for a discharge should contain a notice of examination of the debtor to avoid the necessity of further notice to all creditors in case such an examination is allowed.

34. See also Am. B. R. Dig. § 701.

should be consulted. While the usual notice must be given of an application for the confirmation of a composition,³⁵ it usually takes the form of an order to show cause, entitled in the district court and issued by the court.³⁶ It seems that a like notice is not required on an application to set aside a composition. Still, it is customary.³⁷

d. *Of application for discharge or revocation thereof.*³⁸—Subdivision (2) formerly provided for notice of at least ten days of an application for a discharge. The amendatory act of 1910 added a new subdivision 9 providing for a notice of thirty days in case of an application for a discharge. The provision as to thirty days notice is positive and should be strictly complied with.^{38a} The Supreme Court has, in Form No. 57, suggested a method which is both cumbersome and, in so far as it attempts to take from the district judge the power to fix the practice,³⁹ of doubtful force. Such notice should take the form of a short show cause order, the original signed by the judge and attested by the clerk, the same to be mailed either by the clerk or by the referee, or the attorney in charge if so "ordered by the judge." This practice is regulated by rules in the different districts,⁴⁰ and, in some, prior to the amendatory act of 1903, fees were charged for this service. Unless, however, there are district rules modifying it, the practice suggested by the Supreme Court should be followed.⁴¹ Personal notice of the application is not essential to the binding force of a decree granting a discharge.⁴² It is not necessary that the notice shall have been actually received and read by creditors, but mailing in the manner prescribed by the statute is sufficient.⁴³ A bankrupt is entitled to reimbursement for the expense of notice to creditors of an application for his discharge.⁴⁴ A default upon a motion to discharge a judgment will be opened, where the creditor did not have proper notice of the proceeding.⁴⁵ Since notice of an application for a discharge is required, it is not necessary to give notice to creditors of an application to extend the time within which to make the application for the discharge.⁴⁶ It seems that, on an application to revoke a discharge, any notice fixed by the court is sufficient.⁴⁷

e. *Of proposed sales.*⁴⁸—Notice of all proposed sales of property is required by subdivision (4). In this connection § 70-b should be consulted. The requirement that notice be given of every proposed sale of assets has proven an unfortunate restriction on discretion. The time necessary, substantially two weeks after application, often makes advantageous sales impossible. This difficulty doubtless led to General Order XVIII, under which most sales are now

35. In re Bloodworth-Stembridge Co. (D. C., Ga.), 21 Am. B. R. 153, 178 Fed. 372; Matter of Fox (D. C., N. Y.), 34 Am. B. R. 512, 222 Fed. 135.

36. See In re Hoole, 3 Fed. 490.

37. See under Section Thirteen, *ante*. Compare In re Hamlin, Fed. Cas. 5,993.

38. See also Am. B. R. Dig., § 1068.

38a. Matter of Langfeldt (D. C., Fla.), 41 Am. B. R. 580, 253 Fed. 458.

39. That is, as in derogation of Bankr. Act, § 58-c.

40. See, for instance, the practice in the Northern District of New York, 1 N. B. N. 124.

41. Order of Judge.—Notice to creditors of the hearing of an application for a discharge and the fixing of the date thereof should be upon the order of the judge in accordance with Supreme Court Form No. 57. In re Hockman (D. C., Pa.), 30 Am. B. R. 921, 209 Fed. 330.

42. Hanover National Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1.

43. In re Downing (D. C., N. Y.), 28 Am. B. R. 773, 199 Fed. 329; Claflin v. Wolff (N. J. Ct. of Errors & App.), 38 Am. B. R. 352, 96 Atl. 72.

44. A bankrupt is entitled to be reimbursed under General Order X, for the amount advanced by him for the issuance, publication and mailing of necessary notices to creditors of an application for his discharge. In re Hatcher (D. C., Tex.), 16 Am. B. R. 722, 145 Fed. 658.

45. Matter of Quackenbush, 19 Am. B. R. 647, 122 App. Div. 456, 106 N. Y. Supp. 773.

46. In re Fritz (D. C., N. Y.), 23 Am. B. R. 84, 173 Fed. 560, holding that the matter is one of discretion, and notice to all creditors does not seem necessary.

47. Compare under Section Fifteen.

48. See also Am. B. R. Dig. §§ 595-596.

made. Under this order the court or a referee may direct a private sale, with or without notice, for good and sufficient cause shown.⁴⁹ The word "perishable" has been construed with extreme liberality.⁵⁰ This is hardly necessary—that is, if General Order XVIII (2) is not in derogation of the statute—provided good cause can be shown for a private sale; at least, such a construction can fairly be put upon that general order. However, when substantial loss will not result, the command of the statute should be obeyed. If notice of a proposed sale is given, it is often so phrased as also to give notice of a meeting of creditors to attend a public sale of the property immediately thereafter.⁵¹ If a creditor actually attends a sale of a bankrupt's property and bids on the same it is immaterial whether he received the usual notice of sale by mail or not.⁵² If an order of sale lapses for any cause and a subsequent order of sale is made, notice should be given to creditors and lienors.⁵³

f. Of declaration and payment of dividends.—Subdivision (5) requires notice of the declaration and time of payment of dividends. This seems to imply two meetings; indeed, since the amendatory act of 1903, two meet-

49. Sale without notice; discretion of referee.—In *re Hawkins* (D. C., N. Y.), 11 Am. B. R. 49, 125 Fed. 633, holding that the discretionary power of a referee directing a private sale of the bankrupt's property, without notice to creditors, ought not to be disturbed unless it clearly appears that his discretion was improvidently exercised.

An order to sell perishable property, even real estate, rests in the sound discretion of the court, and where it is not affirmatively shown that gross injustice has been done to the creditors, a sale of such property at private sale by the trustee, will not be disturbed for lack of notice to a creditor of the application of an order to sell or for confirmation of the sale. In *re Milne Mfg. Co.* (Ref., N. Y.), 21 Am. B. R. 468.

Notice of trustee's sale; sufficiency of publication.—The act of March 3, 1893, (27 Stat. 751), requiring publication once a week for at least four weeks before the sale of real property, which requirement has been construed to mean twenty-eight days at least, does not bind the Federal courts in their administration of the bankruptcy act; and, in the absence of reason to believe that publication three days earlier would have made a real difference for any purpose, the publication of notice of sale of the bankrupt's real estate once a week during each of the four weeks preceding the time set for the sale, the first publication, however, being but twenty-five days before, is sufficient. In *re National Mining Exploration Co.* (D. C., Mass.), 27 Am. B. R. 92, 103 Fed. 232; In *re La France Copper Co.* (D. C., Mont.), 30 Am. B. R. 381, 205 Fed. 207. *Contra:* In *re Britannia Mining Co.* (D. C., Wis.), 28 Am. B. R. 651, 197 Fed. 459.

No notice to stockholders of a bankrupt corporation of a proposed sale of assets is necessary. In *re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896.

50. In *re Edes* (D. C., Me.), 14 Am. B. R.

382, 384, 135 Fed. 595; In *re Smith*, 1 N. B. N. 180; Anon., 1 N. B. 204. *Contra:* In *re Beutel's Sons* (Ref., Ohio), 7 Am. B. R. 768, holding that perishability within the meaning of the term in bankruptcy involves physical deterioration of the property itself. Mere depreciation in value is not enough. Stock of hardware cannot be sold without notice to creditors as "perishable property" although by delay it is becoming unseasonable.

Sale of building deteriorating in value.—Where a building, used as a manufacturing plant by an involuntary bankrupt, was rapidly deteriorating in value and was unsalable, and an offer was made therefor of a sum representing its fair value, which offer was conditioned upon conveyance being made within a shorter period of time than would allow notice to be given in accordance with the usual practice in sales of bankrupt properties, and where great loss would be occasioned by failure to make the sale, the court is justified in making an order, allowing the trustee to consummate the sale without notice, and a sale so made will not be set aside. In *re Milne Mfg. Co.* (Ref., N. Y.), 21 Am. B. R. 468.

51. See discussion under subtitle "Combined Forms," *ante*, in this section.

52. In *re Caldwell* (D. C., Ga.), 34 Am. B. R. 495, 178 Fed. 377; *Pace v. Berry* (Ky. Ct. of App.), 40 Am. B. R. 53, 195 S. W. 151.

53. *Allgair v. Fisher* (C. C. A., 3d Cir. 16 Am. B. R. 278, 143 Fed. 962, holding that where the order of a referee authorizing a private sale of the bankrupt's property at a set price, within thirty days, expires by reason of the failure of the trustee to make the sale, a sale, made under a further order of the referee, at a price much less than the set price, will be set aside where it appears that the sale and the order authorizing it were made without notice to creditors or lienors.

ings are necessary.⁵⁴ Following the practice under the former law, the forms include one to be used by the trustee in instructing creditors to call for their dividends.⁵⁵ This form is archaic and rarely used, dividend checks being mailed direct with receipts attached, or so phrased as to amount to receipts when indorsed. It is common practice, too, to combine in one notice (1) that for the declaration of dividends and (2) that for the payment of the dividends so declared.⁵⁶ Where creditor claims are disallowed,⁵⁷ or if for any reason their claims are voluntarily withdrawn,⁵⁸ they will not be heard to object to any failure to give or defect in a notice as to the declaration of a dividend.

g. Of filing final accounts.—Notice of the filing of final accounts and of the time and place where they may be examined is required by subdivision (6). In this connection §§ 47-a (8), 55-f, and 65-b should be consulted.⁵⁹ The notice is one of ten days, but the return day must be at least fifteen days after the filing of the trustee's final report and account. A meeting for such purpose cannot now be held until three months after the first dividend.⁶⁰

h. If a proposed compromise of a controversy.—Subdivision (7) refers to § 27; perhaps, at least by analogy, to § 26. No compromise can be made, no matter how advantageous, save on the statutory notice. The requirement is often met by combining such a notice with one for a meeting for general purposes.

i. Of a proposed dismissal of a proceeding.⁶¹—Subdivision (8) clearly refers to § 59-g, and the cases cited under § 59 should be consulted. The practical difficulty of notifying creditors whose names and addresses are unknown, as in most involuntary cases before adjudication, is apparent. It, however, does not, it is thought, limit the mandatory effect of this provision.⁶² Notice to the creditors of the bankrupt of a proposed dismissal of the proceedings is indispensable, and an order of dismissal without notice is erroneous.⁶³ It has been held that the provision requiring notice of a proposed dismissal, construed with section 59-g, does not require notice where the dismissal is

54. See Bankr. Act, § 65-b, as amended.

55. Form No. 17.

56. See "Supplementary Forms," *post*.

57. *Matter of Leslie & Griffith Co.* (D. C., Mass.), 36 Am. B. R. 744, 230 Fed. 465.

58. *American Sav. Bank & Trust Co. v. Munson* (Wash. Sup. Ct.), 38 Am. B. R. 55, 159 Pac. 1195.

59. Compare *In re Stein* (D. C., Ind.), 1 Am. B. R. 662, 94 Fed. 124, for the law before the amendatory act of 1903.

60. See under Section Sixty-five of this work.

61. See also Am. B. R. Dig. § 173.

62. For instance, see *Neustadter v. Chicago Dry Goods Co.* (D. C., Wash.), 3 Am. B. R. 96, 96 Fed. 830; *Matter of Lederer* (D. C., N. Y.), 10 Am. B. R. 492, 125 Fed. 96.

Dismissal of proceedings; notice to creditors.—An alleged bankrupt had more than twelve creditors, three of whom joined in an involuntary petition against him. Two of the petitioning creditors colluded to compel the alleged bankrupt to pay the claim of the third who was permitted to withdraw as a petitioning creditor. All but two of the listed creditors, aside from the original petitioning creditors, signed a statement in writ-

ing that they objected to an adjudication and agreed not to participate in any effort to that end. The notices to creditors, contemplated by sections 58-a(8) and 59-d, of a proposed dismissal of the proceedings for lack of sufficient number of petitioning creditors and to give other creditors an opportunity to intervene, were not given and no creditors intervened. It was held that one of the petitioning creditors having withdrawn and the other two being estopped from proceeding with the petition because of conduct in violation of their duty as petitioning creditors, the two remaining creditors who had not joined in the creditors' statement would not have been sufficient to make a jurisdictional petition and the court was warranted in dismissing the proceedings without the giving of the notice of proposed dismissal to creditors, especially after issue had been joined and a hearing had and where the question of lack of notice to other creditors was raised for the first time upon appeal. *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507.

63. *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000.

on the initiation of the court, on account of a voluntary bankrupt's failure to take the necessary preliminary steps to bring the creditors before the court; the provision relates only to applications for dismissals by parties in interest.⁶⁴ The section contemplates notice to creditors when the petition is about to be dismissed for want of prosecution or by consent of the parties already in court, and has no application to the dismissal of the petition on the merits after hearing.⁶⁵ A dismissal of a petition without notice to creditors is not void because the bankruptcy court has jurisdiction of the subject-matter and of the parties, and its erroneous orders and judgments are as valid, in the absence of direct proceedings to review them, as those in which there is no error.⁶⁶ In an involuntary proceeding, where no list of creditors has been scheduled, the court may dismiss the petition upon the bankrupt's motion, without notice to those creditors who have not intervened.⁶⁷ The notice, if before a reference to the referee, should perhaps take the form of an order to show cause, and be served as above suggested in the same manner as the like order in an application for discharge.⁶⁸

j. Of appointment of receivers.⁶⁹—A receiver of the property of an alleged bankrupt ought never to be appointed, except in rare cases,⁷⁰ without notice to the alleged bankrupt; but an appointment without notice is not, in a constitutional sense, a deprivation of property without due process of law.⁷¹ Neither should a receiver be appointed without notice to adverse claimant in possession of the property,⁷² or a State court receiver,⁷³ in possession of the property.

64. *Matter of Crisp* (D. C., Tenn.), 38 Am. B. R. 557.

65. *Lackawanna Leather Co. v. La Porte Carriage Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 658, 211 Fed. 318.

66. Effect of dismissal without notice.—*In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 674, 135 Fed. 1000; *In re Jemison Mercantile Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 588, 112 Fed. 966, 50 C. C. A. 641, upon the motion of all the petitioners, a petition in bankruptcy was dismissed without notice to the creditors. Eleven months and twenty-three days after this dismissal other creditors appeared, and asked permission to join in the dismissed petition and to prosecute the proceeding, and their application was denied. The court held that the dismissal of the petition without giving notice to the creditors was not void, and that the application was too late to be seriously considered; *Neustadter v. Chicago Dry Goods Co.* (D. C., Wash.), 3 Am. B. R. 96, 96 Fed. 830; *In re Jamaica Slate Roofing & Supply Co.* (D. C., N. Y.), 28 Am. B. R. 763, 197 Fed. 240.

In this case the court, after referring to sections 58 and 59, said: "It is my opinion that these provisions of the law relate to dismissals which in effect withdraw the cases without submission to the court for its decision upon the merits, and there appears to be no requirement of notice to creditors who have not appeared, of trials of hearings in involuntary cases, but if the law does require notice to creditors of hearings upon the

merits, still the rendering of a final judgment without notice to the creditors would be an irregularity or error, the effect of which would be to make the judgment voidable or reversible, as to parties to the record, and void as to others."

67. *Matter of Levi* (C. C. A., 2d Cir.), 16 Am. B. R. 294, 142 Fed. 962.

68. See p. 831, *ante*, and in the "Supplementary Forms," *post*.

69. See also Am. B. R. Dig., § 298.

70. *In re Abrahamsen* (Ref., N. Y.), 1 Am. B. R. 44.

71. Bankr. Act, § 2 (33); *Latimer v. McNeal* (C. C. A., 3d Cir.), 16 Am. B. R. 43, 142 Fed. 451.

Bankrupt in prison.—The appointment of a receiver of a bankrupt before adjudication without notice to the bankrupt, who was in prison for engaging with two others, who had absconded, in procuring money through the mails by fraudulent representations, was held not to be void as taking property without due process of law, where a notice would in all probability defeat the very object of the appointment. *In re Francis* (D. C., Pa.), 14 Am. B. R. 676, 136 Fed. 912.

72. *T. S. Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861.

73. Notice to state receiver.—Although notice to an alleged bankrupt of an application for the appointment of a receiver is excused by showing that the defendant has absconded, notice of such application should be given to a state receiver, since the receiver in bankruptcy, when appointed, succeeds to

k. Of petition for attorney's allowance.—A petition for the allowance of an attorney's fee under section 64-b (3) must be upon notice to the parties interested.⁷⁴

l. Of filing voluntary petition after involuntary petition.—When a bankrupt against whom an involuntary petition is pending files his voluntary petition notice should be given to the creditors filing the involuntary petition before any adjudication is made upon the voluntary petition, and then such action should be taken as the hearing shows to be for the best interest of the estate.⁷⁵

m. Of meetings generally.—In addition to the requirements as to notice of the different steps already mentioned, subsection *a* also requires that the parties in interest shall have the statutory notice of "all meetings of creditors." This omnibus phrase seems to include every gathering to pass on matters that may be submitted to creditors. It does not, therefore, include meetings where the referee or judge acts independently of them. A first meeting or a special meeting to fill a vacancy in the office of trustee must, therefore, be regularly noticed.⁷⁶

III. NOTICE TO CREDITORS BY PUBLICATION.

Subsection *b* provides that only the notice of the first meeting must be published. It should be so published at least once, and the last publication must be "at least one week prior to the date fixed for the meeting." Publication must be in the official newspaper.⁷⁷ Whether other notices shall be published depends either on the standing rules of the district or the order

the possession of the receiver in the state court. *Bauman Diamond Co. v. Hart* (C. C. A., 5th Cir.), 27 Am. B. R. 632, 192 Fed. 498.

74. *In re Young* (D. C., N. Car.), 16 Am. B. R. 106, 142 Fed. 891.

75. *In re Dwyer* (D. C., N. Dak.), 7 Am. B. R. 432, 112 Fed. 777; *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945, holding that where an involuntary proceeding is pending and a voluntary petition is subsequently filed notice thereof should be given to the petitioning creditors, and opportunity be thus afforded to determine the course most likely to conserve the interests of the estate; *Matter of Continental Coal Corp.* (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113.

Want of notice of voluntary petition.—In the case of *In re New Chattanooga Hardware Co.* (D. C., Tenn.), 27 Am. B. R. 77, 90, 190 Fed. 241, the court, in commenting on the *Dwyer* case, said: "I am clearly of opinion that the want of formal notice to the petitioning creditors of the application for an adjudication in the voluntary case, which it is stated in the *Dwyer* case should, as a matter of proper practice, be given, is not now a valid objection to an adjudication in the voluntary proceedings, as it appears that the petitioning creditors in both the involuntary cases have in fact had actual notice of the application for an adjudication under the voluntary petition, and have appeared in op-

position thereto, so that the failure to give them formal notice is entirely immaterial."

76. Not so of a "special meeting," called under General Order XXI (6); there the court fixes what is due notice.

Notice of special meeting.—In the case of *In re Stoeber* (D. C., Pa.), 5 Am. B. R. 250, 105 Fed. 355, the court said: "I am of opinion that the notice in question, namely, of a special meeting called upon the petition of a creditor, under paragraph 6 of General Order 21, to have a re-examination of certain claims, should have been sent out by the referee, and that this duty did not rest upon the petitioner. Paragraph 6 provides that 'due notice [of such meeting] shall be given by mail addressed to the creditor whose claim is to be re-examined, but does not specify by whom the notice shall be given. I think, however, that this omission is supplied by the Bankruptcy Act in clause 'c' of section 58, which declares that 'all notices shall be given by the referee unless otherwise ordered by the judge.' It was suggested that this clause should be confined to the eight notices enumerated in clause 'a' of the same section, but I am unable to assent to the correctness of this construction. As the language is 'all notices,' and there is no other qualification than this 'unless otherwise ordered by the judge,' I can see no reason to limit the meaning of the word 'all.'"

Closing estate.—The creditors must have ten days notice of a final meeting of creditors before closing the estate. *Matter of Levy* (D. C., Pa.), 44 Am. B. R. 248, 261 Fed. 432.

77. Bankr. Act, § 28.

of the court in each case. It is customary on discharge applications and sales. Failure to publish, while not going to the jurisdiction, is probably so far an irregularity as to render void any meeting for which publication is necessary.⁷⁸ Proof of publication should be made by affidavit of the proprietor or foreman of the newspaper.⁷⁹

IV. BY WHOM NOTICES ARE GIVEN.

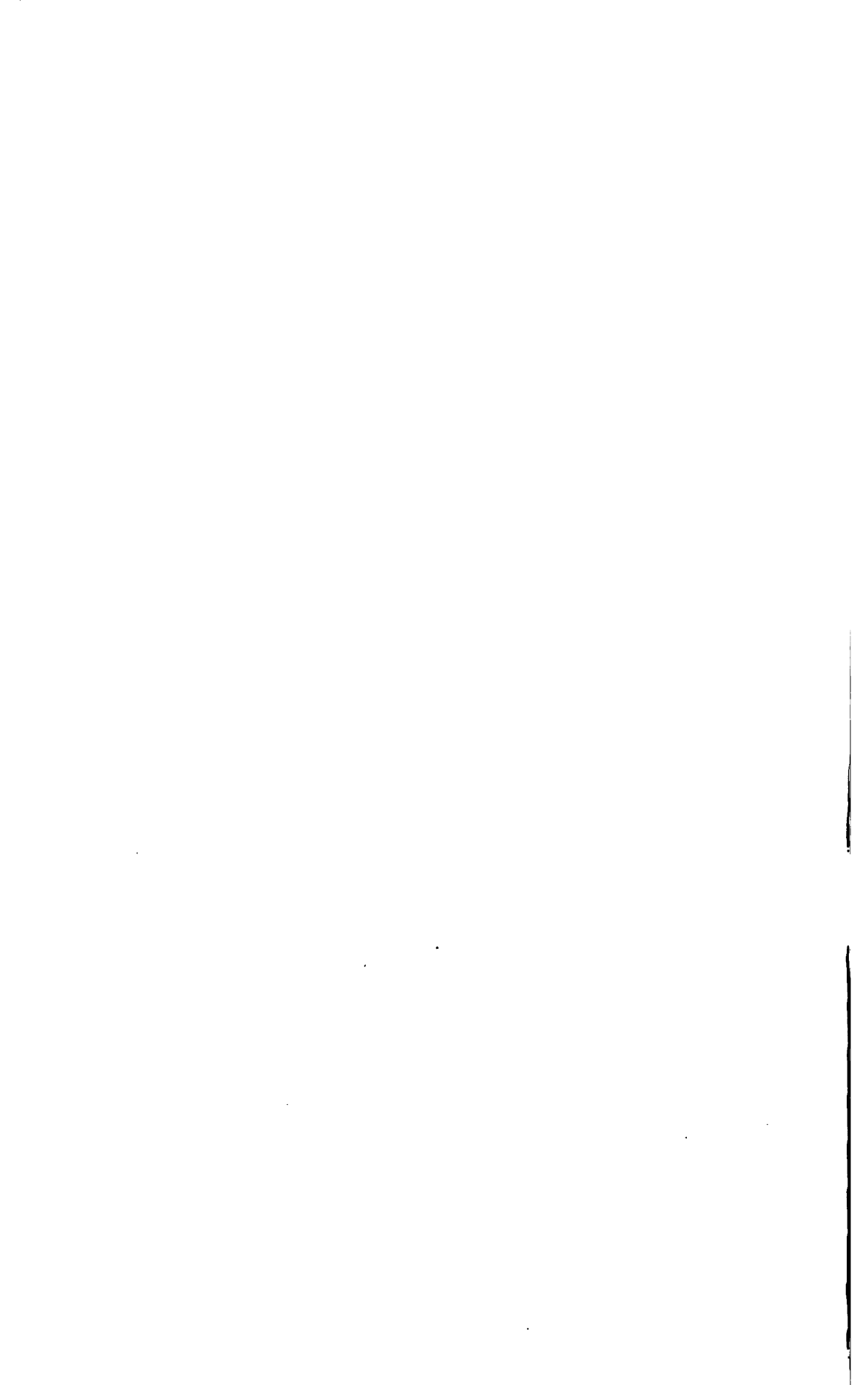
Notices must be given by the referee, "unless otherwise ordered by the judge." If by the former, the official business envelope can be used; perhaps if, under the order of the judge, actually mailed by another. Notices are sometimes printed on postal cards, sometimes on slips and inclosed in envelopes. The law imposes this duty upon the referee, and it will be presumed that he has properly performed it.⁸⁰ If the referee mails the notice he is entitled to indemnity for his actual expense in so doing, but, especially since § 72 was added by the amendatory act, to no fee. No compensation thus being possible, the judge has often in the past "otherwise ordered," *i. e.*, he has, by standing rule, directed such notices to be mailed by the bankrupt or his attorney, and this practice will perhaps become general. In that case, proof must be made by affidavit and filed with the referee. If the referee mails the notices, a certificate in his record-book that he mailed notices to all creditors at the addresses given in the schedules, or as afterward filed with the papers in the case, is enough.⁸¹

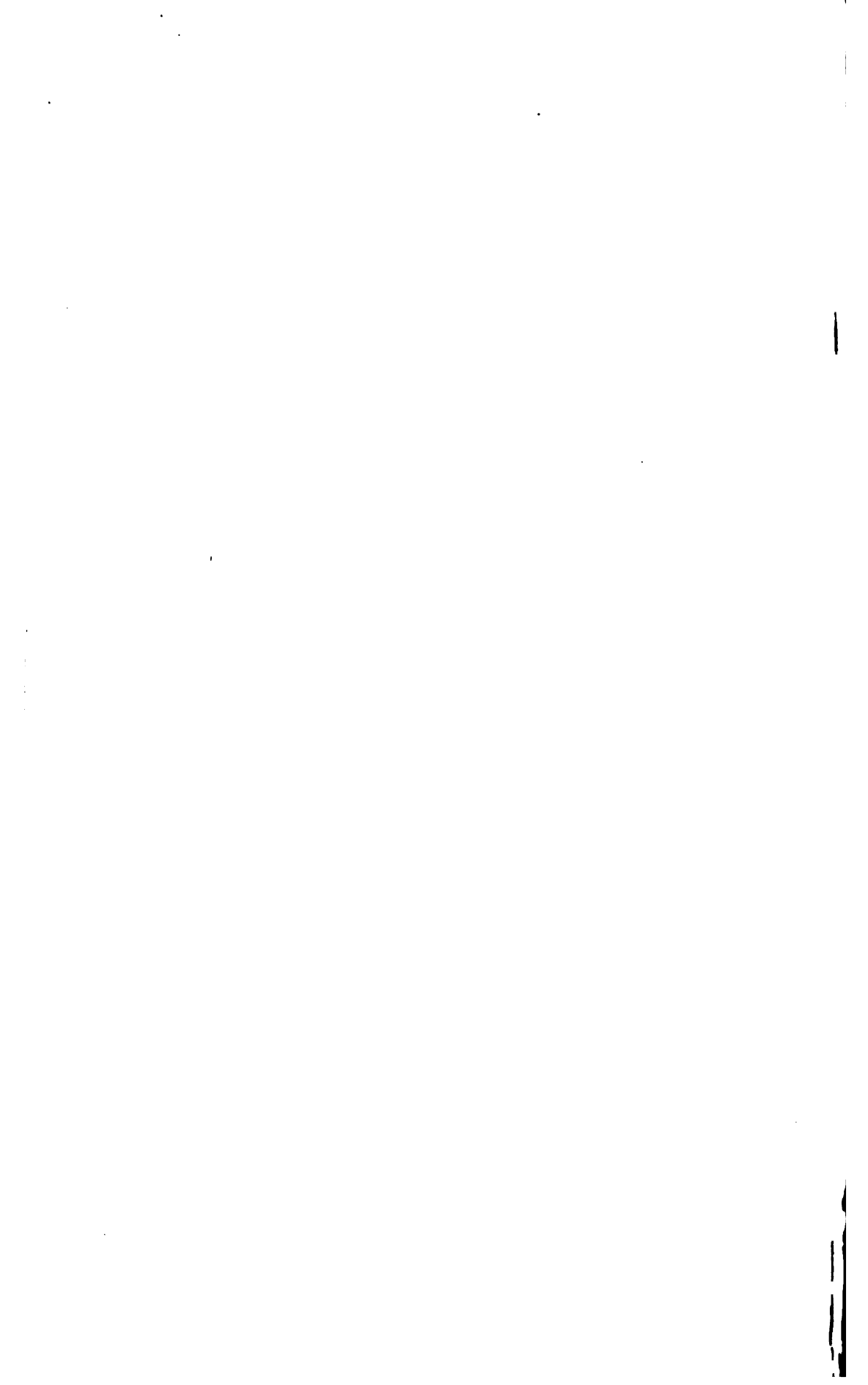
78. *In re Hall*, Fed. Cas. 5,922. See also *In re Bellamy*, Fed. Cas. 1,260; *Wiley v. Pavey*, 61 Ind. 457.

79. For form see 1 N. B. N. 118. See also "Supplementary Forms," *post*.

80. *Claffin v. Wolff* (N. J. Ct. of Errors & App.), 38 Am. B. R. 852, 96 Atl. 73.

81. This practice is outlined in 1 N. B. N. 112, 113, 118.





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